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

Prepared Testimony to the

Committee on the Judiciary
United States House of Representatives

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Chairman Conyers, Ranking Member Smith, members of the Committee – Thank you for the opportunity to appear before you today.

I am currently a professor of law (on leave) from Duke Law School, a visiting professor at Harvard Law School and a partner and chair of the Supreme Court and Appellate practice at O'Melveny & Myers, LLP in Washington.

In 1993, I was nominated by the President and confirmed by the Senate to be Assistant Attorney General and head of the Office of Legal Counsel (OLC). I served in that role from 1993 until 1996. During and since my time at OLC, I have discussed its importance with many of those who preceded me as heads of the office, including the late Chief Justice Rehnquist and Justice Antonin Scalia, John Harmon, Theodore Olson, Charles Cooper, Douglas Kmiec, William P. Barr, Judge Michael Luttig, and Tim Flanigan. We all share a belief in the critical role that office plays in the legitimate and lawful functioning of the national government. Its responsibility is no less than assisting the President and the Attorney General in insuring that the Constitution is obeyed and the laws of the United States are faithfully executed. It was, for me, the most rewarding job I have ever held. I thus understand and appreciate the importance of the series of hearings you are conducting. [1]

It is indisputable that something went badly wrong with the Office of Legal Counsel. A series of the most important legal opinions it has ever issued were described by a subsequent head of the office in the same administration as "deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President."[2] Jack Goldsmith was referring to the substantive and

[1] I need not continue at great length in my prepared statement because I fully share the reasoning and conclusions put forth by my colleague Christopher Schroeder in his testimony submitted to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part III* (herein *Interrogation Techniques*): *Hearings Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2008) (prepared statement of Christopher H. Schroeder, former Deputy Assistant Attorney General in the OLC in the Department of Justice).
[2] Jack Goldsmith, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE ADMINISTRATION 10 (2007).

procedural failings that infected the memos issued on the use of aggressive interrogation tactics on persons detained in the war on terror. The first of these opinions, known as the "Bybee memo" was prepared at the request of Alberto Gonzales, former Counsel to the President, and signed by Jay Bybee, former Assistant Attorney General for the OLC. It generated resounding criticism from the legal community.[3] Many distinguished lawyers and scholars shared the conclusion of Yale Law School Dean Harold Koh that the August 2002 memo was "perhaps the most clearly erroneous legal opinion I have ever read."[4]

Indeed, this single memo underscores what I believe was the primary and critical flaw in OLC's process: the drafters of the "torture memos" deviated from their duty to offer neutral legal advice,[5] instead reaching a pre-determined and unsupportable legal conclusion. In order to reach its conclusion, this and the subsequent torture memo of March 14, 2003, had to overcome legal constraints embodied in federal laws concerning Assault, 18 U.S.C s. 113, Maiming, 18 U.S.C s. 115, Interstate stalking, 18 U.S.C s. 2261A, War crimes, 18 U.S.C s. 2441, and Torture, 18 U.S.C s. 2340A, as well as the Fifth, Eighth and Fourteenth Amendments, the Convention Against Torture (CAT) and customary international law.

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[3] *See* Eric Lichtblau, BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE 142-44, 154 (2008); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 Geo. J. Legal Ethics 347, 349 (2007); Jose Alvarez, Symposium: *Torture and the War on Terror: Torturing the Law*, 37 Case W. Res. J. Int'l L. 175, 195 (2006); David Luban, *The Torture Debate in America, in Liberalism, Torture, and the Ticking Bomb* 35, 66 (Karen Greenberg ed., Cambridge University Press 2006); Louis-Phillippe Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 Am. U. Int'l L. Rev. 9, 37 (2005); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67, 83 (2005); Marty Lederman, *Understanding the OLC Torture Memos (Part I)* (Jan. 8, 2005) http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html; Marty Lederman, *Judge Roberts and the Commander in Chief Clause* (Sept. 13, 2005) http://www.scotusblog.com/wp/judge-roberts-and-the-commander-in-chief-clause; *Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2005) (statement of Harold Hongju Koh, Dean and Professor of International Law, Yale Law School); Peter Brooks, *The Plain Meaning of Torture?*, Slate, Feb. 9, 2005, http://www.slate.com/id/2113314; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1707 (2005); Jordan J. Paust, *Executive Plans and Authorization to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811, 813-23 (2005).

[4] *Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2005) (statement of Harold Hongju Koh, Dean and Professor of International Law, Yale Law School).

[5] Several years ago, a bipartisan working group of former OLC employees compiled a list of best practices that have historically guided the work of the Office. *See* Appendix F entitled "Principles to Guide the Office of Legal Counsel," dated Dec. 21, 2004. *See also Interrogation Techniques: Hearings Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2008) (testimony of Daniel Levin) ("The opinions I worked on benefitted [sic] enormously from comments from other parts of the Justice Department and the government. In particular, the opinion I wrote at the end of 2004 benefitted [sic] from detailed comments from lawyers at the State Department and the Criminal Division in Justice, although it bears repeating that any mistakes in that opinion are entirely my responsibility. There is an incredible wealth of legal talent around the government and I believe it is a mistake not to take advantage of it. You won't always agree with what other lawyers may have to say, but you almost always benefit from hearing it. I do not know why, but my understanding is that some of the earlier opinions were very tightly held and were not circulated for comments. I do not think that was justified by any legitimate concerns about classification or leaks. Rather, I think that was a mistake and that the opinions would have benefited from broader review.").

Only a deeply flawed process could produce such a disastrous legal opinion. And deeply flawed the process was. State Department, immigration, and military officials were systematically excluded from substantive discussions, as OLC ignored those most likely to have insight on the day-to-day administration of the relevant laws. Discussion was limited to a small group of high-level officials who ultimately failed to address or disclose the weaknesses in their analysis, leaving their conclusions susceptible to obvious criticism. In order to preserve OLC's institutional function, similar abuses must not occur again.

In the case of the torture memos, however, it is not simply that a bad process produced flawed opinions. Rather it seems that the predetermined need to reach indefensible conclusions necessarily required a truncated process that excluded from consultation other agencies and career attorneys who would not have condoned the reasoning or the results of the process. Here, conclusion drove process. When former Assistant Attorney General Daniel Levin testified before the Subcommittee he was asked by Representative Davis, "Mr. Levin, . . . do you know of any Administration that has so consistently advanced positions that are at odds with mainstream and judicial opinions regarding the scope of its powers?," Mr. Levin replied: "I don't."[6]

I believe it is important to view the torture memos in a larger perspective. Those memos are but one part of an approach to law that represented perhaps the most sustained challenge in our history to fundamental constitutional values, including the separation of powers.

At the heart of this regime you will find a consistent, undisguised disregard for the other branches of the national government. This denigration of the legitimate authority of the legislative and judicial branches of government is made manifest in a striking number of assertions and actions – first and foremost the disregard for criminal provisions of the war crimes and torture laws, as well as the Foreign Intelligence Surveillance Act; the assertion that Congress lacks a significant policymaking role in defining the scope and objectives of American military action; the repeated attempts to keep the judiciary from reviewing the legality and constitutionality of detentions; the sweeping assertions of executive immunity from compliance with laws passed by Congress, coupled with the extraordinary claim that decisions to violate statutory requirements would and should be kept secret from Congress; and finally, a refusal to provide any meaningful accommodation to Congress's legitimate need for testimony and information that could either confirm or put to rest very serious charges that the criminal justice process was politicized.

With respect to the legislature, the claimed freedom to violate the prohibitions against torture asserted in the memoranda of August 1, 2002 and March 14, 2003 was predicated upon an analytical approach that wholly denigrates the role of Congress. The

[6] *Interrogation Techniques: Hearings Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2008) (testimony of Daniel Levin, former Assistant Attorney General).

August 2002 Bybee Memo sets out the authority that a President might legitimately have in the absence of any legislative constraints, calls that inherent authority, and then assumes that the authority cannot be impaired by acts of Congress. That is, whatever the President could do in the absence of any legislative authorization, he can do even if Congress has expressly prohibited the acts in question. As explained in a recent article by David Barron and Martin Lederman, this cannot be right.[7] This is a distinction fundamental to our system of separated powers, a distinction long recognized by the Supreme Court, by past Presidents and by the Congress, between the ability of a president to take the initiative when Congress has not acted versus the ability of a president to defy duly enacted laws of the United States.

The President cannot rule by decree. Every official action taken by the president must have a basis in statutory or constitutional authority. Like almost all of my predecessors as head of the OLC, I have a robust view of the scope of the inherent authority of the President under the Constitution. In the area of national security and defense, there would be very few instances in which I would conclude that the President could not act merely because his action was said to be *ultra vires* – that is, beyond his affirmative authority, even though violative of no constitutional or statutory restrictions.

Once Congress has acted, however, the situation is fundamentally changed. Where Congress is legislating in areas under its board authority under Article I, laws designed to limit executive branch action are generally lawful and should rarely be held invalid because they entrench upon a core untouchable authority of the President.

Take the simple example of the disciplining and punishment of members of the military. There is no doubt that the President's responsibilities as commander-in-chief provide him with the "inherent authority" to create a set of rules of conduct for members of the armed services and to create a system for trying and punishing violations of his code of conduct. You can't run an Army without a system of discipline. But that "inherent authority" does not preclude Congress from adopting a Uniform Code of Military Justice. Congress has adopted such a code and it is indisputably constitutional and binding on the President.

The notion that Congress cannot limit actions that the President – in the absence of legislation – could otherwise take as part of his "inherent power" has no support in the case law. The Supreme Court has never endorsed such a sweeping theory of presidential power. To the contrary, whenever the Supreme Court has been presented with a case in which the executive branch has acted in violation of an existing statute governing the conduct of armed conflict or intelligence gathering, it has repudiated the idea that the President has broad authority to ignore existing law. It has done so in cases decided as far back as the early 1800s.[8] As Justice Stevens' recently wrote in an opinion of the Court, "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that

[7] David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb - Framing the Problem, Doctrine and Original Understanding*, 121 Harv. L. Rev. 689, 741-43, 761-62 (2008).
[8] *See, e.g., Little v. Barreme*, 6 U.S. 170 (1804).

Congress has, in proper exercise of its own war powers, placed on his powers."[9]

Mr. Chairman, we should never forget that the circumstances facing officials of the Department of Justice and national security agencies after September 11, 2001 were truly extraordinary. The morning after the attack, the New York Times said it with stark simplicity: "It was a moment that split history." Fears that further attacks were coming – perhaps even more deadly – were real and palpable. We should all have some humility about how we would have performed under such excruciating pressures.

It is nonetheless clear that the adoption of an extreme version of "executive unilateralism" was a mistake, as many courageous lawyers within the administration argued at the time. Americans – in government and out – were prepared to work together. Our historic constitutional structures would have been adequate to the extraordinary demands. We must now continue the process of restoring the constitutional order that has served us so well for more than two centuries.

Thank you, Chairman Conyers. For the convenience of the Subcommittee, I have enclosed various documents which elaborate upon some of the issues raised in my testimony. I look forward to answering any questions the members of the Subcommittee may have.

Appendix A is an editorial Christopher Schroeder and I wrote for the Washington Post in 2001 discussing the President's power to use military commissions in times of war and emphasizing the need for judicial review of those proceedings.

Appendix B is an op-ed Christopher Schroeder and I wrote for the New York Times in 2007 discussing Congress's role with respect to military activities.

Appendix C is a 2006 article from the New York Review of Books written as a letter to Congress from various law professors and government officials regarding FISA, presidential power, and the domestic spying program.

Appendix D is the 1994 OLC memorandum I prepared for the Hon. Abner Mikva, then counsel to the President, regarding the President's authority to decline to execute unconstitutional statutes.

Appendix E is an op-ed I wrote for the New York Times in 2006 defending the President's authority to decline to execute unconstitutional laws in certain situations.

Appendix F is the 2004 memorandum describing best practices and guiding principles for OLC prepared by various OLC attorneys.

[9] *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 2774 n.23 (2006).