

# California Law Review Circuit

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VOL. 1

MAY 2010

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## Professionalism and Power: Flawed Decision Making by the OLC Exposes a Bar That is Losing Its Moxie

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In recent years, legal scholars and practitioners alike have expressed major misgivings about the advice that the Department of Justice’s Office of Legal Counsel (OLC) provided to former President George W. Bush following the attacks of September 11, 2001. On February 19, 2010, House Judiciary Committee Chairman John Conyers Jr. released internal communications of the Justice Department that uniformly and definitively discredit—in multiple and material aspects—the OLC’s now-infamous August 1, 2002, “torture memoranda.”<sup>1</sup> The debate about what the OLC got wrong is over.<sup>2</sup> It is time to

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1. On July 29, 2009, the DOJ’s Office of Professional Responsibility (OPR) issued a report that found, among other things, that the “torture memoranda” were misstated in material respects. The OPR found that the evidence showed that John Yoo, the principal author of the memos, “committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.” DEPARTMENT OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 11 (2009), *available at* <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf> [hereinafter OPR REPORT]. On January 19, 2009, Attorney General Michael B. Mukasey and

consider what went wrong with the OLC.

As much as has been written decrying the substandard work the OLC produced, the reasons that ostensibly talented and learned lawyers produced it remain imprecisely explained or ignored. The attorneys who served in the Bush Administration's OLC, to a greater extent than not, are still considered to be some of the finest legal minds in the United States. Yet, they produced fundamentally and seriously flawed work product that even their staunchest defenders have disavowed. How can this be?

The answer is that a disquieting zeitgeist has pervaded the highest reaches of the legal profession and academy. The view of many is that the Bush administration's OLC brilliantly produced fundamentally flawed work in order to support the aims of the executive.<sup>3</sup> That view conveniently places the locus of responsibility for error-ridden legal memoranda on the nominal "clients" the OLC served. However, it elides a truth that must not be forgotten: an attorney must be of service, but never servile.

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Deputy Attorney General Mark Filip wrote a letter concerning the OPR Report to H. Marshall Jarrett, OPR Counsel, disagreeing with a finding of scienter, but unequivocally agreeing that the torture memoranda were fundamentally flawed, dismissing them as incorrect or inadequately supported in multiple, material aspects. Letter from Michael B. Mukasey, Attorney General, and Mark Filip, Deputy Attorney General, to Marshall Jarrett, OPR Counsel 4 & n.2 (Jan. 19, 2009), available at <http://judiciary.house.gov/hearings/pdf/Mukasey-Filip090119.pdf>. In an interview with the OPR, former Attorney General Mukasey characterized one of the August 1, 2002, torture memoranda as a "slovenly mistake." OPR REPORT at 9. On January 5, 2010, Deputy Attorney General David Margolis delivered a memorandum to Attorney General Eric Holder concerning the OPR Report, stating:

I am not prepared to conclude [as did the OPR] that the circumstantial evidence . . . established by a preponderance of evidence that [John] Yoo intentionally or recklessly provided misleading advice to his client. *It is a close question.* I would be remiss in not observing . . . John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power . . .

Memorandum from David Margolis, Associate Deputy Attorney General, to Eric Holder, Attorney General, on Objections to the Findings of Professional Misconduct 67 (Jan. 5, 2010) (emphasis added), available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>. See also Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155 (2010) (concluding, *inter alia*, that the "Commander-in-Chief" analysis set forth by the torture memoranda was without merit and implausibly stated).

2. On December 30, 2004, OLC Acting Assistant Attorney General Daniel Levin issued a memorandum that superseded and eliminated or corrected much of the analysis set forth by one of the August 1, 2002, torture memoranda. See OPR REPORT, *supra* note 1, at 5–6, 159. Levin told the OPR that when he first read one of the torture memoranda, "[I had] the same reaction I think everybody who reads it has – 'this is insane, who wrote this?'" *Id.* at 124. On January 22, 2009, President Obama issued an executive order providing, among other things, that no officer, employee, or agent of the United States government can rely upon any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001, and January 20, 2009. See Exec. Order No. 13,491, 74 Fed. Reg. 4893 (2009), available at [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/).

3. An alternative view would be that brilliant lawyers were incapable under the circumstances of producing work product that was not riddled with obvious and indefensible material errors.

An attorney is not just the implementer of a client's wishes. This notion may seem antiquated, but the professional independence of attorneys is not passé. An able and ethical attorney must advise a client to refrain from doing wrong, and refuse to take any part in the ways of a client who will not follow that advice.<sup>4</sup> An able and ethical attorney may even breach the confidence that is the hallmark of her profession to expose preemptively and thereby thwart a client's contemplated wrongdoing.<sup>5</sup> She thus wields power to uphold the law, and she must at least attempt to use that power to dissuade her client from going forward with untoward plans.

However, prominent client-malefactors, whose prominence makes their wrongs especially consequential, have little to fear from their well-compensated attorneys. In corporate America, the executive is king, and kings more often than not task lawyers to produce legal work just as any other commodity is produced: without the measure of independence, self-reflection, and courage that the integrity of their profession demands. The predilections of the nominal "clients" the OLC served, servilely, mirrored the mores of that corporate milieu.

A putatively pure theory of plenary executive prerogative that is endemic in corporate America demonstrably and detrimentally infected the Bush administration's OLC. The *élan vital* of the Justice Department may wax and wane somewhat with each presidential changing of the guard, but the Bush administration's OLC seems to have almost eagerly succumbed to the contagion. It facilitated the stated ends of executive decision makers, and used the power of the OLC to assure them that they could do very dirty and arguably illegal work with impunity. The OLC thereby sacrificed the professional independence and fealty to the law that it should have upheld.

The academic community cannot disclaim its share of responsibility for

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4. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("A lawyer shall provide competent representation to a client."); *Id.* at R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ."); *Id.* at R. 1.13(b) ("If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action . . . that is . . . a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary . . . ."). The "knowledge" requirement of the latter two cited rules does not preclude discipline and even criminal responsibility upon facilitating a criminal act, despite an attorney's defense of ignorance or honest mistake of law. See, e.g., Jess David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 213–215 (2010) ("The standard is that lawyers are immune from discipline if they assist their clients with non-frivolous arguments. . . . Frivolity must include an objective component. . . . There are several reasons to conclude that at least some of the torture memos were objectively frivolous. . . . [A] lawyers' mistake of law regarding the lawfulness of torture is irrelevant, . . . for [purposes of] accomplice liability."); Lavitt, *supra* note 1, at 174–180 & n.61 (collecting authorities and considering whether an "honest" mistake of law would be recognized by a judicial authority as a valid defense against prosecution arising out of certain conduct by the OLC during the Bush Administration).

5. See *infra* Part I.

fostering this ebbing of independence at the highest levels of the legal profession in the United States. Institutions of legal education must begin the process of restoring the status of an attorney to her rightful role as an independent voice among the highest echelons of authority. In particular, the premier institutions of legal education must never be seen to put down practitioners, pander to power, or promote a brand of ethical relativism that sees all interests as engaged in a Darwinian competition that attributes to the victorious virtue and to the vanquished nothing at all. Instead, they must convey constantly to all who study law that for the able and ethical attorney, might must never make right.

## I

### THE DETERIORATION OF ATTORNEY INDEPENDENCE IN CORPORATE AMERICA

On February 9, 1999, Bayer Corporation held a mandatory ethics training session at the headquarters of its pharmaceutical division in Connecticut. The head of Bayer's operations in the United States reportedly began the training session by stating:

Everyone is expected to obey the law—not only the letter of the law, but the spirit of the law as well. You will never be alone to adhere to the high standards of the law. Should you feel prodded, speak with a lawyer, or call me. I'm serious about that.<sup>6</sup>

According to an attendee, the assembled employees in the room erupted into laughter.<sup>7</sup>

That attendee was George J. Couto, a whistleblower. After the meeting, Mr. Couto brought a *qui tam* lawsuit that implicated Bayer in massive Medicaid fraud. Bayer pleaded guilty to a criminal charge, and paid a big fine.<sup>8</sup> It shares that distinction with many other well-known corporations that were convicted of crimes during the 1990s.<sup>9</sup>

The collapse of Enron Corporation coincided almost precisely with the

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6. *Interview with Neil V. Getnick*, 17 CORPORATE CRIME REPORTER 16 (2003), available at <http://corporatecrimereporter.com/getnickinterview.html>.

7. *Id.*

8. See Getnick, et al., *Case Study Pharmaceuticals*, 2007, [http://www.getnicklaw.com/practice/whistle\\_cs\\_4.html](http://www.getnicklaw.com/practice/whistle_cs_4.html); see also Melody Peterson, *Bayer Agrees to Pay U.S. \$257 Million in Drug Fraud*, N.Y. TIMES, Apr. 17, 2003, at C1, available at <http://www.nytimes.com/2003/04/17/business/17DRUG.html> (“In the largest Medicaid fraud settlement [ever], Bayer agreed yesterday to pay the government \$257 million and pleaded guilty to a criminal charge after engaging in what federal prosecutors said was a scheme to overcharge for the antibiotic Cipro.”).

9. For the Top 100 corporate criminal convictions during the 1990s, see Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, CORPORATE CRIME REPORTER, <http://corporatecrimereporter.com/top100.html>. Although rarely reported in the popular press, “federal courts sentence roughly two hundred organizations, mostly corporations, each year. Although the average sentence requires payment of several million dollars, judges may order corporations to pay hundreds of millions of dollars in fines and restitution.” Timothy A. Johnson, *What Booker Means for Convicted Corporations*, 116 YALE L.J. POCKET PART 301, 301 (2007), available at <http://www.thepocketpart.org/images/pdfs/527.pdf>.

collapse of the World Trade Center in 2001.<sup>10</sup> It was a dénouement of sorts, capping off a heady decade of defalcations and unseemly machinations at the highest levels of corporate America. Astonished by the wave of crime that had washed over corporate America during the 1990s, Robert Hirshon, then-President of the American Bar Association (ABA), seemingly asked a straightforward question: Where were *the attorneys*?<sup>11</sup>

In March 2002, the ABA appointed a task force to examine “systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations . . . .”<sup>12</sup> President Hirshon assured that “[t]he issues will be studied in the context of the system of *checks and balances* designed to enhance the public trust in corporate integrity and responsibility.”<sup>13</sup>

The task force produced a report, commonly known as the “Cheek Report” after its chairman, James H. Cheek, III.<sup>14</sup> The Report pinpointed a problematic concentration of managerial control in the senior executive officers of corporate America that eroded the checks and balances afforded by the active oversight and advice of attorneys.<sup>15</sup> According to the Report, a growing deference to the personal interests of senior company executives had demonstrably deteriorated the autonomy and integrity of corporate counsel.<sup>16</sup>

The ABA did what the ABA could do. It considered the existing Model Rules of Professional Conduct, and proposed adding a few more. In 2003, the ABA (adopting the recommendations of the Cheek Report) enacted new subsections (b)(2) and (b)(3) to Rule 1.6 of its Model Rules of Professional

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10. *See Profile: Jeffrey Skilling*, BBC NEWS, Oct. 23, 2006, available at <http://news.bbc.co.uk/2/hi/business/6077062.stm> (sell-off of Enron’s shares started in September and October, and Enron filed for bankruptcy protection in December 2001). Jeff Skilling, who was promoted from Enron’s chief operating officer to chief executive officer in February 2001, received his Master in Business Administration from the Harvard Business School in 1979. *Id.*

11. Legislators asked the same question. *See* Richard A. Oppel, Jr., *Enron’s Many Strands: The Hearings; Lawmakers Contend Lawyers for Enron Should Have Raised Concerns*, N.Y. TIMES, Mar. 15, 2002, at C7.

12. AMERICAN BAR ASSOCIATION, REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 2 (2003), available at [http://www.abanet.org/buslaw/corporateresponsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf) [hereinafter ABA REPORT].

13. *See id.* (emphasis added).

14. *See id.* at 1.

15. *See id.* at 11 (“This concentration of day to day managerial control in the senior executive officers may give rise to . . . persistent challenges for effective corporate governance. . . . [S]enior executive officers of public companies may sometimes succumb to the temptation to serve personal interests by maximizing their own wealth or control . . . . Unchecked, these various motivations on the part of senior executive officers can significantly harm the interests of the corporation and the investors, employees, customers and other constituencies affected by the corporation’s business.”).

16. *See id.* at 14–15 (“The competition to acquire and keep client business, or the desire to advance within the corporate executive structure may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long-term interest of their client, the corporation.”).

Conduct.<sup>17</sup> These subsections permit an attorney to expose a client's wrongdoing, not only when that wrongdoing threatens life or limb, but also when a client's fraud threatens the property or financial interests of another.<sup>18</sup>

The purposes of these amendments were clear. The ABA, perhaps aspirationally but in real terms, reaffirmed that a corporate attorney can act to ensure that her corporate client will remain law-abiding, even if that means not staying true to the managers who would lead the client astray.<sup>19</sup> By exercising professional independence and personal courage, even at great personal cost, corporate counsel may thus be expected to undermine an executive's wrongful aims.

Bolstering the ABA's salutary invocations, the Justice Department took a complementary stance.<sup>20</sup> On January 20, 2003, Deputy Attorney General Larry D. Thompson released a memorandum (the "Thompson Memorandum") that laid out guidelines to govern the exercise of discretion when federal prosecutors decide whether to prosecute a corporation or its managers.<sup>21</sup> The most controversial of those guidelines instructed federal prosecutors to take into account whether the target entity was willing to waive the attorney-client privilege.<sup>22</sup>

Wittingly or not, Thompson had proposed a very specific means to promote the professional independence of attorneys in corporate America. The prospect that confidential communications might come to light might lead even the most servile corporate counsel to adopt a precautionary principle. It might lead her to be more cognizant of the independence demanded by the Rules of

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17. See *ABA/BNA Lawyers' Manual on Professional Conduct*, 19 CURRENT REPORTS 467 (2003).

18. See AMERICAN BAR ASSOCIATION, *A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005*, at 133-37 (2006).

19. See ABA REPORT, *supra* note 12, at 23. Some members of the ABA Task Force objected to the view of a corporate lawyer as an enforcer of law. That conception, they said, might create an adversarial relationship between the corporate lawyer and the corporation's senior executive officers, and thereby actually undermine the lawyer's ability to counsel the corporation's compliance with law. Nevertheless, recognition that the responsibility of a lawyer for a public corporation is owed to the corporation, and not to its directors, officers, or other corporate agents, is more important than smooth business relationships or personal aggrandizement by way of promotion within the company.

20. See Eric Lichtblau, *Bush Officials Vowing to Seek Tough Penalties in Wall St. Cases*, N.Y. TIMES, Dec. 19, 2002, at A1 ("[S]enior Bush administration officials are planning to seek tougher corporate fraud penalties and to prosecute vigorously the lawyers . . . who have failed to detect the scandals that have rocked Wall Street. Deputy Attorney General Larry D. Thompson said in an interview that he had instructed prosecutors to take a harder look at 'what kind of advice the outside professionals gave to these companies and whether or not they were complicit in the wrongdoing.'").

21. Memorandum from Larry D. Thompson, Deputy Attorney General, to the Heads of Department Components, U.S. Attorneys (Jan. 20, 2003), available at [http://www.justice.gov/dag/cftf/corporate\\_guidelines.htm](http://www.justice.gov/dag/cftf/corporate_guidelines.htm).

22. See *id.* ("In determining whether to charge a corporation . . . the prosecutor may consider the corporation's willingness to . . . waive attorney-client and work product protection.").

Professional Conduct. It might instill in her a greater willingness to act for the benefit of the corporation *qua* entity, and not merely for the personal benefit of the senior executives at its helm.

One would suppose that these powerful new tools strengthened the hands of attorneys in the marketplace. The ABA endorsed the ability of attorneys to choose disclosure of planned or ongoing wrongs that might cause financial harm. The Justice Department encouraged waivers that would predictably bring more corporate communications to light. Based on these innovations, one could have expected at least an uptick of better compliance work by the attorneys who serve corporate America. Unfortunately, however, both of these measures fared poorly.

First, many states, including California, have not adopted the revisions to Rule 1.6 recommended by the Cheek Report.<sup>23</sup> New York's rules are equally protective of clients' confidences, although perhaps a bit more ambiguously so than California's.<sup>24</sup>

Second, the attorney-client privilege guideline set forth by the Thompson Memorandum almost immediately provoked howls of outrage. By late 2006, Senator Arlen Specter, then a Republican and the departing chairman of the Senate Judiciary Committee, introduced legislation to eliminate it.<sup>25</sup> Five days later, Deputy Attorney General Paul J. McNulty diluted it.<sup>26</sup> The resulting "McNulty Memorandum" placed strict restraints on prosecutors' requests for such waivers.<sup>27</sup>

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23. Compare MODEL RULES OF PROF'L CONDUCT 1.6(b)(2)–(3) with CAL. RULES OF PROF'L CONDUCT 3-100(B). See also Paul W. Vapnek, Mark L. Tuft, Ellen R. Peck & Justice Howard B. Wiener (Ret.), CAL. PRAC. GUIDE: PROFESSIONAL RESPONSIBILITY (TRG) § 7:71.14 (noting that ABA Model Rule 1.13(c) on lawyer's discretionary ability to report confidential information outside the entity client to prevent substantial injury to the entity directly conflicts with the attorney's duty of confidentiality under the California's State Bar Act (CAL. BUS. & PROF. CODE § 6068(e))).

24. Compare MODEL RULES OF PROF'L CONDUCT 1.6(b)(2)–(3) with N.Y. RULES OF PROF'L CONDUCT 1.6(b)(3).

25. See Lynnley Browning, *Former Deputy at Justice Dept. Would Limit Legal Disclosure*, N.Y. TIMES, Dec. 1 2006, at C6.

26. See Howard M. Shapiro, et al., *Department of Justice McNulty Memo Curtails Controversial Portions of Thompson Memo—Legislation Introduced in the Senate*, Dec. 13, 2006, available at <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3507> ("The McNulty Memorandum was issued on the heels of the legislation proposed in the Senate five days earlier, on December 7, 2006, by outgoing Senate Judiciary Chairman Arlen Specter. His bill . . . would bar federal attorneys or agents engaged in criminal or civil enforcement matters from demanding or requesting that a corporation waive the attorney-client privilege . . .").

27. See Memorandum from Mark Filip, Deputy Attorney General, to the Heads of the Components, U.S. Attorneys (Aug. 28, 2008), available at <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf> (re-issuance of the McNulty Memo); see also Ashby Jones, *Thompson Memo Out, McNulty Memo In*, WALL ST. J.: LAW BLOG, Dec. 12, 2006, available at <http://blogs.wsj.com/law/2006/12/12/thompson-memo-out-mcnulty-memo-in> (noting that the McNulty Memo requires federal prosecutors to obtain written permission from senior members of the Justice Department before seeking privileged attorney-client communications or legal advice from a company).

The McNulty revisions were not enough. Critics argued that the McNulty guidelines did not sufficiently constrain the Securities and Exchange Commission, the Federal Communications Commission, the Department of Housing and Urban Development, and other agencies. In response, the House of Representatives passed the Attorney-Client Privilege Protection Act of 2007.<sup>28</sup> Once again, Senator Arlen Specter sponsored the bill in the Senate.<sup>29</sup> The Justice Department opposed the bill, and it never became law (though corporations and law firms have operated at times as though it did).<sup>30</sup>

Regrettably, the responses by the ABA and the Justice Department to the collapse of Enron described above lacked persistency. More independent Wall Street attorneys might have contained or curbed the causes that contributed to the Collapse of 2008.

## II

### THE DETERIORATION OF INDEPENDENCE IN THE OLC DURING THE POST-SEPTEMBER 11 CRISIS

Some of the Cheek Report's insights about the way that executive interests influence corporate counsel shed light on what was going wrong in the OLC during the early years of the Bush administration. Similar pressures to obey authority and abandon professional independence affected attorneys serving in the Justice Department's OLC during the aftermath of September 11.

George W. Bush took office as President of the United States on January 20, 2001. Commentators quickly distinguished his management training at the Harvard Business School from that of his predecessor, Bill Clinton, who was a graduate of the Yale Law School.<sup>31</sup> The attitudes of the new "C.E.O. of America" almost perfectly reflected the more widespread mindset of corporate managers.<sup>32</sup> The incoming Bush administration took over an OLC that functions in certain respects like the Office of General Counsel in a

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28. H.R. 3013, 110th Cong. (2007).

29. S. 3217, 110th Cong. (2008).

30. For example, recently the House Oversight and Government Reform Committee wanted to look into the legal advice that was provided to Bank of America in connection with its acquisition of Merrill Lynch. In response, the law firm WilmerHale, on behalf of Bank of America, raised the Attorney-Client Privilege Protection Act of 2007, although it never became law. See Louise Story, *Congress Presses for Details from Bank of America on Talks*, N.Y. TIMES, Sept. 20, 2009, at B1.

31. George W. Bush received his Master in Business Administration from the Harvard Business School in 1975. George W. Bush, Presidents, About the White House, <http://www.whitehouse.gov/about/presidents/georgewbush> (last visited Feb. 13, 2010).

32. See, e.g., James Bennet, *The Bush Years; C.E.O., U.S.A.*, N.Y. TIMES, Jan. 14, 2001, § 6 (Magazine), at 624; Richard L. Berke, *Bush Is Providing Corporate Model for White House*, N.Y. TIMES, Mar. 11, 2001, § 1, at 1 ("With his degree in management from Harvard, George W. Bush . . . has given the nation a rolling seminar on management, sounding at times as though he were reading from a primer for aspiring child executives. . . . Who but the most unpatriotic shareholder could argue with that?").

corporation.<sup>33</sup> The question here is whether the OLC, when tested by the post-September 11 crisis, compliantly subordinated its independence and fealty to the law to the desires of the senior executive officers of the United States.

There is evidence to suggest that it did. In particular, personal executive interests in immunity from future prosecution appear to have influenced the decision by OLC Deputy Assistant Attorney General John Yoo to include in the torture memoranda an unqualified opinion that “the law would not apply” to the exercise by the president of his powers as “Commander-in-Chief.”<sup>34</sup> Although predictably there are differing memories of the events during the summer of 2002, the OPR Report discloses evidence that gives rise to this strong and reasonable inference.

On July 15, 2002, a mere two weeks before the torture memoranda were finalized, Yoo stated in writing that he had no intention of including in the August 1, 2002, OLC opinions any analysis of the so-called “Commander-in-Chief and defenses” issues.<sup>35</sup> On that date, he wrote the following in an email to his assistant:

One other thing to include in the op: a footnote saying that we do not address, because not asked, about defenses, such as necessity or self-defense, or *the separation of powers argument that the law would not*

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33. For an excellent, concise summary of the history of the OLC, see Note, *The Immunity-Confering Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086 (2008). In order for the President to faithfully execute the law, as provided by Article II of the Constitution, Congress foresaw the President’s need for expert legal advice. In 1950, the Justice Department’s Office of Legal Counsel took over the function of “[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President.” *Id.* at 2087.

34. See OPR REPORT, *supra* note 1, at 49–50.

35. The “Commander-in-Chief” analysis was in pertinent part as follows:

Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. . . . Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Attorney General, on Standards of Conduct for Interrogation Under 18 U.S.C. §§2340–2340A (Aug. 1, 2002), at 39, available at <http://www.usdoj.gov/olc/docs/memo-gonzales-aug2002.pdf>. The “defenses” analysis was in pertinent part as follows:

We have demonstrated that the ban on torture in Section 2340A . . . as applied to interrogations of enemy combatants ordered by the President pursuant to his Commander-in-Chief power would be unconstitutional. Even if an interrogation method, however, might arguably cross the line . . . and application of the statute was not held to be an unconstitutional infringement of the President’s Commander-in-Chief authority, we believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability.

*Id.*

*apply to the exercise of the commander in chief power.*<sup>36</sup>

But, after meeting the following day with White House Counsel Alberto Gonzales and others in the White House, Yoo nearly immediately started working on both of those subjects.<sup>37</sup> David Addington testified before the House Judiciary Committee that: “In defense of Mr. Yoo, I would simply like to point out that [he did] what his client asked him to do.”<sup>38</sup>

In interviews with the OPR, Patrick Philbin (a “second deputy”) and Jay Bybee (who signed the torture memoranda) discussed specifically the decision to include therein the “Commander-in-Chief and defenses” analyses. Philbin told the OPR:

[H]e did not know why the two sections were added. As second deputy, he did not review any drafts until late in the process, and when he did, he told Yoo that he thought the sections were superfluous and should be removed. According to Philbin, Yoo responded, “They want it in there.” Philbin did not know who “they” referred to and did not inquire; rather, he assumed that it was whoever had requested the opinion.<sup>39</sup>

Bybee also intimated that the “Commander-in-Chief and defenses” analyses were included in the torture memoranda at the request of the OLC’s “client”:

Bybee told us he did not recall why the two sections were in the memorandum and he did not remember discussing them with Yoo and Philbin, nor did he recall that Philbin raised any concerns about them. He did not remember seeing any drafts that did not contain the two sections. He told OPR, however, that criticism that the Commander-in-Chief and defenses sections were not necessary was “just flat wrong if the client requested the analysis.”<sup>40</sup>

Yoo, the principal author of the torture memoranda, told the OPR that he was “pretty sure” that the two sections were added because he, Bybee, and Philbin “thought there was a missing element to the opinion.” He stated that he remembered the three of them talking about

36. See OPR REPORT, *supra* note 1, at 49 (emphasis added).

37. *Id.* at 52.

38. *Id.* at 50, 198. In their responses to the OPR’s inquiries, Yoo and Bybee argued that David Addington, former Counsel to Vice President Richard Cheney, was Yoo’s “client.” *Id.* at 7, 198, n.152. Mr. Addington

appeared before the House Judiciary Committee on June 17, 2008, and testified that . . . Yoo met with him and Gonzales . . . and [told him that] he planned to discuss in the [torture memoranda] . . . the constitutional authority of the President . . . and possible defenses to the torture statute. Addington testified that he told Yoo, “Good, I’m glad you’re addressing these issues.”

*Id.* at 52. Gonzales “speculated” in an interview with the OPR that “David Addington had strong views on the Commander-in-Chief power, [and] he may have played a role in developing that argument.” *Id.* at 51.

39. See OPR REPORT, *supra* note 1, at 51.

40. *Id.* at 51.

the sections and whether to include them in the memorandum, [and] he believes that Bybee went back and forth on that question before the memorandum was finalized. Yoo acknowledged that the CIA may have indirectly suggested the new sections by asking him what would happen in a case where an interrogator went “over the line” and inadvertently violated the statute.<sup>41</sup>

Considered together, these statements by the principals suggest that “Commander-in-Chief and defenses” analyses were added to the torture memoranda because the “clients” to whom the OLC authors reported desired it.<sup>42</sup> The CIA’s question was not “indirect.” Portions of the relevant memoranda directly responded to it. The drafters knew that their opinions could be used as a shield in precisely the manner described by former OLC Assistant Attorney General Jack Goldsmith, III: “[There is a] flip side of OLC’s power to say ‘no,’ and to put a brake on government operations. It is one of the most momentous and dangerous powers in the government: the power to dispense get-out-of-jail-free cards.”<sup>43</sup>

Based in part on the foregoing, “the evidence . . . led [the OPR] to conclude that Yoo put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice, and . . . he therefore committed intentional professional misconduct.”<sup>44</sup>

Critics of the OPR Report rightly disagree with the finding by the OPR that Yoo failed to provide legal advice “candidly.” He was demonstrably ideologically predisposed before joining the OLC to rationalize any executive action in times of war. His sincerity does not excuse, however, the apparently importuned inclusion in the torture memoranda of unequivocal conclusions that might otherwise have been omitted.<sup>45</sup> A controversial analysis of the president’s powers as Commander-in-Chief, perhaps more than any other flawed aspect of the torture memoranda, has created a lasting perception that the Bush administration’s OLC bent (and possibly broke) the law in order to accommodate executive prerogatives.

The torture memoranda were in these aspects “one-sided and

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41. *Id.* at 50–51.

42. *Id.* at 52 (“[W]e believe it is likely that the sections were added because some number of attendees at the July 16 meeting requested the additions [and] perhaps because the Criminal Division had refused to issue any advance declinations [of prosecution.]”).

43. Jack Goldsmith, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 96–97, 149–50, 162 (2007) (characterizing OLC opinions as a “golden shield” and an “advance pardon”). *See also* OPR REPORT, *supra* note 1, at 197.

44. OPR REPORT, *supra* note 1, at 254.

45. An honest expression of Yoo’s professional opinion is presupposed, as anything less than that would have been fraudulent. *See*, RESTATEMENT (SECOND) OF TORTS § 525 cmt. c (1965) (“[A] statement that a particular person, whether the maker of the statement or a third person, is of a particular opinion . . . is a misrepresentation if the person in question does not hold the opinion . . .”).

tendentious.”<sup>46</sup> A legal opinion by an institutional actor that purports to be an “objective” analysis of the law but omits known, material authority that is incompatible with the maker’s stated opinion gives rise to an inference that the opinion was incomplete by intention. By providing an unqualified and unequivocal opinion that “the law would not apply to the exercise of the commander in chief power,” the Department of Justice conferred unqualified absolution in advance upon those undertaking the enhanced interrogation of Al Qaeda detainees.<sup>47</sup> The evidence suggests that the torture memoranda were deliberately crafted with that goal in mind, owing to the authors’ deference to the interests of particular executive consumers of the opinions.

Objectively, the principal author of the torture memoranda perfectly accommodated a very obvious executive purpose. One may infer from the evidence that he did so purposefully, or at least with the knowledge that the desired outcome was substantially certain to ensue. The conclusions of the Cheek Report about the responsibility of general counsel to a corporation *qua* entity thus resonate strongly in the analysis of what went wrong with the OLC during the Bush administration. The OLC lost sight of the fact that it owed its duties first and foremost to the law and to the government *qua* entity, and not to particular government actors.

As Deputy Attorney General David Margolis has stated: “I would be remiss in not observing . . . [t]he [torture] memoranda suggest that [John Yoo] failed to appreciate the enormous responsibility that comes with the authority to issue institutional decisions that carried the authoritative weight of the Department of Justice.”<sup>48</sup>

The ability of the Justice Department to say “no” to even the highest elected officials, and thereby halt or at least “brake” contemplated actions that might violate law, is not an abstract ideal. An independent Attorney General may uphold the law, even in times of war.

### III

#### THE CONTRIBUTION OF THE ACADEMY

The practice of law is not just a vehicle for the acquisition of money and status; it is a service that involves a constant struggle for justice. Although imposing the highest standards for admission, prestigious law schools in particular too often pay relatively little or no attention to training attorneys for a power struggle with elite interests.<sup>49</sup> It is from those schools that corporate

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46. OPR REPORT, *supra* note 1, at 201 n.154.

47. See, e.g., Lavitt, *supra* note 1, 156–66, 182–83 (observing that OLC memoranda predictably have acted as a talisman to ward off prosecutions).

48. See Margolis, *supra* note 1, at 67.

49. See, e.g., Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 58 (2009) (“Law schools teach students to think like lawyers but not to act like them.”); *id.* at 63–64 (“[S]tudies of law school socialization often tell a story of decline and diversion . . . . For

America recruits.

Practical training in law school has been the subject of vigorous debate for years.<sup>50</sup> To be sure, law schools have made laudable efforts to properly prepare their graduates for practice.<sup>51</sup> Clinical programs cannot do enough, however.<sup>52</sup> Those programs (with notable exceptions) are perpetuated by and tailored to fit the perceived priorities of large donors, including leading law firms.<sup>53</sup> Skills training may increase the productivity of new associates, but it does nothing to prepare them to make the tough decisions that will require standing up to an executive authority.

The legal academy must find a way to exercise its own independence, to model and convey to law students what it means, and what it takes, to be a gutsy, practicing lawyer. Competent lawyers often tell their clients “no” just as law schools must tell their patrons on occasion, even if that means a loss of revenue or a coveted place of prominence. The value-added attribute of independence, if ubiquitous, would enhance the prestige and relative power of the law academy and legal profession.

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example, a study of Harvard Law School students describes their legal education as a ‘moral transformation,’ during which they ‘dissociate themselves from previously held notions about justice and replace them with new views consistent with the status quo.’”); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 6 (2007) (law schools “give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice” and fail “to complement the focus on skill in legal analyses with effective support for developing ethical and social skills”).

50. See, e.g., Peter A. Joy & Robert R. Kuehn, Symposium, *Looking Forward: The Next Sixty Years of Clinical Legal Education: The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 183 (2008) (“The value of clinical legal education courses . . . has long been contested. . . . [The] debate over the value of clinical legal education . . . continues.”).

51. See, e.g., Sandefur & Selbin, *supra* note 49, at 58 (“Clinical legal education [is] an applied, apprenticeship-like setting now commonplace within most law schools . . . [C]linics were developed as a direct response to the call for more practical and professional training, and they have proliferated throughout legal education during the last forty years.”). Practical and professional training apart, clinical programs are commendable because they customarily serve deserving populations who otherwise would be unable to obtain legal services.

52. See, e.g., Richard A. Matasar, *Skills and Values Education: Debate about the Continuum Continues*, 19 N.Y.L. SCH. J. HUM. RTS. 25, 25 (2003) (“Even if they have taken the best Professional Responsibility courses and have had a ‘live client’ clinic, [students’] professional values have not yet been challenged by the extraordinary pressures of serving actual clients . . .”).

53. See, e.g., Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 19 (2000) (“[N]o other external funding programs [were] as important to the proliferation of clinical legal education programs as the Ford Foundation and Title IX programs. By the end of the Title IX program in September of 1997, there were real-client in-house law school clinical programs in at least 147 law schools. During the period in which Ford Foundation and Title IX grants were available, representatives of the practicing bar were calling for greater emphasis in law schools on lawyering skills and professional values as taught in clinical courses . . . .”); *id.* at 29 (“Today, clinical programs are largely funded by the law schools as any other part of the curriculum [is funded] . . . .”); see also Sandefur & Selbin, *supra* note 49, at 64 (“[T]he organized bar repeatedly has called for more practical and professional training in legal education.”).

New courses and attitudes in law school thus can and should address the lack of independence that has undermined the required role of attorneys.<sup>54</sup> During law school, the essence of legal practice must never be equated with the first few years of life for an associate at the lowest levels of a hierarchal, multinational law firm. The obsequiousness and deference to authority that associates must exercise to succeed in that milieu are poor preparation for the struggles to maintain their professional independence that will come later in their legal careers.

Our culture, now more than ever, needs lawyers who have acquired in law school an understanding of “Business Associations” that deemphasizes the role of an attorney as a strategic asset to be deployed in the never-ending quest for profits. There is a place in the academy for the luxury of impractical contemplation of abstract theories about picayune points of practical significance to nearly no one. But that luxury must give way now, in the main, to a frank recognition that preparation for the practical realities of law practice is far more important if the legal profession is to regain the independence that it so direly needs today.<sup>55</sup> New lawyers can help to lead the way.

Students of the law will join the long and noble procession of attorneys who came before and will follow after them. Their vision of the future is thus vital. Law schools should focus principally on preparing them to be independent, ethically minded attorneys who are attuned to the rigor that their professional autonomy demands. Can we say confidently that that is the way American attorneys are perceived today?

#### CONCLUSION

After September 11, the conditions described in this Essay combined to undermine the professional independence of attorneys who, when called upon to rise to a momentous occasion, fell demonstrably short. Until the resolve to be independent is sparked in young attorneys on their way to serve America’s elite, this failing is likely to get worse.

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54. See, e.g., Diane Curtis, *UC Irvine Offers A New Approach To Law School*, CAL. B.J., Oct. 2009 (“This year, the inaugural class is taking a year-long course in Lawyering Skills, which will focus on negotiations, interviewing and fact investigation. They also are taking Legal Profession, which delves into professional ethics, the economics of the profession and the psychology of being a lawyer.”).

55. See, e.g., Timothy W. Floyd, *Moral Vision, Moral Courage, And the Formation of the Lawyer’s Professional Identity*, 28 MISS. C. L. REV. 339, 347 (2009) (“Although the Carnegie Report does not often explicitly rely on the language of character and virtue . . . the Report states: ‘Law schools shape the minds and hearts of their graduates in enduring ways. This . . . is especially salient in the development of professional purpose and identity. . . . [P]rofessional education aims to initiate novice practitioners to think, to perform, and to conduct themselves (that is, to act morally and ethically) like professionals.’”); see also Mathias M. Siems, *A World Without Law Professors* 10 (working draft) (Nov. 1, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1481868](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481868) (concluding that in a different legal education environment “self-referential legal research would disappear”).

What can be done to restore the proper equilibrium between attorney and management, in both the private and public sectors? I propose we foster the perception and reality of attorneys as independent actors, entitled to respect, and, at some level, to be feared as wielders of the authority that accompanies the power of the law.

The legal academy must begin this indoctrination in law school. This is particularly necessary in those schools on which preeminent institutions rely for recruits. Law students need to be convinced that the practice of law is a noble profession that is worthy of their talent—and their self-sacrifice.

To be worthy of the respect they so richly deserve, attorneys need to be keepers of the law, and must be held accountable when they fall short. Enhanced accountability for complicity in executive wrongdoing will remind the bar that the lessons learned in law school must never be forgotten.

If we are to learn anything from the torture memos, it is that blind adherence to abstract theory in law school succumbs to concrete authority in the marketplace. Servile attorneys, poorly prepared for the rigors of their profession, should play no role in the practice of law.

