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# No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win

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# No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win

Sudha Setty\*

*Inter arma enim silent leges.*<sup>1</sup>  
(In times of war, the law falls silent.)

*Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.*<sup>2</sup>

## I. INTRODUCTION

One of the key hallmarks of a democratic nation is that there are no secret laws.<sup>3</sup> In the post-September 11, 2001 era, the George W. Bush administration relied on national security concerns and the unitary executive theory of presidential power as justifications for maintaining secret legal policies that govern parts of the war on terrorism that affect serious issues of human rights and civil liberties. These legal policies sometimes staked out positions that are at odds with legislation, treaties, and court decisions<sup>4</sup>—but the parameters of the executive branch legal

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1. 14 CICERO, *Pro T. Annio Milone Oratio*, in PRO MILONE–IN PISONEM–PRO SCAURO–PRO FONTEIO–PRO RABIRIO POSTUMO–PRO MARCELLO–PRO LIGARIO–PRO REGE DEIOTARIO 16–17 (N.H. Watts trans., Harvard Univ. Press, 6th prtg. 1979).

2. *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting).

3. See LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969) (“[T]he attempt to create and maintain a system of legal rules may miscarry [if there is] a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe.”).

4. See Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 498 (2006) (noting that “[i]n many areas, the constitutional law enunciated in formal opinions and memoranda

policies were sometimes unknown because of the lack of public disclosure.<sup>5</sup> Administration critics decried the use of secret legal policy, and called for the disclosure of legal opinions generated by the Department of Justice Office of Legal Counsel. Some opinions were disclosed in the waning days of the Bush administration, others were disclosed early in the Obama administration, and still others remain unpublished and unknown.

This Article considers the call for disclosure and concludes that it is feasible, desirable, and realistic to expect the timely disclosure of most Office of Legal Counsel opinions. This Article recognizes the historical pattern of politicization of executive branch legal policy during a war or armed conflict, then analyzes how secrecy in the development and implementation of legal policy runs afoul of the rule of law, compromises the quality of legal policy being generated by the Office of Legal Counsel, and undermines public confidence in the integrity of executive branch constitutional interpretation. This Article uses both a historical and a comparative analysis to critique the use of secret law; first, by considering how the United States has historically dealt with the development of executive branch legal policy in wartime; second, by illustrating how other nations that face severe national security threats maintain greater transparency and accessibility for legal policy related to national security matters; and third, how the use of unitary executive theory to support nondisclosure is at odds with historical practice and the rule of law.

Part II outlines the history of the Office of the Attorney General and the Office of Legal Counsel, offers examples of the politicization of executive branch legal policy during times of conflict, and places in context the politicized opinions of the Office of Legal Counsel under the Bush administration.

Part III critiques the process by which the Office of Legal Counsel under the Bush administration developed, disseminated, and authorized legal policy without proper internal or external safeguards as to the quality of opinions being issued.

Part IV notes that scholars have promoted disclosure of executive branch legal policy as one of many potential means of countering the effects of a politicized environment within the Department of Justice. This part outlines the need for a general policy of disclosure in terms of

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issued by the Office of Legal Counsel . . . is sometimes at least as important as any decision of Article III courts”).

5. See, e.g., Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1055 (2008).

increasing the quality of the opinions issued, curbing the greatest excesses of the secret opinions, and asserts the need for a new mandatory disclosure requirement for future administrations.

Part V addresses whether a call for disclosure is workable in light of two typical rebuttals offered by U.S. administrations: the pragmatic argument that secrecy and non-disclosure are necessary to maintain the integrity of the national security efforts, and that the lack of disclosure is consistent with the President's powers, particularly during wartime. This part critiques both of those arguments in favor of secret law, based on Congress's constitutional powers for oversight of the Executive, historical practices of the United States, as well as a comparative analysis with India, Israel, and the United Kingdom.

## II. THE POLITICIZATION OF THE OFFICE OF THE ATTORNEY GENERAL

One of the fundamental responsibilities of the U.S. Attorney General and his or her subordinates in the Office of Legal Counsel is to provide legal advice and counsel to the administration.<sup>6</sup> As the chief legal officer of the United States, the Attorney General has an obligation to uphold the rule of law by providing the best possible legal counsel to the President and administration and to limit the effect of political pressures to mold his or her opinion to facilitate the political goals of the President.<sup>7</sup> The importance of adhering to the rule of law is compounded when the legal opinions offered by the Attorney General are used as legal comfort—protecting government actors from future liability and criminal prosecution while conducting work on behalf of the administration.<sup>8</sup>

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6. NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789–1990*, at 1–2 (1992); see Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559, 1577 (2007) (noting that the opinions generated by the Office of Legal Counsel are generally considered binding on the executive branch, unless the President or Attorney General disagrees based on a differing legal interpretation).

7. Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 *J. NAT'L SEC. LAW & POL'Y* 455, 464–66 (2005) (“When a lawyer gives legal advice . . . she has a professional obligation of candor toward her client . . . [T]he lawyer's role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible.” (citing MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003))). Clark contrasts this obligation of a legal advisor to offer his or her “best assessment” of the law with that of a legal advocate, who can offer any non-frivolous interpretation of the law when arguing on behalf of a client before a judge. *Id.* at 465; see also *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 55 (2008) [hereinafter *Oversight Hearing Transcript*] (statement of Sen. Whitehouse) (noting that the Attorney General has “assumed the role, in essence, of, sort of, a corporate counsel to the executive branch”).

8. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 96 (2007) (quoting a senior Justice Department prosecutor noting that it is

C. *Current Examples of the Politicization of the Office of Legal Counsel*

During the years of the George W. Bush administration, the Office of Legal Counsel drafted numerous memoranda and legal opinions that engendered a great deal of criticism on two fronts: first, for the substance of the policies promulgated.<sup>49</sup> As with the examples of Bates and Biddle, one criticism of the OLC is that its legal advice facilitates a vast expansion of presidential power. The second body of criticism stems from the process by which the OLC developed and implemented its legal policy.<sup>50</sup> In sharp contrast to the Bates and Biddle examples, the primary concern here is the secretive process by which legal policy is developed and implemented.<sup>51</sup>

In fact, the Bush administration's concerted effort to cut the judiciary and Congress out of the decision-making process on legal policy is the antithesis of the approach undertaken by the Lincoln and Roosevelt administrations.<sup>52</sup> Although issues of war and armed conflict have affected many administrations, when executive branch legal policy is not

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reeling from Watergate. The trust of the American people in their government had been shaken. The damage done over the last seven years to our constitutional democracy and our civil liberties rival the worst of those dark days. This president's administration has repeatedly ignored the checks and balances that have been wisely placed on executive power by our founders . . . . [A]mong the most disturbing aspects of those years has been the complicity of the Justice Department, which has provided cover for the worst of these practices during those seven years.

*Id.*

49. See Clark, *supra* note 7, at 458–63 (arguing that the U.S. Government relied on inaccurate statements of law in setting interrogation policies); Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375, 379–80 (2002) (addressing the effects of the PATRIOT Act on individual privacy rights); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 182 (2004) (documenting the attempts of the George W. Bush administration to curtail judicial review in cases of alleged human rights violations by the U.S. government).

50. See generally GOLDSMITH, *supra* note 8 (examining the “role that lawyers played in determining counterterrorism policy”); Johnsen, *supra* note 6 (advocating the need for internal legal constraints in the executive branch); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1250–58 (2006) (noting the executive branch's use of constitutional avoidance theory to assert its right to circumvent the parameters of FISA); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006) (arguing the avoidance canon should not be used on issues regarding the separation of powers between Congress and the President).

51. SCHLESINGER, *supra* note 37, at 61 (concluding that the last Bush administration was the most secretive in U.S. history, including the Nixon administration); Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogation*, N.Y. TIMES, Oct. 4, 2007, at A1 (noting that the last Bush administration adapted new legal policies on interrogation “without public debate or Congressional vote, choosing to rely instead on the confidential legal advice of a handful of appointees”).

52. See GOLDSMITH, *supra* note 8, at 82–85; Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAGAZINE, Sept. 9, 2007, at 40, 45.

disclosed in a meaningful fashion to other parts of the administration, the other branches of the federal government, or to the public, it is clear that the quality of the legal policy, as well as the credibility of the administration's lawyers, suffers greatly.

A number of examples of controversial and secret legal opinions evidence the Bush administration's expansive view of presidential powers vis-à-vis the war on terror, and the intense interest in excluding Congress, the public, and even other departments within the executive branch<sup>53</sup> from understanding the parameters of executive branch legal policy.<sup>54</sup>

First, two August 2002 OLC memoranda (the "Bybee Memoranda") analyzed the definition of "torture" with regard to interrogation techniques used on persons captured in the war on terror and held outside of the United States. The first memorandum<sup>55</sup> was drafted by OLC attorney John Yoo<sup>56</sup> and signed by Assistant Attorney General Jay Bybee. Although the administration relied on this memorandum since 2002 to delineate those interrogation techniques that were arguably lawful,<sup>57</sup> the memorandum itself was only made public after it was

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53. Not every OLC opinion related to national security matters was insulated from other administrative departments. *E.g.*, Memorandum from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice (Jan. 11, 2002), available at [https://www.pegc.us/archive/State\\_Department/taft\\_memo20020111.pdf](https://www.pegc.us/archive/State_Department/taft_memo20020111.pdf). In a cover letter accompanying a forty-page critique of an OLC draft memorandum regarding detainee treatment, Taft notes that "both the most important factual assumptions on which [Yoo's] draft is based and its legal analysis are seriously flawed." *Id.* at 1; see also M. Elizabeth Magill, *Can Process Cure Substance? A Response to Neal Katyal's "Internal Separation of Powers,"* 116 YALE L.J. POCKET PART 126, 130 (2006) (stating that the last Bush administration was aware of opposing arguments but disagreed with them).

54. The concern about secret laws and rules developed by the last Bush administration extends beyond the OLC. See, e.g., Bruce Ackerman, *Take Your Paws off the Presidency!*, SLATE, July 15, 2008, <http://www.slate.com/id/2195384/index.html> (discussing the possibility of secret executive orders in place that would alter the presidential succession process notwithstanding constitutional and congressional constraints).

55. Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Memorandum]. The Bybee Memorandum was superseded, in part, by another memorandum drafted by the acting head of the OLC, Daniel Levin, that addressed the applicability of the Convention Against Torture and disavowed some of the conclusions made in the Bybee Memorandum. See Memorandum from Daniel Levin, Acting Assistant Att'y Gen., U.S. Dep't of Justice Office of Legal Counsel, to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004) [hereinafter Levin Memorandum].

56. John Yoo, *Behind the 'Torture Memos,'* SAN JOSE MERCURY NEWS, Jan. 2, 2005, at 1P (acknowledging that he helped to draft the Bybee Memorandum).

57. The Defense Department incorporated significant portions of the language from the Bybee Memorandum in its own report on interrogation practices. See U.S. DEP'T OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM 61-69 (2003) (enumerating thirty-five techniques and evaluating the usefulness of those techniques); see also Douglas Jehl et al., *C.I.A. Is Seen as Seeking New Role on Detainees: Officials Say Agency Is Fearful of Blame*, N.Y. TIMES, Feb. 16, 2005, at A16 (explaining that the Bybee Memorandum was

leaked in mid-2004 after the public learned of detainee abuses at the Abu Ghraib prison in Iraq.<sup>58</sup> At that point, congressional and public outrage at the content of the memorandum,<sup>59</sup> which authorized the use of harsh interrogation techniques and narrowed the conventional definition of torture<sup>60</sup> to provide legal comfort to interrogators who engaged in harsh techniques,<sup>61</sup> forced the President to disavow the use of torture during interrogations.<sup>62</sup>

The second August 2002 memorandum—issued on the same day as the first and also authorized by Bybee<sup>63</sup>—reinforced the administration’s view that the definition of torture was extremely narrow and required specific intent by interrogators to cause serious physical or mental harm,

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“sought by the C.I.A. to protect its employees from liability”).

58. See Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1 (“[T]he Justice Department advised the White House that torturing al-Qaeda terrorists in captivity abroad ‘may be justified,’ and that international laws against torture ‘may be unconstitutional if applied to interrogations’ conducted in President Bush’s war on terrorism.”); see also *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part III: Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 2 (2008) [hereinafter *Interrogation Rules, Schroeder Statement*], available at <http://judiciary.house.gov/hearings/pdf/Schroeder080626.pdf> (statement of Christopher H. Schroeder, Professor of Law & Pub. Pol’y Stud., Duke Univ.) (“[T]o 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.”). A contemporaneous OLC memorandum on interrogation techniques remains secret from the public. *Id.* at 3.

59. See Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 (“[A] law professor at the University of Chicago said: ‘It’s egregiously bad. It’s very low level, it’s very weak, embarrassingly weak, just short of reckless.’”). Compare Posting of Jack Balkin to Balkinization, Arguments That Make You Ashamed to be a Lawyer, <http://balkin.blogspot.com/2004/06/arguments-that-make-you-ashamed-to-be.html> (June 9, 2004, 12:14 EST) (“The torture memo . . . makes the President a King, someone who must be presumed to do no wrong. If the President adopted this position, and acted upon it, it would be grounds for impeachment.”), with Adrian Vermeule & Eric A. Posner, *A ‘Torture’ Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22 (arguing that the Bybee Memorandum “falls well within the bounds of professionally respectable argument”).

60. Bybee Memorandum, *supra* note 55, at 46 (“[W]e conclude that torture as defined in and proscribed by [the Convention Against Torture] covers only extreme acts. . . . Because the acts inflicting torture are extreme, there is [a] significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.”). The Bybee Memorandum also stated that the proscriptions of the Convention Against Torture likely did not apply to the President’s execution of the war on terror, under the rationale that the Convention infringed upon the President’s executive authority as Commander-in-Chief. See *id.* at 36–39 (“[T]he structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned in the Constitution to Congress, is vested in the President.”).

61. Additionally, Bybee offered two broad defenses to individuals who used techniques which would fall within the narrowed definition of torture: necessity and self-defense. *Id.* at 39–46.

62. Eric Mink, Editorial, *The Torture Memos*, ST. LOUIS POST-DISPATCH, Apr. 9, 2008, at D11. See generally Shane et al., *supra* note 51, at A1; Levin Memorandum, *supra* note 55.

63. Memorandum from Jay S. Bybee, Assistant Att’y General, U.S. Dep’t of Justice Office of Legal Counsel (Aug. 1, 2002) [hereinafter Second Bybee Memorandum].

and that interrogators were protected from future prosecution because they had no such specific intent.<sup>64</sup> A heavily redacted version of this memorandum was released by the administration on July 24, 2008, in response to a Freedom of Information Act (FOIA) request from the American Civil Liberties Union.<sup>65</sup>

Tellingly, only the late 2004 OLC memorandum declaring that “‘torture is abhorrent both to American law and values and to international norms’” was voluntarily made public by the administration.<sup>66</sup> However, even this memorandum contained legal protection for CIA interrogators to reassure them that past practices were not prosecutable.<sup>67</sup>

Second, a 2002 executive order issued by President Bush<sup>68</sup> authorized the National Security Agency to conduct warrantless surveillance programs over U.S. citizens, which were authorized by the OLC<sup>69</sup> but not revealed to the judiciary, including the Foreign Intelligence Surveillance Act (FISA)<sup>70</sup> court.<sup>71</sup> This executive order was not disclosed until late 2005, at which point Congress immediately demanded to be briefed on the program to understand its parameters.<sup>72</sup>

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64. *Id.* at 16–17.

65. See American Civil Liberties Union, Documents Released by the CIA and Justice Department in Response to the ACLU’s Torture FOIA (July 24, 2008), <http://www.aclu.org/safefree/torture/36104res20080724.html>.

66. Shane et al., *supra* note 51.

67. *Id.*; Levin Memorandum, *supra* note 55, at 17.

68. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

69. Jack Goldsmith stated that the White House systematically undermined FISA protections using secret and “‘flimsy’” legal opinions which were “‘guarded closely so no one could question the legal basis for the operations.’” Rosen, *supra* note 52, at 45. The OLC has also opined that Fourth Amendment protections against unlawful search and seizure do not apply to “‘domestic military operations.’” Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., to William J. Haynes II, Gen. Counsel of the Dep’t of Def. 8 n.10 (Mar. 14, 2003) [hereinafter Yoo Memorandum] (referring back to an earlier, still-secret OLC memorandum entitled, “‘Authority for Use of Military Force to Combat Terrorist Activities Within the United States’”).

70. The Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1863, 1871 (2000).

71. See Risen & Lichtblau, *supra* note 68.

72. See *Oversight Hearing Transcript*, *supra* note 7, at 4 (disagreeing with the President’s view that warrantless wiretapping is within the President’s inherent executive authority, and arguing that the President cannot be above the rule of law); Scott Shane & Eric Lichtblau, *Full House Committee Gets Briefing on Eavesdropping*, N.Y. TIMES, Feb. 9, 2006, at A22; Charles Babington, *White House Agrees to Brief Congress on NSA Surveillance*, WASH. POST, Feb. 9, 2006, at A6; Nancy Pelosi, Editorial, *The Gap in Intelligence Oversight*, WASH. POST, Jan. 15, 2006, at B7; Memorandum from Alberto R. Gonzales, Att’y Gen., to William H. Frist, Majority Leader, U.S. Senate 1–3, 6–36 (Jan. 19, 2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>. For a detailed analysis of the legality of the NSA wiretapping program, see generally John Cary Sims, *What NSA Is Doing . . . and Why It’s Illegal*, 33 HASTINGS CONST. L.Q. 105 (2006).

Third, a March 2003 memorandum authored by Yoo (the “Yoo Memorandum”)<sup>73</sup> provided additional legal comfort to interrogators by asserting that “federal laws prohibiting assault, maiming and other [violent] crimes did not apply to military interrogators” who questioned captives in the war on terror, based on the President’s wartime powers.<sup>74</sup>

The Yoo Memorandum sought to insulate U.S. government agents from prosecution or other legal liability if they used highly coercive interrogation techniques, such as waterboarding, head-slapping, and exposure of prisoners to extreme temperatures.<sup>75</sup>

The existence of this memorandum had been known outside of the administration for several years, despite the administration’s refusal to disclose it to the public or most members of Congress until April 1, 2008.<sup>76</sup> The memorandum was initially classified by the Department of Justice to prevent disclosure, but was ultimately declassified after a review undertaken as part of a Freedom of Information Act lawsuit brought by the American Civil Liberties Union to gain access to the memorandum.<sup>77</sup>

The initial classification of the Yoo Memorandum was made because of purported national security concerns associated with the release of the opinion;<sup>78</sup> remarkably, however, the contents of the Yoo Memorandum were kept secret from the top lawyers for each branch of the military.<sup>79</sup> Since the public release of the Yoo Memorandum, scholars have questioned why such an opinion—containing no sensitive personal information nor details about specific intelligence-gathering programs—was ever withheld from public view.<sup>80</sup>

Fourth, a 2005 opinion authorized harsh techniques, such as waterboarding, and the use of such techniques in combination with each other, for the interrogation of persons designated as enemy combatants.<sup>81</sup> This opinion was issued soon after Alberto Gonzales began his tenure as

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73. Yoo Memorandum, *supra* note 69.

74. Dan Eggen & Josh White, *Memo: Laws Didn’t Apply to Interrogators*, WASH. POST, Apr. 2, 2008, at A1.

75. *Id.*

76. *Id.*

77. Press Release, Am. Civil Liberties Union, Secret Bush Administration Torture Memo Released Today in Response to ACLU Lawsuit (Apr. 1, 2008), available at <http://www.aclu.org/safefree/torture/34747prs20080401.html>.

78. Eggen & White, *supra* note 74.

79. *Id.*

80. Posting of Marty Lederman to Balkinization, Full Employment Memo for Bloggers (and Prosecutors?), <http://balkin.blogspot.com/2008/04/full-employment-memo-for-bloggers-and.html> (Apr. 1, 2008, 20:25 EST).

81. Shane et al., *supra* note 51.

Attorney General in February 2005, over the objection of then-Deputy Attorney General James Comey.<sup>82</sup>

Fifth, a late 2005 opinion was drafted after Congress passed the Detainee Treatment Act of 2005,<sup>83</sup> which had specifically outlawed some harsh interrogation techniques.<sup>84</sup> This opinion confirmed that the CIA practices could be reconciled with the Detainee Treatment Act's restrictions, once again providing legal cover for CIA interrogators, should later decision makers conclude that the practices were illegal.<sup>85</sup>

Finally, an unpublished 2006 executive order—reviewed and approved by the OLC—confirmed authorization for the use of “enhanced” interrogation techniques.<sup>86</sup> Additional memoranda regarding interrogation techniques have been issued, but not made public.<sup>87</sup>

Much of the substantive criticism of these memos has turned on the expansive assertion of executive power,<sup>88</sup> the resulting erosion of due process and human rights protections for persons designated as “enemy combatants,”<sup>89</sup> and the weakening of privacy and civil liberties protections of U.S. citizens.<sup>90</sup> Procedurally, the Bush administration exploited a structural flaw, leveraging the lack of a requirement to disclose its legal policy to make the OLC a tool for the administration,

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82. *Id.* It was later revealed that certain members of Congress were briefed on the use of waterboarding of prisoners as early as 2002, but that they were forbidden from taking written notes on the brief, or from disclosing their knowledge to anyone, including their own staff members. Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, WASH. POST, Dec. 9, 2007, at A1. Rep. Jane Harman noted that she filed a classified letter objecting to the program, but was prevented from speaking publicly due to the rules of secrecy governing her role on an intelligence committee. *Id.*

83. Pub. L. No. 109-148, 119 Stat. 2739 (2005).

84. The Senate followed up on September 26, 2006, by voting 53-46 not to ban waterboarding as an interrogation technique. *Oversight Hearing Transcript, supra* note 7, at 4.

85. Shane et al., *supra* note 51.

86. *Id.*

87. *Id.*

88. The assertion of expansive additional powers by a President is not a phenomenon unique to the United States. Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2506 (2006); Thomas Poguntke & Paul Webb, *The Presidentialization of Politics in Democratic Societies: A Framework for Analysis*, in *THE PRESIDENTIALIZATION OF POLITICS* 1, 1 (Thomas Poguntke & Paul Webb eds., 2005).

89. Eggen & White, *supra* note 74; Editorial, *There Were Orders to Follow*, N.Y. TIMES, Apr. 4, 2008, at A22 (noting that the Yoo Memorandum was “81 pages of twisted legal reasoning to justify President Bush’s decision to ignore federal law and international treaties and authorize the abuse and torture of prisoners”); *see also* Yoo Memorandum, *supra* note 69, at 1 (“[T]he Fifth and Eighth Amendments, as interpreted by the Supreme Court, do not extend to alien enemy combatants held abroad.”).

90. *See generally* Sims, *supra* note 72.

providing legal comfort for controversial actions for government actors and private cooperators.<sup>91</sup>

### III. PROCESS CONCERNS AT THE OLC DURING TIMES OF POLITICIZATION

Critics of the George W. Bush administration argued that the OLC in earlier administrations was able to maintain a culture of non-politicization in order to provide the soundest legal advice possible, within some political constraints.<sup>92</sup> In contrast, the OLC in the Bush administration, particularly after the terrorist attacks of September 11, 2001, arguably gave political goals primacy over the best possible legal advice.<sup>93</sup>

The marked lack of information disclosure from the Bush administration regarding legal policy<sup>94</sup> served to enable and increase the politicization, as there existed few external checks on the content and quality of the legal opinions, and little public or congressional knowledge of the use and reliance upon these policies.<sup>95</sup>

#### A. *Culture of the OLC Under Previous Administrations*

The OLC, at least in times of peace, historically has maintained its reputation for high-quality legal analysis and executive branch constitutional interpretation due to its long-standing culture of independence from the political motivations of any given administration.<sup>96</sup> The fact that memoranda drafted during previous

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91. GOLDSMITH, *supra* note 8, at 64–68 (noting that then-White House Counsel Alberto R. Gonzales began, in early 2002, looking for ways to provide legal comfort for government actors in light of the restrictions of the Geneva Conventions, War Powers Resolution, FISA and other statutes); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2337 (2006) (“[When the high-ranking officials at OLC] become advocates . . . the system breaks down. The decisions of that Office begin to look suspect, resembling a courtroom flush with political influence rather than law.”).

92. See GOLDSMITH, *supra* note 8, at 33 (“[T]he office has developed powerful cultural norms about the importance of providing the President with detached, apolitical legal advice, as if OLC were an independent court inside the executive branch.”). See generally Dellinger et al., *supra* note 10.

93. GOLDSMITH, *supra* note 8, at 33.

94. Scheppele, *supra* note 43, at 858–59 (calling the lack of disclosure regarding executive branch legal policy “unprecedented and not in keeping with the general American approach to emergency powers”).

95. Eggen & White, *supra* note 74 (noting that the top lawyers in the different military branches were not involved in the development of the Yoo Memorandum, nor were they given copies of the Memorandum once it had been prepared and implemented).

96. GOLDSMITH, *supra* note 8, at 33, 145.

administrations, in which the President was of a different political party, were still cited with approval by OLC lawyers in a different administration with different political goals evidences this impartiality.<sup>97</sup>

Even though the career lawyers at the OLC report to political appointees, common OLC practice under most administrations prioritized the quality and impartiality of the legal opinions over their political utility.<sup>98</sup> To further this goal, the OLC strove to avoid political advocacy whenever possible.<sup>99</sup> Further, there was an understanding that without the belief that the OLC was setting forth objective legal policy, the credibility of the OLC would be severely jeopardized in the eyes of the public and the other parts of government.<sup>100</sup>

### *B. Changes in OLC Procedures During the Bush Administration*

OLC cultural norms and processes during the Bush administration changed significantly and were a result of the war-time outlook of the administration and its desire for the maximum possible presidential authority in constitutional decision-making during the war on terror.<sup>101</sup> First, the administration severely limited information disclosure on many levels: within the Department of Justice, within the administration as a whole, and to other branches of government and the public.<sup>102</sup> Second,

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97. See Posting of Marty Lederman to Balkinization, Understanding the OLC Torture Memos (Part 1), <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html> (Jan. 7, 2005, 9:15 EST) (“[I]n issuing its new memo OLC has taken a critically important step toward restoring the office’s reputation for providing rigorous and impartial legal advice.”); Posting of Michael C. Dorf to Findlaw, The Justice Department’s Change of Heart Regarding Torture: A Fair-Minded and Praiseworthy Analysis That Could Have Gone Still Further, <http://writ.news.findlaw.com/dorf/20050105.html> (Jan. 5, 2005).

98. Johnsen, *supra* note 6, at 1577.

99. Shane et al., *supra* note 51.

100. Moss, *supra* note 22, at 1311–12.

101. *Oversight Hearing Transcript*, *supra* note 7, at 2–3 (“[Senate oversight] efforts revealed a Department of Justice gone awry. . . . [Investigation revealed] the United States Attorney firing scandal, a confrontation over the legality of the administration’s warrantless wiretapping program, the untoward political influence of the White House at the Department of Justice, and the secret legal memos excusing all manners of excess. And the crisis of leadership has taken a heavy toll on the tradition of independence that’s long guided the Justice Department, provided it with safe harbor from political interference.”) (statement of Sen. Patrick Leahy, Chairman, Sen. Judiciary Comm.).

102. See *Oversight Hearing Transcript*, *supra* note 7, at 3 (statement of Sen. Patrick Leahy) (noting the practices of the Justice Department are leading it to be a “department of cloaking misguided policies under veiled secrecy, leaving Congress, the courts, but especially the American people in the dark”); Eggen & White, *supra* note 74 (“The top lawyers for each military service, who were largely excluded from the group, did not receive a final copy of Yoo’s March memo and did not know about the group’s final report for more than a year.”); Philip Shenon & Eric Lichtblau, *Justice Nomination Seen as Snub to Democrats*, N.Y. TIMES, Jan. 24, 2008, at A16 (noting that the nomination of Steven G. Bradbury to head up the OLC had stalled repeatedly as the Department of Justice refused to provide Congress copies of OLC opinions on various terrorism issues).

the nondisclosure of legal opinions and the opacity of the OLC created an environment in which other changes could be effected without outside oversight, including political influence on content and conclusions of the legal opinions drafted by the OLC.<sup>103</sup> Third, the lack of information disclosure led to the breakdown of other norms such as appropriate supervision within the OLC<sup>104</sup> and the use of external checks, including consultation with the general counsels for relevant administrative departments, in developing legal policy.<sup>105</sup> Relying on secret legal policy compromised the quality of legal analysis and the credibility of the OLC, and denigrated its ability to give legal comfort that would withstand congressional or public scrutiny.

### 1. Lack of Information Disclosure

One major shift from prior administrations was the degree to which information regarding legal policy was not shared with other members of the Bush administration, or with Congress, despite specific requests for that information.<sup>106</sup>

Many of the controversial OLC opinions related to national security would likely remain unknown to the public but for leaks of the relevant memoranda or other key documents,<sup>107</sup> or protracted litigation

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103. *Oversight Hearing Transcript*, *supra* note 7, at 72 (“I’m worried we’re not getting enough clarity on critical issues. We have heard reference to legal opinions, to justifications, facts that remain hidden from the Congress, the American people. And it’s a hallmark of our democracy that we say what our laws are and what conduct they prohibit. We’ve seen what’s happened when hidden decisions are made in secret memos and that’s held from the American people, held from their representatives here in Congress. It erodes our liberties, but it undermines our values as a nation of laws.”) (statement of Sen. Patrick Leahy).

104. GOLDSMITH, *supra* note 8, at 167.

105. Eggen & White, *supra* note 74.

106. *See, e.g., Oversight Hearing Transcript*, *supra* note 7; Order Granting Plaintiffs’ Motion for Reconsideration, *ACLU v. Dep’t of Def.*, No. 04 Civ. 4151 (S.D.N.Y. May 8, 2008), available at [http://www.aclu.org/pdfs/safefree/aclu\\_v\\_dod\\_ordergranting\\_motionforreconsideration.pdf](http://www.aclu.org/pdfs/safefree/aclu_v_dod_ordergranting_motionforreconsideration.pdf) [hereinafter *ACLU FOIA Order*] (granting an FOIA request for OLC opinions on the parameters of harsh interrogation techniques); Shenon & Lichtblau, *supra* note 102. Additionally, the most visible examples of stonewalling by the Justice Department do not relate to the OLC opinions themselves. Instead, they involve issues such as the Justice Department’s failure to comply with congressional subpoenas for documents related to the potentially politically motivated firings of certain U.S. Attorneys, as well as then-Attorney General Alberto Gonzales refusing to answer questions about the firings. *See Oversight Hearing Transcript*, *supra* note 7, at 3–4 (statement of Sen. Patrick Leahy); *see also* Carrie Johnson, *Internal Justice Dept. Report Cites Illegal Hiring Practices*, WASH. POST, July 28, 2008, at A1 (reporting on the findings of the Department of Justice Inspector General that hiring decisions at the Department of Justice were improperly politicized). Although such issues tend to grab the attention of the public, to some extent they are easier issues to confront, since both the request for information and the subsequent refusal to disclose that information are made public.

107. *See* Johnsen, *supra* note 6, at 1563, 1599.

demanding disclosure.<sup>108</sup> Without a leak or voluntary administration disclosure, Congress and the public remained unaware of executive branch legal policy.<sup>109</sup> A number of OLC memoranda that delineated the Bush administration's view on the legal parameters of the war on terror were only released to the public in January 2009, in the waning days of the Bush administration.<sup>110</sup> This lack of disclosure by the OLC is consistent with the attitude of the administration as a whole. Whereas under previous administrations, the disclosure of legal opinions and other documents was routine,<sup>112</sup> the Bush administration took a dramatically

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108. See ACLU FOIA Order, *supra* note 106.

109. See *Oversight Hearing Transcript*, *supra* note 7, at 71–72 (statement of Sen. Grassley); Johnsen, *supra* note 6, at 1563.

110. See USDOJ:OLC, What's New At OLC, <http://www.usdoj.gov/olc/whatsnew.htm> (last visited Jan. 28, 2009) (indicating that many OLC opinions related to national security were made public on January 8, 2009 and January 16, 2009). The January 2009 publications included OLC memoranda from as early as 2001 that dealt with the administration's conduct in the war on terror, as well as congressional oversight efforts. See, e.g., Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen., to Counsel to the President (Nov. 6, 2001), available at [www.usdoj.gov/olc/2001/pub-millcommfinal.pdf](http://www.usdoj.gov/olc/2001/pub-millcommfinal.pdf) (made public January 8, 2009).

112. One significant shift in information disclosure is the difference in treatment of requests under the Freedom of Information Act (FOIA) between the Clinton administration and the Bush administration. Compare Memorandum from John Ashcroft, Att'y Gen., to the Heads of all Fed. Dep'ts and Agencies (Oct. 12, 2001), available at <http://www.usdoj.gov/oip/011012.htm> (stating that “[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis”), with Memorandum from Janet Reno, Att'y Gen., to the Heads of Dep'ts and Agencies (Oct. 4, 1993), available at [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page3.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm) (“The Department [of Justice] will no longer defend an agency's withholding of information merely because there is a ‘substantial legal basis’ for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.” (citation omitted)). Congress's attempts to strengthen FOIA in December 2007, were undermined by the Bush administration's efforts to have disputes mediated by the Department of Justice, as opposed to the less partisan National Archives. See Editorial, *The Cult of Secrecy at the White House*, N.Y. TIMES, Feb. 7, 2008, at A30.

different view.<sup>113</sup> Reliance on secret laws—near anathema to the rule of law—became routine.

The Bush administration's stance, although subject to considerable criticism,<sup>114</sup> did not violate rules or codified procedures of the OLC.<sup>115</sup> The processes for developing and publicizing legal policy within the OLC, within the Department of Justice, or even within the administration as a whole have historically operated according to uncodified and informal customs and cultural norms.<sup>116</sup>

Although those customs and norms were adhered to by many prior administrations, the Bush administration chose to alter the processes by which legal policy is developed and disseminated:<sup>117</sup> first, in how the OLC opinions are used for political purposes;<sup>118</sup> second, in whose input was sought in the development of legal policy;<sup>119</sup> and third, in not sharing the legal opinions with administration actors directly affected by the opinions.<sup>120</sup>

This is particularly evident in certain OLC opinions involving issues of national security and the administration's conduct in the war on terror.

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113. See Sudha Setty, *The President's Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL J.L. & PUB. POL'Y 247, 256–60 (2008) (discussing the lack of information forthcoming from the Bush administration); Editorial, *The President's Lawyers*, WASH. POST, Mar. 11, 2008, at A18.

114. See Walter E. Dellinger et al., *Guidelines for the President's Legal Advisors*, 81 IND. L.J. 1345, 1350–51 (2006) (stating that the OLC should publicly explain any advice contrary to statutory requirements); Lederman, *supra* note 80 (“The classification of this memo was entirely unjustifiable.”).

115. GOLDSMITH, *supra* note 8, at 33 (noting that the OLC “is subject to few rules to guide its actions and has little or no oversight or public accountability”); Johnsen, *supra* note 6, at 1578–79 (discussing the need for the OLC to adhere to internal guidelines). This lack of mandated disclosure of OLC memoranda is properly viewed in the context of the statutory requirement to disclose intelligence programs to congressional intelligence committees. See 50 U.S.C. §§ 413, 413a, 413b (Supp. IV 2004) (requiring that the President, Director of National Intelligence, or head of relevant departments keep the congressional intelligence committees “fully and currently informed” of various intelligence activities).

116. Johnsen, *supra* note 6, at 1578–79. Although this lack of structure has been the norm through numerous administrations since the OLC was founded, the significant shift in culture and the politicization of the OLC under the Bush administration exposed that many of the customary practices and procedures used by OLC lawyers and the Department of Justice in previous administrations were not required by any kind of internal or external control. Therefore, the Bush administration viewed those norms as non-binding and chose not to enforce them. GOLDSMITH, *supra* note 8, at 33, 79–80.

117. GOLDSMITH, *supra* note 8, at 166–67.

118. See *id.* at 95–98 (discussing the OLC's impact in helping to shape policy).

119. *Id.* at 116 (noting OLC policy limiting readership of controversial opinions to a small group of lawyers); Johnsen, *supra* note 6, at 1564.

120. GOLDSMITH, *supra* note 8, at 166–67 (noting OLC policy excluded the State Department from access to the opinions); Johnsen, *supra* note 6, at 1600 (“OLC apparently either never solicited or simply ignored the advice of the Department of State and the Criminal Division of the Department of Justice.”).

The Bybee Memorandum and Yoo Memorandum authorization of extremely harsh interrogation techniques is an example of how the process by which legal policy is developed has changed considerably, and how external controls are not used to ensure that the legal opinions being generated reflect the best thinking of individuals familiar with the relevant areas of law.<sup>121</sup>

## 2. Political Pressure on the OLC

Attempts to convince the Bush administration to follow the precedent set by Lincoln and Franklin Roosevelt, which turned on publicizing the administration's desired policy position and lobbying for congressional and public support, were limited and ultimately unsuccessful.<sup>122</sup>

The route of Lincoln and Roosevelt was consistently rejected, and process-oriented secrecy brought additional political pressure to bear on the OLC. This pressure transformed the OLC into an advocate that “lost its ability to say no” to the White House,<sup>123</sup> a transformation underscored by those who referred to Yoo as “Dr. Yes” for his acquiescence to any and all White House requests for legal justifications.<sup>124</sup>

Additionally, decisions about hiring, promotion, and resignation in the OLC appeared to turn on perceptions of loyalty to the administration and its preferred legal positions. Career lawyers who tried to remain politically neutral in their legal analyses were ostracized<sup>125</sup> or passed

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121. See GOLDSMITH, *supra* note 8, at 167–72.

122. *Id.* at 81–85. Goldsmith recounts that his attempts to restore process controls at the OLC were rejected by David Addington, counsel to Vice President Dick Cheney and an influential voice in shaping executive branch legal policy. *Id.* at 80–82. In another exchange, Goldsmith recalls offering his opinion to Addington that the Fourth Geneva Convention “applied to all Iraqi civilians, including terrorists and insurgents.” Rosen, *supra* note 52, at 43. Addington was “livid” and replied that the President had made up his mind that the Geneva Conventions did not apply to terrorists, and then told Goldsmith, “[y]ou cannot question his decision.” *Id.* Goldsmith left his post after nine months, due in part to his unwillingness to provide the administration legal comfort for all of its proposed national security programs. *Id.*

123. Shane et al., *supra* note 51 (quoting Douglas Kmiec, head of the OLC under Presidents Reagan and George H.W. Bush).

124. *Id.* (referring to then-Attorney General John Ashcroft’s private nickname for John Yoo).

125. James Comey, former Deputy Attorney General, prepared his resignation after then-White House Chief of Staff Andrew Card and then-White House Counsel Alberto Gonzales attempted to have then-Attorney General John Ashcroft sign off on a memo that claimed that an even more aggressive version of the administration’s warrantless wiretapping program was legally sound while Ashcroft was hospitalized and Comey was acting Attorney General. Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST, May 16, 2007, at A1.

over for promotion,<sup>126</sup> while OLC lawyers perceived to be sympathetic to the White House legal agenda were promoted and supported,<sup>127</sup> with the implication that White House support would be withdrawn if that loyalty were brought into question.<sup>128</sup>

Political pressure, combined with OLC opinions shrouded in secrecy from inception through issuance, undermined the credibility and quality of legal reasoning found in OLC opinions.<sup>129</sup> The lack of self-policing by the OLC and the administration was compounded by a lack of significant oversight from supervisors within the Justice Department,<sup>130</sup> lawyers from other parts of the administration, and Congress.

For example, Jack Goldsmith notes that prior to his tenure as OLC head, even National Security Agency lawyers were denied access to OLC's legal opinions governing National Security Agency activities.<sup>131</sup> This attitude reflected the administration's view that it had no obligation to share information with any agency within its own administration, even when the legal opinion in question directly related to the activities of that agency.

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126. Shane et al., *supra* note 51 (noting that when Alberto Gonzales sought to fill the vacancy at the OLC after Goldsmith's departure, he "informed Daniel Levin, the acting head who had backed Mr. Goldsmith's dissents and signed the new opinion renouncing torture, that he would not get the job").

127. *Id.* Steven G. Bradbury, perceived to be sympathetic to the White House's desire for legal justification for its preferred course of action, acted as head of the OLC after Levin was advised he would not be nominated. Bradbury was not, however, immediately nominated to the Senate for confirmation to the post. Instead, he was put through a probationary period by the White House at the suggestion of Harriet Miers, then-White House counsel. *Id.*

128. *Id.* (citing Charles J. Cooper, head of the OLC under President Reagan, as viewing the probationary period as problematic from a partiality perspective). Bradbury was later nominated by President Bush, but was never confirmed as head of the OLC, due in part to administration rejection of the Senate request for the release of OLC memoranda authored by Bradbury. See Philip Shenon & Eric Lichtblau, *White House Renews Battle Over Lawyer Who Signed Interrogatories*, N.Y. TIMES, Jan. 24, 2008, at A16 ("[The OLC's] nominations stalled in the Senate because of a dispute with the Justice Department over its failure to provide Congress with copies of legal opinions on a variety of terrorism issues.").

129. Margulies, *supra* note 32, at 3-4.

130. In the case of the Bybee Memorandum, Jay Bybee signed off on John Yoo's draft without making himself an expert in that area of law, or consulting someone who was an expert in national security, war powers, and humanitarian law. GOLDSMITH, *supra* note 8, at 22-23. Then-Attorney General John Ashcroft did not provide such supervision, and was actually bypassed in the development of the Bybee Memorandum by virtue of Yoo's close relationship with top White House officials. See Rosen, *supra* note 52, at 43. Commentators have noted that the lack of impartiality and the overtly political nature of the Bybee Memorandum have compromised its utility and the integrity of the OLC generally. See Dorf, *supra* note 97 ("[T]he August 2002 memo can only be described as a serious departure from longstanding OLC practice. In content and tone, the memo reads much like a document that an overzealous young associate in a law firm would prepare in response to a partner's request for whatever arguments can be concocted to enable the firm's client to avoid criminal liability.").

131. Rosen, *supra* note 52, at 45.

Further, lawyers within the administration, including general counsels of the military, objected strongly to the substance of the Bybee Memorandum on torture, but their input was not recognized or considered in the drafting and promulgation of the Memorandum.<sup>132</sup> A lack of such external checks established the environment for the OLC to become a “hothouse for rogue ideological opinion, protected from the winds of scrutiny and peer review and other things by the classification shield.”<sup>133</sup>

This highly insulated environment not only denigrates the quality of legal policy, but brings into question whether some OLC attorneys acted in violation of legal ethical standards.<sup>134</sup> Given the significant overhaul of processes at the OLC, it is unsurprising that administration critics have called for mandatory disclosure of OLC memoranda.<sup>135</sup>

#### IV. IS MANDATORY DISCLOSURE REALLY THE SOLUTION?

Mandatory disclosure of OLC memoranda that articulate executive branch legal policy and provide legal comfort to administration actors will increase the quality and integrity of OLC opinions. Further, the actions of the Bush administration demonstrate that internal practices of voluntary disclosure are not effective in maintaining transparency and

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132. See Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32 (discussing the opposition of U.S. Navy General Counsel Alberto Mora to the policy articulated in the Bybee Memorandum); Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A1 (quoting an Armed Service official concerned that “JAG objections may have fallen on deaf ears, and that the policy that emerged may have opened the door to abuses at U.S. detention facilities around the world”).

133. *Oversight Hearing Transcript*, *supra* note 7, at 68 (statement of Sen. Sheldon Whitehouse).

134. See Clark, *supra* note 7, at 471 (“John Yoo and Jay Bybee apparently failed to comply with their ethical obligations to provide candid legal advice and to adequately inform their client . . .”); Margulies, *supra* note 43, at 644 (“[T]he charged atmosphere of national security advice and litigation can cast legal ethics as a luxury that the attorneys can ill afford.”); see also Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 185 (2006) (“Legal academics have debated whether [lawyers in the OLC] were simply doing their professional duty by representing their clients, or, on the contrary, were betraying their professional commitments in the deepest sense.”). The question of professional responsibility in the OLC continues to be of concern to many scholars. *E.g.*, Harold Hongju Koh, Dean, Yale Law Sch., Yale Law School Commencement Remarks (May 26, 2008), available at [http://www.law.yale.edu/documents/pdf/News\\_&\\_Events/commencement08KohRemarks.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/commencement08KohRemarks.pdf).

135. Dellinger et al., *supra* note 10, at 1607–08; Neal Katyal, Jack Goldsmith & Jamie Gorelick, Comments at Conference: A Conversation Regarding the Role of the Justice Department in the War on Terror (Apr. 10, 2008), available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=539>, (comments at minutes 28:00–38:00) (noting that although there may be some legal objections to mandatory disclosure of OLC memoranda, it would be a sound policy for future administrations to follow).