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# Those Who Can't, Teach: What the Legal Career of John Yoo Tells Us about Who Should Be Teaching Law

Lawrence Rosenthal



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## THOSE WHO CAN'T, TEACH: WHAT THE LEGAL CAREER OF JOHN YOO TELLS US ABOUT WHO SHOULD BE TEACHING LAW

*Lawrence Rosenthal\**

Perhaps no member of the legal academy in America is more controversial than John Yoo. For his role in producing legal opinions authorizing what is thought by many to be abusive treatment of detainees as part of the Bush Administration's "Global War on Terror,"<sup>1</sup> some have called for him to be subjected to professional discipline<sup>2</sup>; others have called for his

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\* Professor of Law, Chapman University School of Law. I am indebted to John Hall, Ernesto Hernandez, Dan Kahan, Michael Lang, Arnold Loewy, Gowri Ramachandran, Richard Redding, Robin Wellford Slocum, Russell Weaver and the participants at the Criminal Procedure Discussion Forum held in Aix-en-Provence, France, on June 9 and 20, 2010, for enormously helpful comments on prior drafts. I must also thank Zachariah Moura, Isa Lang, and the staff of the Chapman University School of Law's Rinker Law Library for enormously capable research assistance. This article had its genesis in a brief essay I previously published while the investigation into Professor Yoo's conduct during his service in the United States Department of Justice was still ongoing. See Lawrence Rosenthal, *Lowering the Bar? John Yoo Shouldn't Be Teaching. Based on His Memos*, L.A. TIMES, Apr. 9, 2009, § Main, at 31. To the extent that this article is understood as critical of the University of California at Berkeley's School of Law for continuing to employ Professor Yoo, candor compels me to acknowledge that Professor Yoo was a visiting professor at my own institution during the spring semester of 2009. A draft of this article was sent by email to John Yoo and Robert Delahunty with an invitation for their comments. Professor Yoo declined to comment. Professor Delahunty did not respond to the email.

<sup>1</sup> The phrase "Global War on Terror" was eventually adopted by the Bush Administration as a label for its efforts to combat international terrorism. See Scott Wilson & Al Kamen, *"Global War on Terror" Is Given New Name: Bush's Phrase Is Out, Pentagon Says*, WASH. POST, Mar. 25, 2009, at A4.

<sup>2</sup> See, e.g., Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 215-21 (2006); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 463-69 (2005); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SECURITY L. & POL'Y 409, 431-41 (2005); Robert C. Power, *Lawyers and the War*, 34 J. LEGAL PROF. 39, 77-89 (2009); Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN.

criminal prosecution.<sup>3</sup> I aim to raise a different question—whether John Yoo—and his like—ought to be teaching law. Thus far, consideration of this question has been confined to rather brief essays in the popular press.<sup>4</sup> In the academy, there has been little disagreement voiced with the view of Christopher Edley, Professor Yoo's dean at the University of California at Berkeley's School of Law, who, after noting that Professor Yoo "enjoys not only security of employment and academic freedom, but also First Amendment and Due Process rights," concluded: "Assuming one believes as I do that Professor Yoo offered bad ideas and even worse advice during his government service, that judgment alone would not warrant dismissal or even a potentially chilling inquiry."<sup>5</sup> I will offer a different view.

John Yoo provides something of a case study in the problems in legal education today. As a scholar, Professor Yoo is considered something of a superstar; he has been described as "a leading scholar on the relationship of international law and war powers to constitutional commands."<sup>6</sup> Even so, he teaches at a law school—an entity engaged in preprofessional education. Prior to tenure in the Bush Administration, Professor Yoo had little experience in the practice of the law; as we will see,

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L. REV. 409, 439-44 (2011); Michael E. Tigar, *What Lawyers, What Edge?*, 36 HOFSTRA L. REV. 521, 536-37 (2007).

<sup>3</sup> See Erwin Chemerinsky, *Civil Liberties and the War Terror: Seven Years after 9/11 History Repeating: Due Process, Torture and Privacy During the War on Terror*, 62 SMU L. REV. 3, 12 (2009); Claire Finkelstein, *Vindicating the Rule of Law: Prosecuting Free Riders on Human Rights*, in WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 37, 49-64 (Austin Sarat & Nasser Hussain eds., 2010); 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, 174-91 (2010); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 356-61 (2007); Jeanne Mirer, *The Law of Torture and Accountability of Lawyers Who Sanction It*, in THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 241, 249-52 (Marjorie Cohn ed., 2011); Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 193 (2010).

<sup>4</sup> See, e.g., Paul Campos, Editorial, *A Tortured Defense*, DENVER ROCKY MOUNTAIN NEWS, Apr. 16, 2008, at 31; Rosenthal, *supra* note \*.

<sup>5</sup> Christopher Edley, Jr., *The Torture Memos and Academic Freedom*, Apr. 10, 2008, available at <http://www.law.berkeley.edu/news/2008/edley041008.html>.

<sup>6</sup> Panel Discussion, *The Framers' Understanding of Originalism and International Law*, 11 CHAP. L. REV. 307, 308 (2008) (remarks of Ronald A. Cass).

this makes him typical of the current generation of legal educators. Professor Yoo also represents something of a natural experiment of a type that we rarely see—the unusual case of a leading legal scholar with the limited professional experience typical of his generation who leaves the academy and practices law on a regular basis. When Professor Yoo actually practiced law, however, he made quite a hash of things. To use Dean Edley's characterization, Professor Yoo's time in legal practice produced "bad ideas and even worse advice." No medical school would employ an incompetent physician to teach the practice of medicine; such a teacher would surely be thought a menace to the professional development of its students, and to their future patients as well. Surely it is remarkable that the legal academy could regard as something of a superstar an individual who proves unable to practice—at least at an acceptable level—the profession for which he is training his students. Professor Yoo's case is unusual in that he took the rare step of leaving the academic cocoon and venturing into a position where his professional deficiencies were likely to be exposed, but there is reason to believe that his lack of professional judgment is common among the scholars of his generation. All of this suggests that there is something deeply wrong with the state of legal education today.

In the discussion that follows, I will first illustrate the deficiencies in the legal work of Professor Yoo during his service in the Department of Justice. I will then explain why those deficiencies cast grave doubt on Professor Yoo's qualifications to teach law. Dean Edley's view, I will argue, has no proper place in preprofessional education. Indeed, the premises underlying Dean Edley's view illustrate a good deal of what is wrong with legal education today.

#### I. THE LEGAL WORK OF JOHN YOO

According to Professor Yoo's faculty profile, prior to the time that he joined the United States Department of Justice as Deputy Assistant Attorney General for the Office of Legal Counsel ("OLC") in the administration of President George W. Bush, Professor Yoo's sole experience in the practice of law consisted of a stint in 1995-96 as counsel to the Senate Judiciary

Committee.<sup>7</sup> Legislative counseling work is, of course, of an entirely different character than advising a client on compliance with the law. It appears that the first actual client Professor Yoo ever counseled in his legal career was the President of the United States.

### A. *The Torture Memo*

Most criticism of Professor Yoo has focused on his role in producing an August 1, 2002 memorandum—popularly known as the “Torture Memo,” exploring the reach of the federal anti-torture statute.<sup>8</sup> Although the memorandum was signed by Assistant Attorney General Jay Bybee, then-Deputy Assistant Attorney General Yoo’s supervisor, it appears that Professor Yoo was its primary author and that Assistant Attorney General Bybee did not undertake substantial revision of the draft.<sup>9</sup> Among legal scholars, “the memorandum was roundly, almost

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<sup>7</sup> See Berkeley Law Faculty Profiles, <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235> (last visited Mar. 30, 2011).

<sup>8</sup> See David Cole, *Introductory Commentary: Torture Law*, in THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 1, 20-24 (David Cole ed. 2009) (providing a critical overview of the memo) [hereinafter THE TORTURE MEMOS].

<sup>9</sup> See OFF. OF PROF. RESP., U.S. DEPT’ OF JUSTICE, 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 43-62 (July 29, 2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf> [hereinafter OPR REPORT]. According to Assistant Attorney General Bybee’s successor, Bybee “tended to approve Yoo’s draft opinions on these topics with minimal critical input.” JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 169 (2007). In addition, Professor Yoo subsequently signed another memorandum reiterating the view taken in the Torture Memo. See Memorandum for William J. Haynes II, Gen. Counsel, Dep’t of Def., from John C. Yoo, Deputy Assistant Att’y Gen., *Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, Mar. 14, 2003, at 18-19, 36-47, 74-81 available at <http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf> [hereinafter Military Interrogation Memo]. After leaving government service, Professor Yoo continued to defend the memorandum. See, e.g., *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 11 (2008) (statement of John Yoo); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 169-87 (2006).

uniformly condemned,”<sup>10</sup> often in terms unusually harsh for academics.<sup>11</sup>

### 1. The reach of the anti-torture statute

The anti-torture statute provides:

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.<sup>12</sup>

The statute defines “torture” as “an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>13</sup> The Torture Memo, after noting that the statute does not define “severe physical

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<sup>10</sup> M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo “Torture and Power” Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, 12 CHAP. L. REV. 639, 640 (2009).

<sup>11</sup> See, e.g., David Cole, *The Idea of Humanity: Human Rights and Immigrants’ Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 636 (2006) (“a truly astounding opinion”); Kent Greenfield, *Attorney General Mukasey’s Defense of Irresponsibility*, 32 B.C. INT’L & COMP. L. REV. 223, 227 (2009) (“We understand that the legal arguments advanced in the Torture Memo were blatantly wrong.”); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1578 (2007) (“The Torture Opinion is an easy target for criticism, an extreme example of poor lawyering.”); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 35 (2008) (“Yoo’s guidance failed basic tests of sound lawyering . . .”); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1231 (2006) (“[T]he Bybee memorandum has been withered by criticism for the poor quality of its legal analysis.”); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1708 (2005) (“The quality of Bybee’s legal work is a disgrace . . .”); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 70 (2005) (“[T]he process of providing legal advice was so badly flawed, and the lawyers working on the memos were so fixated on working around legal restrictions on the administration’s actions, that the legal analysis became hopelessly distorted.”).

<sup>12</sup> 18 U.S.C. § 2340A(a) (2006).

<sup>13</sup> § 2340(1).

pain,” and acknowledging that “[t]he dictionary defines ‘severe’ as ‘[u]nsparing in exaction, punishment or censure’ or ‘[I]nflicting discomfort or pain hard to endure; sharp; afflictive, distressing; violent; extreme; as *severe* pain, anguish, torture,”<sup>14</sup> nevertheless looked to “statutes defining an emergency medical condition for the purpose of providing health benefits” and concluded that to constitute “severe physical pain” for purposes of the anti-torture statute, pain inflicted during interrogation “must rise to . . . the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions—in order to constitute torture.”<sup>15</sup>

The best explanation for the deficiencies in this approach came from the Bush Administration itself in a 2004 OLC opinion that repudiated the definition of “severe pain” in the Torture Memo:

The August 2002 Memorandum also looked to the use of “severe pain” in certain other statutes, and concluded that . . . pain “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” We do not agree with those statements. Those other statutes define an “emergency medical condition,” for purposes of providing health benefits . . . . They do not define “severe pain” even in that very different context (rather, they use it as an indication of an “emergency medical condition”), and they do not state that death, organ failure, or impairment of bodily function cause “severe pain,” but rather that “severe pain” may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting “severe pain”

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<sup>14</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Att’y Gen., *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, Aug. 1, 2002, in *THE TORTURE MEMOS*, *supra* note 8, at 41, 46-47 (italics and second and third brackets in original) [hereinafter *Torture Memo*].

<sup>15</sup> *Id.* at 47 (internal citations omitted); *accord* Military Interrogation Memo, *supra* note 9, at 38-39.

in the very different context of the prohibition against torture  
 . . . .<sup>16</sup>

In other words, the statutes to which the Torture Memo looked to define “severe pain” did not in fact define “severe pain.” That seems a pretty serious deficiency in legal analysis.<sup>17</sup>

Although the Torture Memo’s definition of “severe pain” has been the focus of most of the critical commentary about its reading of the anti-torture statute,<sup>18</sup> perhaps even more significant was its conclusion that although the statute defines “tor-

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<sup>16</sup> Memorandum for James B. Comey, Deputy Att’y Gen., from Daniel Levin, Acting Assistant Att’y Gen., *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, Dec. 30, 2004, in THE TORTURE MEMOS, *supra* note 8, at 128, 137-38 n.17 [hereinafter Levin Torture Memo].

<sup>17</sup> About the best that can be said of this portion of the memo is the observation of Deputy Associate Attorney General David Margolis in his review of the Office of Professional Responsibility’s finding that Yoo and Bybee were guilty of professional misconduct:

[T]he memo does not define “severe pain” as strictly limited to incidents resulting in organ failure or death. Rather, the memo advised that severe pain must rise to a “similarly high level,” . . . and that victims must suffer pain that is “*of the kind* that is *equivalent* to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function will likely result.” These qualifiers do not help much and could have been clearer, but the memo read carefully does not authorize interrogators to engage in any behavior that does not *in fact* cause serious physical injury, organ failure, or death.

Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of 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, from David Margolis, Assoc. Deputy Att’y Gen., Jan. 5, 2010, at 33, *available at* <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf> (emphasis in original) (citations omitted) (quoting Torture Memo, *supra* note 14, at 47, 56-57) [hereinafter Margolis MoD].

<sup>18</sup> *See, e.g.*, DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 178-79 (2007); JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 89-91 (2006); PETER MARGULIES, LAW’S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION 60 (2010); OPR REPORT, *supra* note 9, at 176-84; Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1150 (2006); Brad R. Roth, *Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice*, 6 J. INT’L CRIM. JUST. 215, 215-16 (2008); Waldron, *supra* note 11, at 1707-08; Wendel, *supra* note 11, at 80-82.

ture” disjunctively as severe “pain or suffering,” the statutory terms “pain” and “suffering,” according to the Torture Memo, “are not distinct concepts.”<sup>19</sup> This move was critical; without it, even the restrictive definition of “severe physical pain” would not have dramatically narrowed the statute, since the infliction of pain that is unlikely to compromise bodily functions could still produce “severe suffering” and therefore amount to “torture” within the meaning of the statute. But, because the memo opined that the term “suffering” added nothing to the statute, the restrictive definition of “severe pain” became controlling.

The conclusion that the words “or suffering” added nothing to the statutory definition of “torture” is, if anything, even less defensible than the Torture Memo’s definition of “severe pain.” Reading the phrase “severe pain or suffering” to mean the same thing as “severe pain” is inconsistent with the familiar rule that every term in a statute is presumed to have independent meaning.<sup>20</sup> To be sure, this is only a presumption, but there is little reason to think it inapplicable to this context. Given the restrictive definition of “severe physical pain” adopted by the Torture Memo, it should have been especially clear that the statutory phrase “severe physical suffering” has an independent meaning not involving organ failure or its like. For its part, the Torture Memo offers no explanation for how the phrase “severe suffering” necessarily requires some threat of death, organ failure, or comparable impairments of bodily functions. Indeed, after Professor Yoo’s departure from government service, the Bush Administration’s OLC repudiated this aspect of the Torture Memo as well, concluding in a subsequent legal opinion that the statutory concepts of “pain” and “suffering” are distinct.<sup>21</sup>

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<sup>19</sup> Torture Memo, *supra* note 14, at 47 n.3; *accord* Military Interrogation Memo, *supra* note 9, at 39 n.47.

<sup>20</sup> *See, e.g.*, *United States v. Wells*, 519 U.S. 482, 493 n.14 (1997); *Bailey v. United States*, 516 U.S. 137, 145-46 (1995); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).

<sup>21</sup> *See* Levin Torture Memo, *supra* note 16, at 141.

The statutory definition of “torture” is not limited to physical pain and suffering; it also includes “severe mental pain or suffering,” defined as

the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>22</sup>

Under this definition, the Torture Memo’s restrictive definition of “severe physical pain or suffering” proved to be doubly significant, since the first subparagraph of this definition requires a threat of “severe physical pain or suffering” which, as we have seen, was considerably narrowed by the Torture Memo. The memorandum further narrowed “mental pain or suffering” by stressing that mental harm must be “prolonged” and that this result must be specifically intended before the statute is violated.<sup>23</sup>

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<sup>22</sup> 18 U.S.C. § 2340(2) (2006).

<sup>23</sup> See Torture Memo, *supra* note 14, at 49-51; *accord* Military Interrogation Memo, *supra* note 9, at 39-44. The memo’s use of the concept of specific intent was itself confusing. It states:

In order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act . . . Here, because [the anti-torture statute] requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant’s precise objective.

*Id.* at 44; *accord* Military Interrogation Memo, *supra* note 9, at 36-38. This formulation, though hardly a model of clarity, implies that if an actor’s objective is to obtain information or protect national security, the actor lacks the requisite specific intent. In fact,

The effect of the restrictive definition of torture contained in the Torture Memo on interrogation practices is illustrated by another OLC memorandum, signed on the same day as the Torture Memo, discussing the interrogation techniques that the Central Intelligence Agency proposed for use on Abu Zubaydah, “one of the highest ranking members of the al Qaeda terrorist organization.”<sup>24</sup> Professor Yoo was the primary author of the Interrogation Techniques Memo, which was not substantially revised by Assistant Attorney General Bybee.<sup>25</sup> Among other interrogation techniques, the Interrogation Techniques Memo considered the use of the “waterboard,” in which, as described in the memo,

the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in the carbon dioxide level in the individual’s blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth

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it has long been settled that the concept of specific intent requires only that the actor’s objective was to engage in the prohibited conduct and not that the actor intended to violate the law. *See, e.g.*, *United States v. Feola*, 420 U.S. 671, 687-89 (1975). The OLC subsequently retracted the account of specific intent found in the Torture Memo, *see Levin Torture Memo, supra* note 16, at 150 n.27, and added:

[S]pecific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a ‘good reason.’ Thus, a defendant’s motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute.

*Id.* at 150. For a useful discussion of specific intent under the statute, see Dana Carver Boehm, *Waterboarding, Counter-Resistance, and the Law of Torture: Articulating the Legal Underpinnings of U.S. Interrogation Policy*, 41 U. TOL. L. REV. 1, 33-37 (2009).

<sup>24</sup> Memorandum for John Rizzo, Acting Gen. Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Att’y Gen., *Interrogation of al Qaeda Operative*, Aug. 1, 2002, in THE TORTURE MEMOS, *supra* note 8, at 106, 106 [hereinafter Interrogation Techniques Memo].

<sup>25</sup> *See* OPR REPORT, *supra* note 9, at 55-62.

produces the perception of “suffocation and incipient panic,”  
i.e., the perception of drowning.<sup>26</sup>

Under the restrictive definition of “severe physical pain or suffering” adopted in the Torture Memo, the Interrogation Techniques Memo had little trouble reconciling waterboarding with the statute. Waterboarding did not inflict “severe physical pain or suffering,” according to the Interrogation Techniques Memo, because it is not painful:

As we understand it, when the waterboard is used, the subject’s body responds as if the subject were drowning—even though the subject may be well aware that he is in fact not drowning. You have informed us that this procedure does not inflict actual physical harm. Thus, although the subject may experience the fear or panic associated with the feeling of drowning, the waterboard does not inflict physical pain. As we explained in the [Torture] Memorandum, “pain and suffering” as used in [the statute] is best understood as a single concept, not distinct concepts of “pain” as distinguished from “suffering.” The waterboard, which inflicts no pain or actual harm whatsoever, does not, in our view inflict severe pain or suffering.<sup>27</sup>

Accordingly, the memo’s assessment of waterboarding was based on the Torture Memo’s erroneous conflation of “severe pain” and “severe suffering.”

To be sure, the memo offered a fallback:

Even if one were to parse the statute more finely to attempt to treat “suffering” as a distinct concept, the waterboard could not be said to inflict severe suffering. The waterboard is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering.<sup>28</sup>

This represents yet another error of legal analysis; the Interrogation Techniques Memo injects a temporal requirement into the concept of “severe physical suffering,” although the statuto-

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<sup>26</sup> Interrogation Techniques Memo, *supra* note 24, at 109.

<sup>27</sup> *Id.* at 118 (footnote omitted).

<sup>28</sup> *Id.*

ry definition of “torture” requires only that “mental pain or suffering” be “prolonged.” A familiar rule of statutory construction provides that the inclusion of limiting language in one portion of a statute implies the absence of similar limitation elsewhere.<sup>29</sup>

Thus, the errors in this portion of the Interrogation Techniques Memo were serious. If the statute were correctly interpreted to mean that “severe physical suffering” amounts to torture even if not painful, and to reject a requirement that physical suffering be “prolonged” since that qualifier appears only in the definition of “severe mental pain or suffering,” the argument in the Torture Memo that waterboarding is consistent with the anti-torture statute collapses. Although the Torture Memo opined that “it is difficult to conceive of [severe physical] suffering that would not involve severe physical pain,”<sup>30</sup> that observation takes no account of waterboarding which, as the Interrogation Techniques Memo reflects, the authors of the Torture Memo knew was a technique that would be permitted by virtue of the analysis in that memo. It is surely reasonable to believe that a jury might find that waterboarding, in which (to use the Interrogation Techniques Memo’s description) “the subject’s body responds as if the subject were drowning,” causing the subject to experience “the fear and panic associated with the feeling of drowning,” inflicts “severe physical suffering.” If so, waterboarding would satisfy the definition of “torture.” That waterboarding is thought not to be painful could not be dispositive in light of the suffering induced by the physical sensation of drowning. To conclude otherwise would mean that submerging to the point of drowning a detainee who refused to provide information would not qualify as torture even though there is a longstanding concept of water torture in American law involving just this type of conduct.<sup>31</sup> To be sure,

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<sup>29</sup> See, e.g., *Bates v. United States*, 522 U.S. 23, 29-30 (1997); *Russello v. United States*, 464 U.S. 16, 22-23 (1983).

<sup>30</sup> Torture Memo, *supra* note 14, at 47 n.3.

<sup>31</sup> See Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468 (2007). To be sure, Deputy Associate Attorney General Margolis concluded that the failure to discuss this history did not expose the authors of the Torture Memo to professional discipline given that none of

as we have seen, a violation of the anti-torture statute also requires that the defendant specifically intended to produce “severe physical suffering,” but since specific intent requires only that an actor intend to produce the prohibited result, regardless of the actor’s motivation or belief in the legality of his conduct,<sup>32</sup> an interrogator’s intention to produce the “fear and panic associated with the feeling of drowning” in order to obtain information from a detainee would be sufficient to violate the statute.

As for “prolonged mental pain or suffering,” although the Interrogation Techniques Memo acknowledged that waterboarding amounted to “a threat of imminent death,”<sup>33</sup> it indicated that no prolonged mental harm was anticipated “[b]ased on . . . research into the use of these methods at SERE [Survival, Evasion, Resistance and Escape—the Navy’s survival training program] school and consultation with others with expertise in the field of psychology and interrogation.”<sup>34</sup> This conclusion required a good deal of credulousness. One need not be an expert in psychology to question whether the experiences of those who undergo waterboarding during military training fairly reflect the psychological reaction of detainees who are waterboarded by their captors as part of an all-too-real interrogation. In fact, the CIA’s Office of Medical Services later stated that when the CIA presented its position on waterboarding to the OLC, “the expertise of the SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the sub-

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the precedents involved the anti-torture statute or precisely the same technique as was employed by the CIA, although acknowledging that these examples “may have provided useful historical context.” Margolis MoD, *supra* note 17, at 61. It is also worth noting that American history reflects some willingness to tolerate conduct that might well be considered torturous. See JOHN T. PARRY, UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY 135-64 (2010). Even so, this history surely sheds some light on the question whether “severe physical suffering” can occur in the absence of physical pain. Presumably, if water torture involving the sensation of drowning was not regarded as involving either severe physical pain or severe physical suffering, it would not be regarded as torture, yet history does not bear this observation out.

<sup>32</sup> See *supra* note 23.

<sup>33</sup> Interrogation Techniques Memo, *supra* note 24, at 123.

<sup>34</sup> *Id.*

sequent Agency usage as to make it irrelevant.”<sup>35</sup> One wonders why this elementary point was not evident to Deputy Assistant Attorney General Yoo and his colleagues; the point did not escape their successor at OLC, who cautioned that “the very different situations of detainees undergoing interrogation and military personnel undergoing training counsels against undue reliance on the experience in SERE training.”<sup>36</sup>

## 2. Defenses for torture

The Torture Memo went on to opine that even if interrogators committed acts of unlawful torture—in other words, in the argot of the memo, they specifically intended to cause the equivalent of organ failure or its equivalent or long-lasting mental trauma, “[i]t appears to us that under the current circumstances the necessity defense could be successfully main-

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<sup>35</sup> INSPECTOR GENERAL, CENTRAL INTELLIGENCE AGENCY, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPT. 2001-OCT. 2003), at 21-22 n.26 (May 7, 2004), available at <http://documents.nytimes.com/c-i-a-reports-on-interrogation-methods#p=1> [hereinafter IG REPORT].

<sup>36</sup> Memorandum for John A. Rizzo, Senior Deputy Gen. Counsel, CIA, from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., *Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of High Value Al Qaeda Detainee*, May 10, 2005, reprinted in THE TORTURE MEMOS, *supra* note 8, at 152, 169 n.18 [hereinafter Bradbury Interrogation Techniques Memo]. The United States Department of Justice’s Office of Professional Responsibility was highly critical of the Interrogation Techniques Memo for its reliance on the experience of SERE training. See OPR REPORT, *supra* note 9, at 235-36. Reviewing that conclusion, Associate Deputy Attorney General Margolis was only a bit more charitable:

The SERE training—despite its differences with real world application of the waterboard—would be relevant to the threshold question of whether everyone subjected to the waterboard suffers severe mental pain or suffering . . . . The memo continued, however, to attribute too much significance to the SERE training when it stated, “The continued use of these methods without mental health consequences to the trainees indicated that it is highly improbable that such consequences would result here.” The memo would more correctly have observed that [a detainee]’s psychological assessment, combined with the SERE experience and the CIA’s intention to have medical experts monitor the interrogation, made it highly improbable that [the detainee] would suffer mental health consequences. As drafted, however, the memo could be interpreted as concluding that the SERE experience alone virtually eliminated the need for an individualized assessment.

Margolis MoD, *supra* note 17, at 62-63 (citation omitted) (quoting Interrogation Techniques Memo, *supra* note 24, at 126).

tained in response to an allegation of a [statutory] violation.”<sup>37</sup> The memo elaborated:

[T]wo factors will help indicate when the necessity defense could appropriately be invoked. First, the more certain that government officials are that a particular individual has information needed to prevent an attack, the more necessary interrogation will be. Second, the more likely it appears to be that a terrorist attack is likely to occur, and the greater the amount of damage expected from such an attack, the more that an interrogation to get information would become necessary.<sup>38</sup>

In this discussion of the necessity defense, however, the Torture Memo did not mention that the Supreme Court had recently questioned whether a necessity defense exists under federal law,<sup>39</sup> or the Court’s square holding in the same case that no necessity defense could be recognized for the use of marijuana for medicinal purposes because “the Controlled Substances Act . . . reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project).”<sup>40</sup> On similar reasoning, one could conclude that the anti-torture statute itself represents a judgment that torture has no intelligence-gathering benefits worthy of an exception from an unqualified statutory prohibition.

Instead, albeit without mentioning the recent medical marijuana case, the Torture Memo argued that the anti-torture statute had preserved the necessity defense because although the Convention Against Torture expressly included in its definition of “torture” the infliction of severe physical or mental pain or suffering for the purpose of obtaining information,<sup>41</sup> the

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<sup>37</sup> Torture Memo, *supra* note 14, at 92.

<sup>38</sup> *Id.* at 92-93; *accord* Military Interrogation Memo, *supra* note 9, at 74.

<sup>39</sup> *See* United States v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 490 (2001).

<sup>40</sup> *Id.* at 491.

<sup>41</sup> Under the Convention Against Torture, “torture” is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a

anti-torture statute does not contain similar language.<sup>42</sup> This reasoning is deeply flawed. For one thing, the anti-torture statute unqualifiedly prohibits all torture under color of law regardless of motive. The logical inference is that Congress had concluded that the motive for torture under color of law was irrelevant; torture could never have an acceptable justification. For another, the anti-torture statute was enacted to implement the obligations of the United States under the Convention Against Torture,<sup>43</sup> as the memo acknowledged.<sup>44</sup> It is difficult to believe that the statute was intended to be narrower in scope than the treaty that it implemented. Yet, on this point, the Convention is quite unequivocal; it also provided that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture”<sup>45</sup> and that “[a]n order from a superior office or a public authority may not be invoked as a justification of torture.”<sup>46</sup> In its consideration of the treaty, the Senate explicitly acknowledged the import of these treaty obligations.<sup>47</sup> Thus, both the language of

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third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment, art. 1, ¶ 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 112.

<sup>42</sup> See Torture Memo, *supra* note 14, at 93 & n.23; accord Military Interrogation Memo, *supra* note 9, at 76.

<sup>43</sup> See S. REP. NO. 103-107, at 58-59 (1993).

<sup>44</sup> See Torture Memo, *supra* note 14, at 58.

<sup>45</sup> Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment, art. 2, ¶ 2, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 112.

<sup>46</sup> *Id.* art. 2, ¶ 3.

<sup>47</sup> See S. EXEC. REP. NO. 101-30, at 7 (1990). Although the Senate articulated a number of reservations, understandings, and declarations in connection with ratification, none related to the Convention’s prohibition on torture for the purpose of obtaining information. See 136 CONG. REC. 36, 192-99 (1990). In fact, the Reagan Administration had conveyed to the Senate an understanding that the Convention would preserve common-law defenses including self defense and defense of others, see S. EXEC. REP. NO. 101-30, at 16; the first Bush Administration deleted that understanding and acknowledged that the Convention prohibited torture even when undertaken in defense of self or others. See *id.* at 40-41.

the statute and the treaty it implemented cast great doubt on the availability of a necessity defense. Yet, the enormous legal risk associated with a defense of necessity in a prosecution under the anti-torture statute is nowhere disclosed in the Torture Memo.

Even if the Torture Memo correctly concluded that a necessity defense would be recognized to a charge of torture, however, it was less than clear about a central limitation of the defense that had led the Supreme Court to reject proffered necessity and duress defenses in a case involving a prison escape:

Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense will fail. Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of [the prison escape statute] was his only reasonable alternative.<sup>48</sup>

Thus, to present a necessity defense, interrogators would have to demonstrate not only that a detainee had information about an impending attack, but also that interrogators could not reasonably expect success with any lawful means of interrogation.<sup>49</sup> At best, however, the Torture Memo makes this point only indirectly by noting “the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm.”<sup>50</sup> A client might well fail to ap-

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<sup>48</sup> *United States v. Bailey*, 444 U.S. 394, 410-11 (1980) (footnote omitted) (citation omitted) (internal quotation marks omitted).

<sup>49</sup> In this connection, it should be noted that the CIA’s Inspector General found that the CIA often lacked an objective basis for determining whether detainees were withholding pertinent information when deciding whether coercive methods of interrogation were warranted. *See* IG REPORT, *supra* note 35, at 83-85. The Inspector General also found that it was difficult to assess the efficacy of enhanced interrogation techniques such as waterboarding and that even CIA officials disagreed on whether its use was warranted. *See id.* at 88-91.

<sup>50</sup> Torture Memo, *supra* note 14, at 92.

preciate the critical significance of this rather ambiguous and brief observation.<sup>51</sup>

The Torture Memo also observed that “[t]he doctrine of self-defense permits the use of force to prevent harm to another person” and concluded that “a defendant accused of violating [the anti-torture statute] could have, in certain circumstances, grounds to properly claim the defense of another.”<sup>52</sup> This portion of the memo acknowledged that “the defendant’s belief in the necessity of using force must be reasonable” and that “many legal authorities include the requirement that a defender reasonably believe that the unlawful violence is ‘imminent’ before he can use force in his defense,”<sup>53</sup> but suggested that the imminence requirement “may be another way of expressing the requirement of necessity” by reference to

a well known hypothetical, if A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense . . . while the attack itself is not imminent, B’s use of force becomes immediately necessary whenever he has an opportunity to save himself from A.<sup>54</sup>

Whatever the utility of this hypothetical, it plainly has no application to detainees who are continuously in custody and available for interrogation; it should be apparent that they may not be subject to unlawful interrogation techniques unless and until an interrogator reasonably believes that an attack is imminent and that there is no lawful alternative for preventing the attack.<sup>55</sup> Again, however, the Torture Memo, at best, ac-

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<sup>51</sup> For a more elaborate discussion of the problems with presenting a defense of necessity to a charge under the anti-torture statute, see John Alan Cohan, *Torture and the Necessity Doctrine*, 41 VAL. U. L. REV. 1587 (2007).

<sup>52</sup> Torture Memo, *supra* note 14, at 94, 96.

<sup>53</sup> *Id.* at 95.

<sup>54</sup> *Id.*; accord Military Interrogation Memo, *supra* note 9, at 78.

<sup>55</sup> In this regard, the CIA’s Inspector General found that although interrogation of detainees disclosed the existence of a number of terrorist plots of which the CIA was previously unaware, “[t]his review did not uncover any evidence that these plots were imminent.” IG REPORT, *supra* note 35, at 88. That should be unsurprising; once a conspirator is taken into custody, coconspirators are likely to presume that the detainee may have cooperated with interrogators and will therefore abandon plans of which the

knowledges this limitation on the defense on the right of defense in a highly indirect and unsatisfactory fashion. Nor, for that matter, was the client apprised of the risk that the enactment of the anti-torture statute would be understood to eliminate the doctrine of self-defense or defense of others as a defense to torture for the same reasons that the statute might have foreclosed reliance on the common-law necessity defense.

Perhaps unsurprisingly, in subsequent OLC memoranda, the Bush Administration withdrew the analysis of necessity and self-defense in the Torture Memo and placed no reliance on these defenses as legal safe harbors for violations of the torture statute.<sup>56</sup>

Beyond all this, the Torture Memo opined that even if an interrogator violated the anti-torture statute, “the Department of Justice could not enforce [the anti-torture statute] against federal officials acting pursuant to the President’s constitutional authority to wage a military campaign.”<sup>57</sup> The memo reasoned that inasmuch as the Constitution vests in the President the power to act as “Commander in Chief of the Army and Navy of the United States,”<sup>58</sup> and “[o]ne of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy,”<sup>59</sup> it follows that “Congress can no more interfere with the President’s interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.”<sup>60</sup>

The Torture Memo’s position that the President is free to ignore the torture statute is striking; after all, the Constitution obligates the President to “take Care that the Laws be faithful-

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detainee was aware and could have disclosed during interrogation. The Torture Memo, however, acknowledges none of the difficulties of determining whether coercive interrogation is necessary to thwart future attacks despite the fact that this problem would have been highly relevant to its consideration of the doctrines of necessity and self-defense.

<sup>56</sup> See Bradbury Interrogation Techniques Memo, *supra* note 36, at 155; Levin Torture Memo, *supra* note 16, at 129-30.

<sup>57</sup> Torture Memo, *supra* note 14, at 86.

<sup>58</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>59</sup> Torture Memo, *supra* note 14, at 89.

<sup>60</sup> *Id.* at 90; *accord* Military Interrogation Memo, *supra* note 9, at 18-19.

ly executed.”<sup>61</sup> As the Supreme Court observed in the *Steel Seizure* case, “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”<sup>62</sup> Thus, as a matter of textual analysis, the claim that the President has the power to make the law governing interrogation is deeply suspect.

To be sure, if a statute unconstitutionally invaded the President’s powers as Commander in Chief, it presumably would be unenforceable by virtue of the Constitution’s Supremacy Clause,<sup>63</sup> as well as the President’s constitutional obligation to “preserve, protect and defend the Constitution of the United States.”<sup>64</sup> Still, it is striking that the Torture Memo analyzes the Commander in Chief power in isolation; it gives no consideration to relevant sources of congressional power to regulate the manner in which interrogations are conducted. This is not an obscure point; nearly four decades before the Torture Memo was written, in the *Steel Seizure* case, Justice Jackson famously observed: “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>65</sup> This principle, however, goes unmentioned in the Torture Memo.<sup>66</sup> Congress, in turn,

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<sup>61</sup> U.S. CONST. art. II, § 3.

<sup>62</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). The Court continues to cite this statement with approval. See *Medellin v. Texas*, 552 U.S. 491, 526-27 (2008); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (per curiam).

<sup>63</sup> See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

<sup>64</sup> U.S. CONST. art. II, § 1, cl. 7. For arguments along these lines, see Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-24 (1990); and Saikrishna Bangalore Prakash, *The Executive’s Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1628-45 (2008).

<sup>65</sup> *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

<sup>66</sup> Professor Yoo subsequently explained that he understands the holding in *Youngstown*, invalidating President Truman’s seizure of steel mills in order to keep them in production during a labor dispute, as resting on the principle that the area of labor relations falls within congressional authority, unlike the interrogation of enemy

has substantial power over the manner in which the nation is defended; this has been settled since at least *Little v. Barreme*,<sup>67</sup> in which the Court held a naval officer liable for the seizure of a Danish vessel during a period of hostilities between the United States and France even though the officer acted in conformity with a presidential order on the ground that Congress had only authorized the seizure of American vessels sailing to French ports.<sup>68</sup> Notably, *Little*, like the *Steel Seizure* case, makes no appearance in the Torture Memo.

At least three provisions of the Constitution appear to grant Congress power to regulate interrogation by the armed forces, although none are considered in the Torture Memo. First, the Constitution empowers Congress “[t]o make Rules for the Government and Regulation of the land and naval Forces.”<sup>69</sup> This provision has long been construed to enable Congress to define and punish offences committed by members of the armed forces.<sup>70</sup> Second, the Constitution empowers Congress “[t]o define and punish . . . Offences against the Law of Nations,”<sup>71</sup> and as we have seen, the anti-torture statute was enacted to discharge the obligations of the United States under the Convention Against Torture. In fact, the Convention is only

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combatants. See YOO, *supra* note 9, at 183-85. The Court, however, has cited on Justice Jackson’s concurrence as reflecting a broader proposition concerning executive authority even in cases involving international relations. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 524 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). For a useful discussion of the ample historical evidence supporting this conception of the limits on presidential authority as applied to the Commander in Chief power, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

<sup>67</sup> 6 U.S. (2 Cranch) 170 (1804).

<sup>68</sup> *Id.* at 177-79.

<sup>69</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>70</sup> See, e.g., *Solorio v. United States*, 483 U.S. 435, 438-50 (1987); *United States v. Stanley*, 483 U.S. 669, 679 (1987); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78-79 (1857); *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 390 (1818). For a discussion of the framing-era understanding of congressional authority under this Clause, see Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 338-40 (2008).

<sup>71</sup> U.S. CONST. art. I, § 8, cl. 10.

one of many international agreements that outlaw torture.<sup>72</sup> Indeed, the norm against torture is so deeply rooted that it is considered a part of the customary international law that is enforceable among nations even apart from treaty obligations.<sup>73</sup> Thus, a statute forbidding torture under color of law by United States officials when abroad seems to fit comfortably within congressional power to punish violations of international law. Finally, the Constitution authorizes Congress “[t]o . . . make Rules concerning Captures on Land and Water.”<sup>74</sup> Although the Supreme Court has never squarely decided whether the Captures Clause is a grant of authority to regulate the conditions and manner of confinement for prisoners or is limited to the subject of captured property, the Court long observed that a congressional enactment during the War of 1812 “concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.”<sup>75</sup> Thus, the Court has strongly implied that Congress has authority to regulate the conditions under which enemy combatants are held and interrogated.<sup>76</sup>

Aside from all this, there is abundant framing-era evidence that the Constitution was understood to authorize Congress to regulate the treatment of prisoners.<sup>77</sup> Similarly, *Little*

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<sup>72</sup> See HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 224-28 (rev. 2008).

<sup>73</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 Reporters’ Note 5 (1987); Rolf Kuhner, *Torture*, in IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 868, 868, 869 (Rudolph Bernhardt ed., 2000). In the 2004 legal opinion that superseded the Torture Memo, the Bush Administration acknowledged that the prohibition on torture is part of customary international law. See Levin Torture Memo, *supra* note 16, at 128 & n.2.

<sup>74</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>75</sup> *Brown v. United States*, 12 U.S. (8 Cranch.) 110, 126 (1814).

<sup>76</sup> To these three sources of congressional authority, one might add Congress’s authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States.” U.S. CONST. art. I, § 8, cl. 18; see Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1238-43 (2005).

<sup>77</sup> See Prakash, *supra* note 70, at 338-40. For a critical assessment of the use of historical evidence in Professor Yoo’s scholarship to support his claim of presidential

suggests a framing-era understanding that Congress has broad authority over the manner in which the armed forces operate even during a period of active hostilities. The Torture Memo, however, addressed none of this framing-era evidence, just as it failed to address the constitutional bases of congressional authority to enact the anti-torture statute.<sup>78</sup> Perhaps unsurprisingly, the Bush Administration subsequently repudiated the constitutional analysis in the Torture Memo and expressly ac-

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authority to disregard statutes, see Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 399-419 (2011).

<sup>78</sup> To be fair, although the Torture Memo did not address congressional authority under the Captures Clause, two other OLC opinions had recently stated that the Captures Clause was applicable only to captured property, although the Bush Administration later repudiated that view as failing to adequately consider relevant framing-era evidence that the Captures Clause was understood to grant Congress power over enemy prisoners as well as their property. See Memorandum for the Files, *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, from Stephen G. Bradbury, Principal Deputy Assistant Att'y Gen., Jan. 15, 2009, at 5-6, available at [www.justice.gov/olc/docs/memostatusolcopinions01152009.pdf](http://www.justice.gov/olc/docs/memostatusolcopinions01152009.pdf) [hereinafter Status Memo]. Nevertheless, some charity is probably warranted on this point; there is a serious argument that the Captures Clause is limited to seizures of property. See Prakash, *supra* note 70, at 319 & n.82, 338; Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1729-45 (2009). But see 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, 735 n.143 (2008); Aaron D. Simowitz, *The Original Understanding of the Capture Clause*, 59 DEPAUL L. REV. 121, 130-39 (2009). Professor Yoo has defended this view since leaving government. See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201-02 (2004). The Torture Memo's failure to treat with Armed Forces and Law of Nations Clauses, however, is more difficult to explain. As to the former, although a recent OLC opinion had implied that Congress lacked authority under the Government and Regulation of the Land and Naval Forces Clause to regulate the treatment of prisoners, that memo had ultimately declined to resolve the question, see Memorandum for William J. Haynes II, Gen. Counsel, Dep't of Def., *The President's Power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations*, from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, at 5-6 (Mar. 13, 2002), available at [www.justice.gov/olc/docs/memorandum03132002.pdf](http://www.justice.gov/olc/docs/memorandum03132002.pdf). The same can be said of the memo's failure to address the Law of Nations Clause; while a recent OLC opinion had stated that Congress had no power to prevent the President from undertaking the prosecution of enemy combatants before tribunals constituted by the President, that memorandum never made the broader claim that Congress lacks authority to define and punish crimes relating to the treatment of enemy combatants. See Memorandum for Daniel J. Bryant, Assistant Att'y Gen., Office of Legislative Affairs, *Swift Justice Authorization Act*, from Patrick Philbin, Deputy Assistant Att'y Gen., at 17-19, available at [www.justice.gov/olc/docs/memojusticeauthorizationact0482002.pdf](http://www.justice.gov/olc/docs/memojusticeauthorizationact0482002.pdf).

knowledged the constitutionality of the anti-torture statute.<sup>79</sup> Even before this formal concession, when it litigated the extent of presidential authority to authorize the trial of enemy combatants, the Bush Administration was unwilling to advance an argument that the President had authority under the Commander in Chief Clause to try imprisoned enemy combatants in a manner inconsistent with an applicable statute.<sup>80</sup> Thus, the Torture Memo's view that the President has plenary power over enemy combatants in the custody of the United States power was one that the Bush Administration itself concluded was untenable.

### 3. The consequences of the Torture Memo

It is striking how many of the positions taken in the Torture Memo were ultimately repudiated by the Bush Administration. On that score, Professor Yoo has claimed that the legal opinions that replaced the Torture Memo changed little of substance.<sup>81</sup> At first blush, there seems to be something to this claim. The 2004 OLC memorandum on the anti-torture statute that replaced the Torture Memo notes: "While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions . . . involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."<sup>82</sup> Moreover, when the OLC subsequently reassessed the interrogation techniques that the CIA proposed to use on a "high value al Qaeda detainee in the War on Terror,"<sup>83</sup> it concluded that if waterboarding were confined to no more than forty-second applications, limited to no more than two in any twenty-four-hour period and occurring on no more than five days within a single thirty-day period, it would not

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<sup>79</sup> See Status Memo, *supra* note 78, at 3-6.

<sup>80</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 591-93 & n.23 (2006).

<sup>81</sup> See Yoo, *supra* note 9, at 182-83.

<sup>82</sup> Levin Torture Memo, *supra* note 16, at 130 n.8.

<sup>83</sup> Bradbury Interrogation Techniques Memo, *supra* note 36, at 152.

result in sufficiently prolonged physical or mental suffering to fall within the scope of the anti-torture statute.<sup>84</sup>

These conclusions are not unassailable. For example, although the subsequent memoranda rejected the Torture Memo's claim that the statutory phrase "severe physical pain or suffering" was a unitary concept, they also echoed the Torture Memo in opining that "severe suffering" must be prolonged,<sup>85</sup> an implausible reading of the statute given that only the statutory definition of "mental pain or suffering" contains this kind of temporal requirement, as we have seen.<sup>86</sup> If the temporal requirement is rejected as inconsistent with the statutory definition of "severe physical suffering," moreover, then even if waterboarding is not considered painful, it is surely not difficult to conclude that the use of what the OLC itself had acknowledged amounts to "a threat of imminent death,"<sup>87</sup> followed by the sensation of "suffocation and incipient panic," that is, "the fear or panic associated with the feeling of drowning,"<sup>88</sup> amounts to the imposition of severe physical suffering, thereby satisfying the statutory definition of "torture." Consider the kind of evidence that could be adduced in a prosecution under the anti-torture statute based on waterboarding:

In the press, the process has been called "simulated drowning." But Malcolm Nance, the former master instructor at the Navy SERE school who estimated that he had overseen hundreds of waterboarding sessions, as well as having been waterboarded himself, argued that the media didn't really explain the process accurately to the American public. "It's not simulated anything. It's slow motion suffocation with enough time to contemplate the inevitability of blackout and expiration – usually the person goes into hysterics on the board," he

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<sup>84</sup> See *id.* at 169-71, 191-97. For an analysis of the statute consistent with that taken in these memoranda, see Boehm, *supra* note 23, at 17-32.

<sup>85</sup> See Levin Torture Memo, *supra* note 16, at 143; Bradbury Interrogation Techniques Memo, *supra* note 36, at 193-94.

<sup>86</sup> See *supra* text at notes 12-13, 22. For a useful discussion of the flaws in this approach, see Sheldon Gelman, *Lawyers, Interrogations, and the Historic Framework of the Debate about Torture*, 10 CONN. PUB. INT. L.J. 101, 125-27 (2010).

<sup>87</sup> Interrogation Techniques Memo, *supra* note 24, at 123.

<sup>88</sup> *Id.* at 109, 118.

said. “You can feel every drop. Every drop. You start to panic. And as you panic, you start gasping, and as you gasp, your gag reflex is overridden by water. And then you start to choke, and then you start to drown more. Because the water doesn’t stop until the interrogator wants to ask you a question. And then, for that second, the water will continue, and you’ll get a second to puke and spit up everything that you have, and then you’ll have an opportunity to determine whether you’re willing to continue with the process.” Nance had no doubt that waterboarding was torture, and wrong for U.S. soldiers to use on captives.<sup>89</sup>

This might sound like “severe physical suffering” to a jury. Indeed, American history is replete with torture prosecutions based on the use of water to create the sensation of drowning.<sup>90</sup> But, even treating the view of the anti-torture statute taken by the Bush Administration’s OLC after the departure of Professor Yoo as correct, it seems plain that CIA interrogators undertook measures that were unlawful under that view, although not under the original Torture Memo. The Torture Memo, in other words, was not some sort of “harmless error.”

As we have seen, the original Interrogation Techniques Memo authorized the use of waterboarding in a manner consistent with its use in SERE, the Navy’s program of survival training. When waterboarding ensued after the issuance of the Interrogation Techniques Memo, however, it did not conform to the SERE protocol. The CIA’s Inspector General found:

[T]he waterboard technique employed at [redacted] was different from the technique as described in the [OLC] opinion and used in SERE training. The difference was in the manner in which the detainee’s breathing was obstructed. At the SERE School and in the [OLC] opinion, the subject’s airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator [redacted] continuously applied large volumes of

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<sup>89</sup> JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 173 (2008).

<sup>90</sup> *See supra* text accompanying note 31.

water to a cloth that covered the detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique differed from that used in SERE training and explained that the Agency's technique is different because it is . . . more poignant and convincing.<sup>91</sup>

Moreover, in SERE training, "the technique is confined to at most two applications (and usually only one) of no more than 40 seconds each."<sup>92</sup> The Inspector General found that Abu Zubaydah was waterboarded at least 83 times in August 2002.<sup>93</sup> In March 2003, another high-ranking al-Qaeda detainee, Khalid Shaykh Muhammad, was waterboarded 183 times.<sup>94</sup> Waterboarding of this intensity and duration would seemingly satisfy the definition of "severe physical suffering" adopted in the Bush Administration's OLC memoranda that superseded the Torture Memo because of its prolonged nature. And, aside from its illegality, one has to wonder about the efficacy of a technique that must be repeated so frequently.<sup>95</sup>

Although the waterboarding conducted on Abu Zubaydah and Khalid Shaykh Muhammad appears to have constituted unlawful torture under the interpretation of the anti-torture statute that was eventually adopted by the Bush Administration, under the original Torture Memo, this kind of waterboarding seems to have been considered lawful. Although, as we have seen, the original Interrogation Techniques Memo did not authorize waterboarding beyond the techniques used in the SERE program, on July 29, 2003, the CIA obtained an opinion from someone at the Department of Justice that "certain devia-

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<sup>91</sup> IG REPORT, *supra* note 35, at 37.

<sup>92</sup> Bradbury Interrogation Techniques Memo, *supra* note 36, at 193; *accord* IG REPORT, *supra* note 35, app. F, at 8.

<sup>93</sup> IG REPORT, *supra* note 35, at 90.

<sup>94</sup> *Id.* at 91.

<sup>95</sup> The CIA itself was uncertain whether there was any justification for the repeated waterboarding of Abu Zubaydah. Its Inspector General found that the interrogation team eventually concluded that Zubaydah was compliant and wanted to terminate "enhanced interrogation techniques" but senior officials overruled that judgment and "witnessed the final waterboard session, after which, they reported . . . to Headquarters that the [enhanced interrogation techniques] were no longer needed on Abu Zubaydah." *Id.* at 85.

tions are not significant.”<sup>96</sup> In addition, the Attorney General acknowledged to the CIA’s Inspector General that “he [wa]s fully aware of the repetitive use of the waterboard and that [the] CIA [wa]s well within the scope of the [OLC] opinion and the authority given to the CIA by that opinion.”<sup>97</sup> Since waterboarding of such intensity and protracted character was not envisioned in the original Interrogation Techniques Memo, and cannot be squared with the later OLC opinions, it seems that only the original Torture Memo’s view that an interrogation technique must inflict physical pain amounting to organ failure or the like to violate the statute, coupled with the Torture Memo’s recognition of various defenses, could have enabled the Department of Justice to deem the CIA’s variations from its original waterboarding proposal “immaterial.”<sup>98</sup>

Thus, it was the Torture Memo and not any other OLC opinion issued then or later that enabled the Department of Justice to turn a blind eye into the massive escalation of waterboarding that followed its issuance. For this reason, the claim that there is no meaningful difference between the original torture memo and its successors is insupportable. Only the Torture Memo offered support for the brutal and prolonged techniques used on Khalid Shaykh Muhammad and Abu Zubaydah. On just that point, it is instructive that when the 2004 memorandum on the anti-torture statute did not reject the conclusions contained in “prior opinions . . . involving the treat-

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<sup>96</sup> *Id.* at 5. The identity of the official who provided this opinion is something of a mystery. Assistant Attorney General Bybee had left the Department of Justice in March 2003. OPR REPORT, *supra* note 9, at 110. Professor Yoo had left the Department of Justice on May 30, 2003. *Id.* at 102 n.80. Assistant Attorney General Bybee’s successor, Jack Goldsmith, did not begin service until October 6, 2003. *Id.* at 110.

<sup>97</sup> IG REPORT, *supra* note 35, at 45.

<sup>98</sup> Until a meeting on June 20, 2003, the CIA appears to have conducted its interrogation in reliance on a series of “bullet points” that had been prepared in reliance on the legal positions taken in the Torture Memo. *See* OPR REPORT, *supra* note 9, at 100-04. At a meeting on that date, an OLC official explained that the bullet points could not be treated as authoritative. *See id.* at 104. At that time, it appears that a number of high-ranking officials understood that the CIA had exceeded the scope of permissible interrogation techniques under the Interrogation Techniques Memo with respect to Abu Zubaydah and Khalid Shaykh Muhammad yet also believed that there had been no violation of the law. *See id.* at 104-05. In this judgment, it appears that reliance was being placed on the Torture Memo, not the Interrogation Techniques Memo.

ment of detainees,”<sup>99</sup> this formulation is an apparent reference to the Interrogation Techniques Memo, not the Torture Memo. Indeed, the author of the 2004 OLC opinion, in subsequent congressional testimony, expressly denied that the 2004 opinion is properly understood to endorse those interrogation techniques that had been considered permissible under the Torture Memo.<sup>100</sup> Thus, the Torture Memo provides the only legal support that the OLC ever offered for what looks like the CIA’s slide from interrogation to sadism during the prolonged waterboarding of Khalid Shaykh Muhammad and Abu Zubaydah.

### *B. The Domestic Military Operations Memo*

Although it has received far less attention than the Torture Memo, another OLC opinion is equally remarkable. A memorandum addressing the constitutional and statutory constraints on domestic counterterrorist military operations, signed by Deputy Assistant Attorney General Yoo and Special

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<sup>99</sup> Levin Torture Memo, *supra* note 16, at 130 n.8.

<sup>100</sup> In his testimony, the author of the 2004 opinion explained its discussion of the prior OLC opinions concerning the anti-torture statute:

[W]hat I meant was, if you took the other opinions the office had written analyzing particular techniques, and you took out the statutory analysis there and put in the new statutory analysis, in my view, the people writing those opinions would not have come to a different conclusion. Because, for instance, they never said this pain is really, really extreme, and it is just up to the line of body—organ failure, but it is not quite there.

They never—those opinions never thought they were close to the line. It did not mean, as some have interpreted—and again this is my fault, no doubt, in drafting—that we had concluded that we would have reached the same conclusions as those earlier opinions did. We were, in fact, analyzing that at the time, and we never completed that analysis.

*From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part II): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 42 (2008) (testimony of Daniel Levin). According to one account, the author of the 2004 opinion crafted the memo in order to avoid endorsing any oral approvals that Professor Yoo or others had given to what he regarded as highly questionable CIA interrogation practices. See MAYER, *supra* note 89, at 307.

Counsel Robert J. Delahunty,<sup>101</sup> opines that “the Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks.”<sup>102</sup> On this view, despite the constitutional prohibition on unreasonable search and seizure, the military can engage in effectively unconstrained arrest, detention, and search of American citizens, their property and effects on American soil if done in the name of counterterrorism. It is not going too far to say that this Domestic Military Operations Memo authorized the establishment of a form of martial law within the United States.

The Fourth Amendment contains an unqualified prohibition on unreasonable search and seizure:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>103</sup>

Nevertheless, the Domestic Military Operations Memo claimed that “the central concerns of the Amendment – and especially the Warrant Clause – are focused on police activity.”<sup>104</sup> It added, “however well suited the warrant and probable cause requirements may be as applied to criminal investigations or other law enforcement activities, they are unsuited to the demands of wartime and the military necessity to successfully prosecute a war against an enemy.”<sup>105</sup>

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<sup>101</sup> Robert Delahunty currently teaches at the University of St. Thomas School of Law. See Faculty bio for Professor Robert Delahunty, <http://www.stthomas.edu/law/faculty/bios/delahuntyrobert.htm> (last visited Mar. 30, 2011).

<sup>102</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep’t of Def., from John C. Yoo, Deputy Assistant Att’y Gen., and Robert J. Delahunty, Special Counsel, *Authority for Use of Military Force to Combat Terrorist Activities within the United States*, Oct. 23, 2001, at 25 (emphasis in original), available at [http://www.justice.gov/olc/docs/memomilitary\\_forcecombat10232001.pdf](http://www.justice.gov/olc/docs/memomilitary_forcecombat10232001.pdf) [hereinafter Domestic Military Operations Memo].

<sup>103</sup> U.S. CONST. amend. IV.

<sup>104</sup> Domestic Military Operations Memo, *supra* note 102, at 23.

<sup>105</sup> *Id.* at 24.

For example, the memo observed, it was settled that the President's constitutional powers included the power to "requisition property immediately needed for the prosecution of the war,"<sup>106</sup> and to "detain individuals whom the Government believes to be dangerous."<sup>107</sup> It followed, according to the memo, that "[o]ur forces must be free to 'seize' enemy personnel or 'search' enemy quarters, papers and messages without having to show 'probable cause' before a neutral magistrate, and even without having to demonstrate that their actions were constitutionally 'reasonable.'"<sup>108</sup> The memo noted that there was no "case from the War of 1812 – the last major conflict fought out on American soil against a foreign enemy – in which plaintiffs brought a successful wrongful death action due to federal military operations within the continental United States,"<sup>109</sup> and no "Civil War examples in which plaintiffs successfully brought wrongful death actions arising from federal military operations."<sup>110</sup> Moreover, as early as 1798, Congress authorized the seizure of armed French vessels, and "it was never suggested that the Fourth Amendment restrained the authority of Congress or of the United States agents to conduct [military] operations such as this."<sup>111</sup>

As precedential support for its conclusion, the memo cited the holding of the United States Supreme Court that the Fourth Amendment does not apply to operations overseas in *United States v. Verdugo-Urquidez*,<sup>112</sup> the Court's observation in *Scheuer v. Rhodes*<sup>113</sup> that in suppressing civil disorder, "since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range

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<sup>106</sup> *Id.* (quoting *Yakus v. United States*, 321 U.S. 414, 443 (1944)).

<sup>107</sup> *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 748 (1987)).

<sup>108</sup> *Id.* at 26.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 27.

<sup>111</sup> *Id.* at 28 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990)).

<sup>112</sup> *Id.* at 25.

<sup>113</sup> 416 U.S. 232 (1974).

of discretion must be comparably broad”;<sup>114</sup> and a line of cases holding that the destruction or confiscation of property as an incident of military operations is not considered a “taking” for which just compensation is required under the Fifth Amendment’s prohibition on uncompensated takings of private property for a public purpose.<sup>115</sup>

Finally, the memo acknowledged that although it had opined that “the Fourth Amendment would not apply to military operations the President ordered within the United States to deter and prevent acts of terrorism,” “courts could decide otherwise,” and therefore it “analyze[d] the standards that would govern if courts were to subject domestic military operations to the Fourth Amendment.”<sup>116</sup> After recognizing that the Fourth Amendment required that the use of force must be “reasonable,” and admitting that it was “not possible to preview the reasonableness analysis for all possible uses of force within the United States,” the memo nevertheless added, “the use of force in the current circumstances would be reasonable, within the terms of the Fourth Amendment. Here, military force would be used against terrorists to prevent them from carrying out further attacks upon American citizens and facilities.”<sup>117</sup>

Parts of the Fourth Amendment analysis in the Domestic Military Operations Memo are uncontroversial. It is, for example, well-settled that no warrant is required in the face of exigent circumstances that require prompt action.<sup>118</sup> It was also settled by *Verdugo-Urquidez* that the Fourth Amendment has no application to search and seizure occurring overseas, at least when directed against foreign nationals having “no previous significant voluntary connection with the United States.”<sup>119</sup> It is equally settled that the Fourth Amendment

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<sup>114</sup> Domestic Military Operations Memo, *supra* note 102, at 29 (quoting *Scheur*, 416 U.S. at 247).

<sup>115</sup> *Id.* at 30-34.

<sup>116</sup> *Id.* at 34.

<sup>117</sup> *Id.* at 35, 36.

<sup>118</sup> *See, e.g.*, *Michigan v. Fisher*, 130 S. Ct. 546, 548-49 (2009) (per curiam); *Brigham City v. Stuart*, 547 U.S. 398, 403-04 (2006); *Michigan v. Tyler*, 436 U.S. 499, 510 (1978); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967).

<sup>119</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

does not invariably require probable cause or even an individualized determination of reasonable suspicion when a challenged search or seizure is “designed to serve special needs, beyond the normal need for law enforcement.”<sup>120</sup> “For example,” the Supreme Court has written, “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack . . . .”<sup>121</sup> The Domestic Military Operations Memo, however, goes beyond any of this; it opines that the military enjoys a categorical exemption from any form of Fourth Amendment review. No matter how utterly unreasonable or unconstrained, the memo contends that search and seizure by the military in an effort to prevent or deter terrorist attacks is immune from constitutional attack.

It is hard to square the memo’s position with the text of the Fourth Amendment. The Amendment’s opening clause announces an unqualified “right of the people to be . . . secure against unreasonable search and seizure.”<sup>122</sup> The text offers no exception for searches undertaken by the military, even if authorized by the President or motivated by concerns for national security. Indeed, offering the military an exception from the prohibition on unreasonable search and seizure seems squarely inconsistent with the text. If the military could break into anyone’s home, search and seize their possessions, or “seize” individuals by taking suspects into custody in the hope of preventing a terrorist attack, no matter how flimsy or unreasonable its suspicions might be, surely “the people” would hardly be “secure . . . against unreasonable search and seizure.”<sup>123</sup> The constitutional text, in other words, offers a guarantee against all

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<sup>120</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (internal quotation marks omitted); *accord* *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 829 (2002); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

<sup>121</sup> *Edmond*, 531 U.S. at 44.

<sup>122</sup> U.S. CONST. amend. IV.

<sup>123</sup> For a useful discussion of the manner in which the Fourth Amendment’s guarantee of security against unreasonable search and seizure illuminates its meaning and sheds light on the detention of those thought to be unlawful enemy combatants suspected of plotting terrorist attacks, see Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 119-31, 138-51 (2008).

unreasonable search and seizure, not merely unreasonable search and seizure when undertaken by civilian authorities.

In this respect, the unqualified character of the Fourth Amendment differs from its immediate predecessor, which forbids the quartering of troops in private houses but permits a different rule in time of war although, even then, only if authorized by law rather than presidential fiat.<sup>124</sup> Similarly, the Fifth Amendment requires a grand jury indictment “for a capital, or otherwise infamous crime” but carves out an exception for “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”<sup>125</sup> The textual differences between the Third and Fifth Amendments, on the one hand, and the Fourth Amendment, on the other, are striking. Although the Third and Fifth Amendments offer the government greater power in time of war, there is no similar language in the Fourth Amendment. The structure of the Bill of Rights, in other words, indicates that when the Framers wished to carve out an exception for the military or time of war, they did so expressly.

Other structural features of the Constitution similarly undermine the exception to the Fourth Amendment’s coverage endorsed by the Domestic Military Operations Memo. In particular, the Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>126</sup> Habeas corpus, in turn, has been understood since the framing era to grant individuals the ability to obtain judicial review of the lawfulness of their custody.<sup>127</sup> A “seizure” within the meaning of the Fourth Amendment, however, includes tak-

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<sup>124</sup> See U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

<sup>125</sup> U.S. CONST. amend. V.

<sup>126</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>127</sup> See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). For a more recent account from the Court of the history and meaning of the constitutional privilege of habeas corpus, see *Boumediene v. Bush*, 553 U.S. 723, 739-46 (2008).

ing an individual into custody.<sup>128</sup> If domestic military operations were not subject to the Fourth Amendment, however, there would be little logic to the Suspension Clause; the military would have no need of suspension because it would be free to take individuals into custody without constitutional constraint.<sup>129</sup>

As for the Domestic Military Operations Memo's historical claim that the Fourth Amendment has never been understood to apply to the military, refutation can be found in one of the most important works on constitutional law in the history of the Republic, Joseph Story's *Commentaries on the Constitution*.<sup>130</sup> In the treatise, "[a]ccepted as a classic as soon as it appeared,"<sup>131</sup> Justice Story denounced the warrantless military seizure of American citizens suspected of treason during the Jefferson Administration as a violation of the Fourth Amendment.<sup>132</sup> To be sure, it seems that battlefield operations have rarely generated Fourth Amendment or tort litigation; but given the leeway that the law grants the government under exigent circumstances, it should be unsurprising that battlefield operations are rarely challenged under the Fourth Amendment or the law of torts. The Domestic Military Operations Memo, however, does not confine the exception it grants from Fourth Amendment scrutiny to battlefield operations, or even "an appropriately tailored roadblock set up to thwart an imminent

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<sup>128</sup> See, e.g., *Hayes v. Florida*, 470 U.S. 811, 815-16 (1985); *Dunaway v. New York*, 442 U.S. 200, 213-16 (1979).

<sup>129</sup> The memo did not claim that the privilege of habeas corpus had been suspended in the wake of the terrorist attacks of September 11. When the issue of executive authority to detain suspected terrorists subsequently reached the Supreme Court, the Bush Administration did not claim that privilege of habeas corpus had been suspended. See *Boumediene*, 553 U.S. at 771; *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion); *id.* at 573 (Scalia, J., dissenting).

<sup>130</sup> The Supreme Court has repeatedly acknowledged the importance of Justice Story's treatise to constitutional history. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 608 (2008); *Washington v. Texas*, 388 U.S. 14, 19-20 (1967). See generally R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 181-95 (1985).

<sup>131</sup> BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 137 (1993).

<sup>132</sup> See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1895, at 749 n.1 (1833).

terrorist attack,”<sup>133</sup> but claims that any military operation aimed at preventing or deterring terrorism is exempt from the commands of the Fourth Amendment.

Then there is a key precedent, *United States v. United States District Court*,<sup>134</sup> which goes unmentioned in the Domestic Military Operations Memo.<sup>135</sup> In what is commonly known as the *Keith* case, the Court considered “the President’s power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval.”<sup>136</sup> In that case, “the Attorney General approved the wiretaps to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.”<sup>137</sup> The Court rejected the claim that the President could authorize warrantless electronic surveillance without prior judicial approval if motivated by a concern for national security:

Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and

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<sup>133</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

<sup>134</sup> 407 U.S. 297 (1972).

<sup>135</sup> At one point, the memo cites the case, but only in a discussion relating to the Posse Comitatus Act, and only for the proposition that the Foreign Intelligence Surveillance Act “arose out of a background in which the Supreme Court had declined to rule on the President’s constitutional authority to order warrantless electronic surveillance of foreign powers and their agents within the United States.” Domestic Military Operations Memo, *supra* note 102, at 18-19.

<sup>136</sup> 407 U.S. at 299.

<sup>137</sup> *Id.* at 300 (internal quotation marks omitted).

overlook potential invasions of privacy and protected speech.<sup>138</sup>

While acknowledging the government's claim that "the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security"<sup>139</sup> and that traditional Fourth Amendment standards "were established to govern investigation of criminal activity, not ongoing intelligence gathering,"<sup>140</sup> the Court nevertheless concluded that "the President's domestic security role . . . must be exercised in a manner compatible with the Fourth Amendment."<sup>141</sup>

To be sure, *Keith* leaves important questions open. For example, *Keith* puts aside questions related to the surveillance of "foreign powers or their agents,"<sup>142</sup> a concept that could readily reach foreign terrorist organizations. Indeed, another OLC memorandum issued just a few days before the Domestic Military Operations Memo, and also signed by Deputy Assistant Attorney General Yoo, noted that some lower courts had held even after *Keith* that surveillance of the agents of a foreign power need not be authorized by warrant.<sup>143</sup> None of these cases, however, had held that intercepting the conversations of those thought to be agents of foreign powers or organizations is entirely exempt from Fourth Amendment scrutiny for reasonableness; indeed, each of these cases reviewed the challenged surveillance for reasonableness within the meaning of the Fourth Amendment.<sup>144</sup> As we have seen, however, the Domestic

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<sup>138</sup> *Id.* at 316-17 (citations omitted).

<sup>139</sup> *Id.* at 318.

<sup>140</sup> *Id.* at 319.

<sup>141</sup> *Id.* at 320.

<sup>142</sup> *Id.* at 322.

<sup>143</sup> Memorandum for David S. Kris, Associate Deputy Att'y Gen., from John C. Yoo, Deputy Assistant Att'y Gen., *Constitutionality of Amending the Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches*, Sep. 25, 2001, at 4, available at <http://www.justice.gov/olc/docs/memoforeignsurveillanceact09252001.pdf>.

<sup>144</sup> See *United States v. Truong Dinh Hung*, 629 F.2d 908, 914-17 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875-76 (9th Cir. 1977); *Zweibon v. Mitchell*, 516 F.2d 594, 616-59 (D.C. Cir. 1975) (plurality opinion); *id.* at 699-706 (Wilkey, J., concurring and dissenting); *id.* at 706-07 (MacKinnon, J., concurring in part and dissenting in part); *United States v. Butenko*, 494 F.2d 593, 602-09 (3d Cir. 1974); *United States v.*

Military Operations Memo did not purport merely to exempt the military from the warrant requirement; it had opined that the military was exempt from the Fourth Amendment altogether when engaged in counterterrorism. On the memo's view, courts are powerless to curb even the most egregious abuses; the military can establish what amounts to martial law as long as it is in the name of deterring or preventing terrorism.

Nor does the memo make the slightest effort to square its view of unlimited executive prerogative with *Keith's* discussion of the dangers of unfettered executive discretion. One would expect some effort to grapple with *Keith's* view that unlimited executive power cannot be reconciled with the Fourth Amendment, but the Domestic Military Operations Memo simply ignores that problem.<sup>145</sup>

Equally problematic is the manner in which the memo deploys what it characterizes as supporting authority. As we have seen, although the memo cites *Verdugo-Urquidez*, the holding in that case exempts only search and seizure occurring outside of the United States from Fourth Amendment scrutiny, and even then only if the target lacks significant contacts with the United States. While dicta in *Scheuer v. Rhodes* recognizes that executive discretion to suppress civil unrest is broad, the Court's holding in that case was that executive officials enjoy no absolute immunity from civil liability for damages in these circumstances.<sup>146</sup> Such a holding hardly supports the view that

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Brown, 484 F.2d 418, 425-27 (5th Cir. 1973). That has also been the practice of courts assessing the constitutionality of electronic surveillance of the agents of foreign powers or foreign terrorist organizations subsequent to the issuance of the Domestic Military Operations Memo. See, e.g., *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 167-77 (2d Cir. 2008) (search and seizure overseas directed at U.S. citizens for purposes of counterterrorism need not be authorized by warrant but must be constitutionally reasonable); *In re Sealed Case*, 310 F.3d 717, 736-46 (FISA Ct. Rev. 2002) (requiring constitutional reasonableness for domestic electronic surveillance directed at foreign terrorists).

<sup>145</sup> Although Professor Yoo has not offered a defense of the Domestic Military Operations Memo since leaving government service, its co-author has; yet, even that effort makes no attempt to accommodate the breadth of the memo's conclusion with *Keith*. See Robert J. Delahunty, *The Fourth Amendment Goes to War*, ENGAGE, Oct. 2009, at 107.

<sup>146</sup> See 416 U.S. 232, 247-49 (1974).

the Fourth Amendment has no application to domestic military operations involving counterterrorism.

As for the Takings cases, at most they suggest that the destruction of property as an incident of military operations may not be a “seizure,” but they do not support a categorical exception for all military activities from the Fourth Amendment. Even worse, in its discussion of cases holding that the military has the power to requisition property for military purposes, the Domestic Military Operations Memo does not claim any precedent for concluding that such requisitions are exempt from the Fifth Amendment’s compensation requirement, much less the Fourth Amendment’s prohibition on unreasonable search and seizure.

Perhaps the cases involving the seizure of the property of hostile governments or the citizens or the detention of persons during hostilities are closer to being on point, but none of these cases hold that the military has unreviewable power to detain anyone it wishes during periods of active hostilities, at least absent a suspension of the privilege of habeas corpus. For example, the memo noted:

[I]n *Moyer v. Peabody*, the Court rejected a due process claim by an individual jailed for two and a half months without probable cause by the State Governor in time of insurrection. As Justice Holmes wrote, “[w]hen it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment.”<sup>147</sup>

Even putting aside the fact that *Moyer* was a due process case that did not consider the Fourth Amendment,<sup>148</sup> although *Moyer* counsels deference to the executive’s judgment, it stops well short of announcing a categorical exemption of executive detention from constitutional scrutiny:

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<sup>147</sup> Domestic Military Operations Memo, *supra* note 102, at 24 (citations omitted) (quoting *Moyer v. Peabody*, 212 U.S. 78, 85 (1909)).

<sup>148</sup> The Fourth Amendment was not held to be applicable to the States until *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

[I]t may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the governor to revision by a jury.<sup>149</sup>

If anything, precedent suggests that the military's authority to engage in search and seizure is subject to constitutional constraint; in the wake of the Civil War, the Supreme Court held that the Constitution does not tolerate subjecting civilians to martial law in areas where the civilian courts are open and operating.<sup>150</sup> The Court continues to cite this holding as good law with respect to the use of martial law against noncombatants thought to pose a danger to national security.<sup>151</sup>

Thus, there is no support for the view that the military enjoys a general exemption from the individual rights recognized in the Constitution when it acts to protect national security. There is no more support for a view of the Fourth Amendment that effectively endorses unconstrained search and seizure in the name of fighting terrorism. And again, unsurprisingly, in a subsequent memorandum, the Bush Administration's OLC rejected the categorical exemption from Fourth Amendment scrutiny contained in the Domestic Military Operations Memo: "The Fourth Amendment is fully applicable to domestic military operations, though the application of the Fourth Amendment's essential 'reasonableness' requirement to particular circumstances will be sensitive to the exigencies of military actions."<sup>152</sup>

Perhaps the authors of the Domestic Military Operations Memo did not intend to grant the military carte blanche; perhaps they intended only to suggest that the Fourth Amend-

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<sup>149</sup> 212 U.S. at 85.

<sup>150</sup> See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118-30 (1866).

<sup>151</sup> See *Boumediene v. Bush*, 553 U.S. 723, 793-94 (2008); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14, 22 n.20 (1955); *Duncan v. Kahanamoku*, 327 U.S. 304, 314 n.10 (1946).

<sup>152</sup> *Memorandum for the Files*, from Stephen G. Bradbury, Principal Deputy Assistant Att'y Gen., Oct. 6, 2008, available at <http://www.justice.gov/olc/docs/memoolcopiniondomesticusemilitaryforce10062008.pdf> [hereinafter *Memorandum for the Files*].

ment's reasonableness requirement must be applied in light of felt military exigencies, as indicated in the OLC opinion that replaced the original opinion. Indeed, at points, the Domestic Military Operations Memo seems to acknowledge that applicable precedents offer support for that proposition, rather than a categorical exemption from constitutional constraint for domestic military operations.<sup>153</sup> If so, the memo is extraordinarily poorly executed. Rather than stressing the need to defer to the military's assessment of security exigencies, the memo announces a categorical rule that "the Fourth Amendment would not apply to military operations the President ordered within the United States to deter and prevent acts of terrorism."<sup>154</sup> In this respect, the memo is so poorly drafted that it runs into the holding of *Keith*; it does not bother to observe that the Supreme Court had already rejected a claim of absolute executive power when it comes to those suspected of belonging to domestic terrorist organizations.<sup>155</sup> As we have seen, *Keith* reserved decision only on the scope of executive power with respect to foreign powers and, by implication, foreign terrorist organizations and their agents as well but unambiguously rejected the claim that the Fourth Amendment is inapplicable to search and seizure directed at domestic terrorists, even if justified in terms of national security. The Domestic Military Operations Memo, however, does not bother to limit the scope of the exemption from Fourth Amendment constraint that it recognized to military operations directed at members of foreign terrorist organizations; the memo seemingly permits unconstrained search and seizure even when targeted at those suspected of belonging to wholly domestic terrorist organizations as it unqualifiedly con-

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<sup>153</sup> See, e.g., Domestic Military Operations Memo, *supra* note 102, at 33 ("These cases show the Court's consistent recognition that the protections of the Bill of Rights are tempered by the circumstances of war.").

<sup>154</sup> *Id.* at 34.

<sup>155</sup> To be sure, *Keith* deals with a delegation of presidential authority to the Attorney General rather than the military, and it does not refer to the subversive organizations that were targeted for investigation as "terrorists"; but these points do not offer any meaningful basis on which to distinguish the holding in that case. As we have seen, *Keith* plainly rejected any claim of unlimited executive authority to engage in unconstrained search and seizure even when national security rather than ordinary law enforcement interests are at stake.

cludes that “the Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks.”<sup>156</sup>

The memo’s fallback discussion of the standard of constitutional reasonableness that would be applied to domestic military operations if the courts were to reject the claim of unlimited executive power is also problematic. Whatever the merits of alternate holdings in appellate opinions, alternate conclusions in opinion memos written to provide a client with guidance are of dubious efficacy. When given a broad opinion and a fallback, the client is effectively told that it is free to take the broader opinion without need of further legal advice. When a legal opinion fails to disclose the magnitude of legal risk in taking the broader view, moreover, it is difficult for the client to make an informed choice between the two courses of action that the legal opinion has blessed. Perhaps the presence of a fallback position in a legal memorandum is an implicit signal that the primary position carries significant risk, but surely it is preferable to state this directly rather than to leave the matter to the reader’s inference. And, given that the Domestic Military Operations Memo fails to warn the client of the enormous tension between its claim of categorical exemption from Fourth Amendment scrutiny and *Keith*, it is evident that the client was not given sufficient legal advice to evaluate the relative risks of the two contrasting views expressed in the memo. Equally problematic, the discussion of the Fourth Amendment’s standard of reasonableness in the fallback discussion is

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<sup>156</sup> Domestic Military Operations Memo, *supra* note 102, at 25 (emphasis in original). Indeed, the memo contains language that seems to contemplate application of this conclusion to those thought to be engaged in domestic terrorism:

Nor is it necessary that the military forces on our soil be *foreign*. Suppose that an armed and violent group of United States citizens seized control of a part of the country or of one of the territories, and declared itself independent, as occurred during the Civil War. Federal Armed Forces must be free to use force to put down this insurrection without being constrained by the Fourth Amendment, even though force would be intentionally directed against persons known to be citizens.

*Id.* at 27 (emphasis in original).

so abstract that it is difficult to see how a client could find in it useful advice to address any concrete scenario.<sup>157</sup>

### *C. Assessing John Yoo's Lawyering*

Putting aside what are likely highly contested questions of prudence and morality and focusing solely on the quality of the legal analysis, there is much that is distressing in the legal work found in the Torture and Domestic Military Operations Memos. The Torture Memo not only adopts a wholly inapposite definition of “severe physical pain” but also indefensibly conflates the disjunctive “pain or suffering” into a unitary concept—a move that had dramatic implications for the use of waterboarding. The Domestic Military Operations Memo created a gaping hole in the fabric of the Fourth Amendment inconsistent with its text, and without any effort to accommodate the leading precedent. These are only two examples of deeply problematic legal work performed by Professor Yoo at the OLC; there are plenty of others—also subsequently repudiated by the Bush Administration itself.<sup>158</sup>

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<sup>157</sup> A similar problem is presented by another extraordinary observation seemingly made in passing in the Domestic Military Operations Memo: “First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully.” Domestic Military Operations Memo, *supra* note 102, at 24. It is impossible to know what a client should be expected to make of this kind of stray observation. Perhaps a client should be expected not to act on the basis of this type of stray comment, but a client determined to make the most of the leeway offered by this type of seemingly unqualified comment might undertake virtually any type of censorial measure. Perhaps it is unrealistic for a client to rely on such a throwaway observation, but if so, it is unclear what it is doing in a memorandum that purports to give advice to a client. Equally troubling, this discussion fails to disclose that the Supreme Court has rejected a claim of unfettered executive discretion to subordinate speech and press rights to claimed wartime exigencies. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). The Bush Administration’s OLC subsequently withdrew this portion of the Domestic Military Operations Memo as containing comments that are “unnecessary to the opinion, are overbroad and general, and are not sufficiently grounded in the particular circumstances of a concrete scenario, and therefore cannot be viewed as authoritative.” Memorandum for the Files, *supra* note 152, at 2.

<sup>158</sup> Another good example is provided by a January 9, 2002, OLC memo signed by Yoo and Delahunty opining that the President may unilaterally suspend a treaty even in the face of inconsistent treaty terms or implementing legislation, a position that seems indefensible even from the standpoint of the scholarship sympathetic to claims of broad executive power, given that it is quite clear that treaties bind the President no

It is far from clear that the work in these memoranda satisfies the standard of competence imposed on attorneys.<sup>159</sup>

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less than any other part of the government. *See* Ramsey, *supra* note 76, at 1225-37. This position was subsequently repudiated by the Bush Administration. *See* Status Memo, *supra* note 78, at 8-9. For the Bush Administration OLC's accounting of Professor Yoo's legal work that it later disavowed, see *id.* at 2-11; and Memorandum for the Files, *supra* note 152, at 1-2. In addition, high-ranking officials in the Department of Justice subsequently repudiated Professor Yoo's analysis of the President's authority to undertake electronic surveillance in the absence of congressional authorization. *See* INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 10-13, 19-29 (July 10, 2009), available at <http://www.fas.org/irp/eprint/psp.pdf>.

<sup>159</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). For an argument that the Torture Memo does not satisfy even the minimum standard of competence, see LUBAN, *supra* note 18, at 197-98. At the conclusion of an internal investigation of the memos related to the interrogation of suspected terrorists, Associate Deputy Attorney General David Margolis concluded that the minimum standard of competence was satisfied because

[a]lthough Yoo and Bybee's errors were more than minor, I do not believe that they evidence serious deficiencies that could have prejudiced the client. This conclusion is largely supported by the reality that the memos were written for a limited audience and were but part of the dialogue with the CIA. The most significant errors, which occurred in the unclassified [Torture Memo], were not likely to cause prejudice because the classified [Interrogation Techniques Memo] issued contemporaneously and approved specified techniques against a specific individual and advised that the advice would not necessarily apply if the facts changed.

Margolis MoD, *supra* note 17, at 65. It is doubtful that this is an appropriate approach to assessing an attorney's duty of competence. At the outset, the requirement of prejudice to the client in order to find a breach of the duty to provide competent representation is highly questionable. It has no support in the text of the applicable rule, and there seems little reason to immunize an attorney for giving a client incompetent advice merely because the client is wise enough to reject it. Beyond that, even if it were appropriate to import a prejudice requirement into the duty of competence, Margolis appears not to have considered the effect that the Torture Memo may have had in the interrogations of Abu Zubaydah and Khalid Shaykh Muhammad. As we have seen, it appears that only the Torture Memo could have been thought to authorize the escalation in waterboarding beyond the proposal considered in the Interrogation Techniques Memo. It is unclear whether this issue was explored in the Office of Professional Responsibility's investigation since the relevant portion of its report is heavily redacted. *See* OPR REPORT, *supra* note 9, at 83-89. The report does make clear, however, that a number of high-ranking officials believed by the summer of 2003 that the CIA had exceeded the scope of permissible interrogation techniques under the Interrogation Techniques Memo with respect to Abu Zubaydah and Khalid Shaykh Muhammad, yet still believed that there had been no violation of the law. *See id.* at 104-05. This sug-

Aside from that problem, a lawyer is bound to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>160</sup> The failure of the memoranda to disclose the serious legal risks associated with the positions that they take may well be inconsistent with this ethical obligation.<sup>161</sup>

Still, the question whether the memos should expose their authors to professional discipline is not clear. Perhaps the memos’ repeated use of fallback arguments, such as the Torture Memo’s exploration of various defenses to charges of torture and the Domestic Military Operations Memo’s exploration of the concept of Fourth Amendment reasonableness, is at least an implicit acknowledgement that the broader positions taken in these memos were, at best, of uncertain legal merit. Perhaps additional warnings regarding legal risk were given, though not reduced to writing, although it is notable that neither Professor Yoo nor his supervisor at the time claimed to have done so.<sup>162</sup> Moreover, OLC opinions are considered binding on all officials in the executive branch unless overruled by the President or the Attorney General.<sup>163</sup> The efficacy of implied warnings about legal risk that can be teased out of the structure of a written opinion or oral warnings not reflected in the controlling OLC opinion is therefore open to serious question.

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gests that by the summer of 2003, senior administration officials were relying on the Torture Memo and not the Interrogation Techniques Memo as their defense for waterboarding of the frequency and intensity that had been employed on Abu Zubaydah and Khalid Shaykh Muhammad. Margolis’s failure to treat with this evidence is puzzling.

<sup>160</sup> MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2010).

<sup>161</sup> For an argument along these lines, see Johnsen, *supra* note 11, at 1576-86.

<sup>162</sup> See Response to the U.S. Department of Justice Office of Professional Responsibility Final Report Dated July 29, 2009, Submitted on Behalf of Professor John C. Yoo 19-37, Oct. 9, 2009, available at <http://judiciary.house.gov/hearings/pdf/YooResponse090729.pdf>; Classified Response to the U.S. Department of Justice Office of Professional Responsibility Classified Report Dated July 29, 2009, Submitted on Behalf of Judge Jay S. Bybee, Oct. 9, 2009, available at <http://judiciary.house.gov/hearings/pdf/BybeeResponse090729.pdf>.

<sup>163</sup> See, e.g., Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1455-56, 1464-65 (2010); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000).

Nevertheless, precisely because those with ultimate authority to make legal policy for the Executive Branch are the President and the Attorney General, it appears that the ethical obligations of OLC attorneys run to those officials.<sup>164</sup> That view has important implications for an assessment of the extent to which OLC attorneys discharged their ethical obligations when producing the Torture and Domestic Military Operations Memos.

First, it may be that responsibility for the approach taken in the memoranda is attributable to the clients and not the lawyers. A lawyer is under an obligation to “abide by a client’s decisions concerning the objectives of representation.”<sup>165</sup> Perhaps the President and the Attorney General, or the CIA, wished to receive the most aggressive possible view of executive authority with respect to interrogation and search-and-seizure authority rather than a more carefully qualified legal opinion for political or policy reasons. Beyond that, because an OLC opinion might have provided a defense to those who undertook interrogations in reliance on the opinion,<sup>166</sup> the President, the Attorney General, or the CIA might not have been seeking a qualified or equivocal opinion, or an assessment of relevant legal risks, but instead the most aggressive position possible in order to minimize the legal risks faced by those who would

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<sup>164</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2010) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”). The Attorney General is authorized to provide legal advice to the President and the heads of executive departments. See 28 U.S.C. §§ 510-12 (2006). The Attorney General has delegated this responsibility to the OLC. See 28 C.F.R. § 0.25(a) (2010).

<sup>165</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2010). In addition, “[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” *Id.* R. 5.2(b). This qualification seems to have no application to Professor Yoo, who did not claim that his superiors ordered him to reach any result. To the contrary, Associate Deputy Attorney General David Margolis ultimately concluded that former Assistant Attorney General Bybee did not breach his duty of competence in part because he relied on the advice he received from Professor Yoo in deciding to sign the Torture Memo. See Margolis MoD, *supra* note 17, at 64-65.

<sup>166</sup> See Note, *The Immunity-Confering Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2091-108 (2008).

have to undertake potentially unlawful interrogations.<sup>167</sup> Still, this is not quite a defense for the memos; even when the client wishes to push the boundaries of the law, a lawyer is under a duty to “exercise independent professional judgment and render candid advice,”<sup>168</sup> and OLC attorneys are not exempted from any of the ethical obligations of lawyers.<sup>169</sup> What is more, although the internal Department of Justice Investigation into the memos relating to the interrogation of suspected terrorists produced evidence that the CIA had expressed its desire to obtain maximum legal protection for its personnel, it produced no evidence that the President, the Attorney General, or the CIA had insisted on an OLC opinion that conferred such immunity.<sup>170</sup> Indeed, “Yoo himself denied that there was any pressure from the White House or the CIA for a particular result.”<sup>171</sup>

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<sup>167</sup> On this view, attorneys in the OLC owe their clients the same obligation that lawyers owe to private clients to take the most aggressive view possible consistent with the obligations of competence and to refrain from knowingly advising a client to violate the law that advances the client's interest. For an argument that the ethical obligations of lawyers in the OLC are no different than lawyers with private clients, see Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 447-52 (1993). For a different view focusing on the particular obligations of the President and those who counsel the President with respect to the rule of law, see Johnsen, *supra* note 11, at 1586-601; and Jessalyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terror*, 77 U. COLO. L. REV. 1, 33-39 (2006).

<sup>168</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 (2010). Moreover, “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.” *Id.* In addition, “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .” *Id.* R. 1.2(d). Granting the authors of the Torture Memo the benefit of the doubt, they may have sincerely believed that the interrogation techniques approved in the wake of the Torture Memo were not unlawful. That was the view taken by Associate Deputy Attorney General Margolis. See Margolis MoD, *supra* note 17, at 65-67. If so, the remaining question is whether such a belief suggests a lack of professional competence.

<sup>169</sup> See 28 U.S.C. § 530B (2006).

<sup>170</sup> See Margolis MoD, *supra* note 17, at 51-53; OPR REPORT, *supra* note 9, at 37-40, 46-62.

<sup>171</sup> Margolis MoD, *supra* note 17, at 47. Similarly, one might wonder whether the clients subjected the OLC attorneys to time pressures that compromised the quality of their work, although there is no indication that any of the OLC attorneys ever made such a claim. It is in any event unclear that this factor is entitled too much weight in this context, however, since the attorneys involved denied that they lacked sufficient time, and the Military Interrogation Memo repeated the analysis in the Torture Memo although it was issued some six months later. See *id.* at 16-17.

Second, given the identity of the clients, it may be unrealistic to conclude that the OLC lawyers breached an obligation to provide candid advice and adequate warnings about the risks associated with the legal positions taken in the pertinent memos. Even assuming that the OLC lawyers never offered the clients adequate warnings about the legal risks associated with the positions taken in the Torture and Domestic Military Operations Memos, the President, the Attorney General, and the CIA (which was charged with acting on the advice contained in the Torture Memo) have their own lawyers that were presumably able to evaluate the risks associated with the positions taken in memos. Thus, it may be unfair, at least from the standpoint of professional discipline, to treat OLC lawyers in the same fashion as lawyers who provide an otherwise unrepresented client with legal advice.<sup>172</sup>

Accordingly, it may be unwarranted to conclude that the executive branch lacked fair notice of the potential flaws and aggressive character of the Torture and Domestic Military Operations Memos—it may be that the OLC's client had made a quite considered decision to seek an opinion seeking a particularly aggressive view of the law.<sup>173</sup> On that view, unless the memos are thought to fall below the minimum level of competence required of all lawyers, it may be that whatever the defects in the memos, in reality the clients had all the information necessary in order to make informed assessments of the legal advice in these memos.

Even if the memos should not subject their authors to professional discipline, however, they raise serious questions about the legal judgment and abilities of the authors. As we have seen, the Torture and Domestic Military Operations Memos contain serious errors. On that score, blaming the clients is an unsatisfying explanation for the failures of legal analysis

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<sup>172</sup> In rejecting the Office of Professional Responsibility's finding that Professor Yoo had engaged in professional misconduct, Associate Deputy Attorney General Margolis stressed that the Torture Memo was intended for use by sophisticated clients holding high-ranking positions within the executive branch. *See id.* at 45, 65.

<sup>173</sup> For consideration of the issues raised by a client seeking one-eyed legal advice of this character, see William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555 (2008).

in these memoranda. Whatever the clients' views, they did not prevent Assistant Attorney General Bybee's successor, Jack Goldsmith, from withdrawing the Torture Memo after obtaining the assent of the Attorney General,<sup>174</sup> even though he knew that some officials within the Administration were displeased with the OLC's unexpected change in position.<sup>175</sup> Similarly, as we have seen, whatever the clients' views, they did not prevent the OLC, after Professor Yoo's departure, from issuing additional opinions that repudiated the positions in the Torture and Domestic Military Operations Memos discussed above. It seems that the responsibility for the failures of legal analysis found in these memoranda lies not with the clients, but with the lawyers responsible for producing these memos.

## II. THE ROLE OF PROFESSIONAL ABILITY IN THE TEACHING OF LAW

There is a surprising dearth of scholarly literature addressing the question of who is qualified to teach law. As a descriptive matter, however, it seems plain that experience in the practice of law has increasingly little importance in the selection of those who will train the next generation of lawyers. The rise of the theoretician, in turn, may well explain not only some of the problems in legal education today, but also illustrate the responsibility that the legal academy bears for producing the kind of legal work that is reflected in Professor Yoo's unhappy career at the OLC.

### A. *The Rise of the Theoretician and Its Implications for Preprofessional Education*

A study of the career path of law professors, examining those listed as holding tenured or tenure-track appointments in the *American Association of Law Schools* directory for the 1975-76 academic year, found that 67.2% had practiced law prior to teaching and the median length of time spent in prac-

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<sup>174</sup> See OPR REPORT, *supra* note 9, at 112-13.

<sup>175</sup> See GOLDSMITH, *supra* note 9, at 142-62.

tice was five years.<sup>176</sup> Since then, despite the growth of clinical legal education, there has been something of a trend toward even less practice experience among those hired to teach law, especially among law schools ranked at the top of the academic heap. A survey of those teaching law in the 1988-89 academic year, for example, found that only 25% of law professors had more than five years experience in the practice of law, with a mean of 4.3 years practice experience, and among the schools ranked in the top seven by *U.S. News and World Report*, the mean was only 2.7 years practice experience.<sup>177</sup> Considering that these figures include clinicians, it seems plain that experience in practice is given little weight in hiring. A study of those hired by accredited law schools to teach from 1996-2000, in turn, found an average of 3.7 years experience in the practice of law, with an average of only 1.4 years among those hired at schools ranked in the top twenty-five.<sup>178</sup> To similar effect, a survey based on a sample of tenure-track law professors hired between 2000 and 2009 found that those hired typically “had only 3 years of practical legal experience,” with those hired by schools ranked in the top tier by *U.S. News and World Report* having a median of one year experience and a mean of 1.79 years, with 45.6% of the entry-level tenure-track professors hired by these schools having no prior practical experience.<sup>179</sup>

Some believe that the explanation for this trend is the competitive pressure exerted by the *U.S. News and World Report* rankings, which put a premium on peer reputation and accordingly incentivize schools to hire based on the scholarly potential or reputation of applicants rather than their familiar-

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<sup>176</sup> See Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 503, 510-11.

<sup>177</sup> See Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 194, 219 & tbl.20 (1991).

<sup>178</sup> See Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 599, 601 tbl.3 (2003).

<sup>179</sup> See Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 129-30 (2010).

ity with and ability to impart professional skills.<sup>180</sup> Yet, the pressure to hire theorists in order to enhance the scholarly profile of law schools is not new. Nearly eighty years ago, an editorial in the *Marquette Law Review* complained:

[D]uring the past twenty years a powerful group of theorists on the faculties of some of the oldest law schools have developed a policy of banishing from the faculties of these schools men actively engaged in the practice of law and substituting in their places those who are trained in legal theory only . . . .<sup>181</sup>

Whatever the cause, in the legal professoriate we have seen “[t]he rise of theory and the corresponding decline of doctrine.”<sup>182</sup>

The emergence of the theoretician as the dominant force in the legal academy has coincided with increased concern about whether law schools are preparing students for the rigors of legal practice. In recent decades, surveys of both students and recent graduates have produced a consistent pattern of com-

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<sup>180</sup> See, e.g., Melissa J. Marlow, *It Takes a Village to Solve the Problems in Legal Education: Every Faculty Member's Role in Academic Support*, 30 U. ARK. LITTLE ROCK L. REV. 489, 492-93 (2008); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 360 (2001). There is, however, some reason to believe that the *U.S. News* rankings should not be taxed with law schools' focus on the scholarly potential or reputation of those they hire. The most thorough study of the issue to date found that peer assessment scores are driven by prior *U.S. News* rank and not any independent measure of scholarly merit. See Jeffrey Evan Stake, *The Interplay between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 250-52 (2006). There is accordingly surprisingly little empirical evidence that a strategy of hiring theoreticians that produce the type of scholarship thought to be in vogue has an independent effect of a law school's ranking. Conversely, if, as I speculate below, the changing economics of legal practice puts greater market pressure on law schools to produce students with professional skills, then the rankings may actually motivate pedagogical reform as law schools focus on their desirability to applicants and prospective employers, which relate directly to the quality of their student bodies and placement rates, which are themselves important factors in the rankings. See Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 S.M.U. L. REV. 493, 497-500, 520-29 (2007).

<sup>181</sup> Editorial Comment, *Practicing Lawyers as Teachers*, 15 MARQ. L. REV. 167, 167 (1931).

<sup>182</sup> Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1433 (1995).

plaints about the failure of law school to prepare them for practice.<sup>183</sup> Indeed, one study found that even as they go through law school, students develop a preference for teaching that focuses on practice-oriented skills and that this preference persists after graduation.<sup>184</sup>

It is unremarkable that law school graduates focus on their readiness for practice; one 2002 study of those who passed the bar in 2000 found that while 2% were in “nonprofit or education or other” and 9% were in “business,” the remaining 89% were practicing law.<sup>185</sup> A survey of the same group in 2007-08 found that 83.5% of respondents were still practicing law.<sup>186</sup> Criticism of law school as providing inadequate preparation for practice, however, is hardly confined to the consumers of legal education. For decades, leading figures in the bench, bar, and the academy have complained that legal education fails to develop the skills necessary for success in the legal profession.<sup>187</sup> There has also been a consistent stream of recommendations from those who have studied legal education that the curricu-

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<sup>183</sup> See, e.g., RONIT DINOVIETZ ET AL., THE NALP FOUND. FOR LAW CAREER RESEARCH & EDUC. & AM. BAR FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 79 (2004); FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 134-44 (1981); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 478-81 (1993); E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 BYU L. REV. 695, 936-44.

<sup>184</sup> See Douglas D. McFarland, *Students and Practicing Lawyers Identify the Ideal Law Professor*, 36 J. LEGAL EDUC. 93 (1986).

<sup>185</sup> See DINOVIETZ ET AL., *supra* note 183, at 26-27 & tbl.3.1, 89-90.

<sup>186</sup> See RONIT DINOVIETZ ET AL., THE NALP FOUND. FOR LAW CAREER RESEARCH & EDUC. & AM. BAR FOUND., AFTER THE JD II: SECOND RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 24 (2009).

<sup>187</sup> See, e.g., Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?*, 42 FORDHAM L. REV. 227, 232-33 (1973); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 910-13 (1933); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1252-60 (1991); K.N. Llewellyn, *On What is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651, 654-59, 674-76 (1935).

lum of law schools should make greater efforts to integrate the skills necessary for successful representation of clients.<sup>188</sup>

It is not difficult to relate the emergence of the theoretician among the professoriate with the emergence of increasing concern about the ability of law schools to prepare their students for practice. If the primary function of legal education is to inculcate the skills necessary for success in practice, perhaps those who teach law should have reasonable proficiency in those skills. Those who lack familiarity with the foundational skills for success in legal practice, one might theorize, are hardly in a position to teach those skills, and as a consequence, the quality of legal education suffers.<sup>189</sup>

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<sup>188</sup> See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 16-24 (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 56-86 (2007); A.B.A., *Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 14-16; A.B.A., *Final Report and Recommendations*, 1983 TASK FORCE ON PROF'L COMPETENCE 11-13; A.B.A., *Legal Education and Professional Development—An Educational Continuum*, 1992 TASK FORCE ON LAW SCHS. & THE PROF. 131-41.

<sup>189</sup> In this connection, consider one recent account of the disjunction between the skills required to teach law and to produce what is currently regarded as high-quality legal scholarship:

Beginning with the rise of the law-and-economics and law-and-society movements in the 1950s and 1960s, interdisciplinarity has become increasingly important in legal scholarship. For decades now, the best legal scholarship has answered the question, "What should the law be?" Lawyers are trained to answer the question, "What is the law?" The tools suited to that task (case crunching, code crunching, and clause crunching) are the central focus of the core curriculum of American law schools. The normative turn in legal scholarship has required legal academics to acquire new tools—from economics, philosophy, sociology, political science, history, and elsewhere. But these new tools, the bread and butter of the legal academic, are not the explicit focus of the standard law-school course—which focuses almost exclusively on primary legal materials (cases, statutes, regulations, rules, and constitutions) and rarely (indeed, almost never) includes a systematic introduction to the canon of legal scholarship.

Lawrence B. Solum, *The New Realities of the Legal Academy*, in BECOMING A LAW PROFESSOR: A CANDIDATE'S GUIDE ix, xi (Brannon P. Denning, Marcia L. McCormick & Jeffrey M. Lipshaw eds., 2010). Or, as another legal scholar put it, more succinctly, "Professors are rewarded for thinking with imagination more than with practicality." THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 177-78 (2010).

There are a number of ways to attack such a theory. At the outset, one could argue that the appropriate place to teach the foundational skills for practice is in the years after graduation, as recent graduates go through a process of apprenticeship not unlike recent medical school graduates. Externalizing training costs onto law firms, however, has its own set of problems. For government and public interest practices with minimal training resources, such an approach can be disastrous. Even in the most profitable portions of the private sector—those with the greatest ability to absorb training costs—the market is increasingly likely to frown on this approach. In what looks to be a remarkably prescient study of large law firms undertaken prior to the recession that began in 2008, William Henderson and Leonard Bierman concluded that as major law firms have increased in size and geographic scope, the increased costs associated with such an approach produced a relatively uniform business model in which major firms sought premium, relatively price-insensitive work that reduced the efficiency of legal service and eroded the satisfaction of clients and lawyers alike.<sup>190</sup> It does not take a degree in economics to know that a business model based on maintaining demand for inefficient, costly, and price-insensitive work is not sustainable. As the economist Herbert Stein memorably observed, “if something cannot go on forever it will stop.”<sup>191</sup> So it has proven to be with the practice of law. The recession that followed the period studied by Professors Henderson and Bierman has put enormous cost pressures on even the most successful law firms, leading to layoffs, reduced salaries, and reduced hiring,<sup>192</sup> although it

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<sup>190</sup> See William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395, 1420-28 (2009). For a similar account of the forces undermining the efficiency and competitive position of major law firms, see Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760-71.

<sup>191</sup> Herbert Stein, *Leave the Trade Deficit Alone*, WALL ST. J., Mar. 11, 1987, § 1, at 36.

<sup>192</sup> See, e.g., Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and their Impact on Legal Education*, 70 MD. L. REV. 341, 342-46 (2011); Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 318-19 (2011); Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051-52 (2010); Erin J. Cox,

seems clear that these cost pressures have been building for some time.<sup>193</sup> Pressure on legal billing practices in a newly competitive environment that places a premium on efficiency has been particularly intense.<sup>194</sup> In an increasingly competitive environment, law firms will be increasingly less willing to absorb training costs; there is indeed evidence that this trend is gathering steam.<sup>195</sup> Externalizing training costs may therefore no longer be a tenable strategy for law schools.<sup>196</sup> Indeed, it is becoming increasingly apparent, as one scholar recently wrote, that the legal market is coming to view “the major flaw of legal education as the failure to produce more market-ready lawyers with skills and knowledge to add value more quickly in a complex and challenging practice environment.”<sup>197</sup> To make matters more concrete, consider the remarks of the associate general counsel of one major consumer of legal services, United Technologies, who recently stated that his firm “does not ‘allow first or second year associates to work on any of our matters without special permission, because they’re worthless.’”<sup>198</sup>

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Comment, *An Economic Crisis Is a Terrible Thing to Waste: Reforming the Business of Law for a Sustainable and Competitive Future*, 57 UCLA L. REV. 511, 512-22 (2009).

<sup>193</sup> See, e.g., Richard Susskind, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 27-57 (2008); Ribstein, *supra* note 190, at 771-77.

<sup>194</sup> See, e.g., Dilloff, *supra* note 192, at 352-54; Michelle M. Harner, *The Value of “Thinking Like a Lawyer”*, 70 MD. L. REV. 390, 395-99 (2011); Rhee, *supra* note 192, at 320-26; Ribstein, *supra* note 190, at 768-71.

<sup>195</sup> See, e.g., Steven C. Bennett, *When Will Law Schools Change?*, 89 NEB. L. REV. 87, 108-15 (2010); Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORP. L. 363, 390-91 (2009); Rhee, *supra* note 192, at 324-26; Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 603-13 (2010); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2108-09 (2010).

<sup>196</sup> For an illuminating argument that increasing competitive pressures within the legal profession will require law schools to increase their emphasis on the development of professional skills from a leading legal educator, see David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTGERS L. REV. 1127 (2009). For a similar argument from a practitioner, see Bennett, *supra* note 195, at 108-28.

<sup>197</sup> Rhee, *supra* note 192, at 311. For a particularly useful discussion of this point, see Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499, 501-03 (2011).

<sup>198</sup> Cunningham, *supra* note 197, at 499 (quoting Chester Paul Beach, Assoc. Gen. Counsel of United Techs. Corp.).

Another response to the case for greater skills training is the claim that law schools can reserve skills training for a discrete portion of the curriculum, such as clinical courses, which have emerged in significant part because of the concern that traditional law school curricula fail to impart foundational skills.<sup>199</sup> This puts an enormous burden on clinical courses, however; they must not only teach students how to handle real clients and cases, but also provide the foundational skills not found elsewhere in the curriculum. Even aside from this, there is reason to question how much clinical and experiential education can accomplish. Of necessity, clinical and other experiential education involves relatively unsophisticated, small-stakes litigation and therefore is unlikely to do much to develop the skills that will enable a student to practice at a higher level.<sup>200</sup>

In my years in practice as a government lawyer, for example, I frequently worked with student interns, who were usually assigned quite menial tasks. Delegating such work to student interns was quite convenient for the attorneys but rarely of much use to the students as a means of acquiring the skills necessary to succeed in practice. In this connection, it is worth noting the only study of which I am aware to investigate the matter determined that while 62% of recent law school graduates who had clinical experience during law school found that experience helpful to them in the practice of law, and 58% of those with internships found that experience helpful, 78% found that summer legal employment was helpful, and 67% found that legal employment during the school year was helpful to their success in the practice of law.<sup>201</sup> To be sure, there are many perils in assessing law school education on the basis of surveys of recent graduates, but this data surely calls for some caution in assessing the claim that externships and clinics provide the best training for practice.

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<sup>199</sup> For a useful discussion of the this phenomenon, see Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 71-78 (2009).

<sup>200</sup> See, e.g., Johnson, *supra* note 187, at 1256. For additional discussion of the limitations on clinical legal education, see Rhee, *supra* note 192, at 335.

<sup>201</sup> See Sandefur & Selbin, *supra* note 199, at 85 tbl.1.

But there is a more fundamental objection to a model that depends on either post-graduate work or clinical and experiential courses to impart foundational skills. The value of teaching preprofessional students any substantive curriculum that is divorced from the skills necessary to utilize this knowledge in the profession is, at best, obscure. There may be value, for example, in extolling the theoretical virtues of a strong and unitary executive when it comes to national security, especially when compared to an often fractious and indecisive legislature. Nevertheless, our conception of the rule of law is premised on the view that legal rules are not wholly indeterminate and that the law places meaningful constraints on a client.<sup>202</sup> Certainly in our everyday affairs, we do not conceive of the law as so indeterminate that it tolerates virtually anything as long as a lawyer can produce the requisite form of words to bless a client's desired course of action. Accordingly, supplying students with a theoretical or philosophical basis to assess the virtues of a strong executive falls far short of what these students will need to practice law. To become lawyers, students must become adept at the manner by which theory is applied in light of applicable legal constraint. It is the client that needs grounding in history, philosophy, and national security studies in order to develop its own views on national security policy; the lawyer needs a different skill set to reconcile the client's views with applicable legal constraints.

*B. The Perils of the Theoretician as Reflected in the Legal Career of John Yoo*

The rise of the theoretician in the legal academy means that the current generation of legal scholars is less likely to focus on what the law is than on what the law should be. After all, the decline of the academy's focus on doctrine naturally entails less concern with the details of extant legal regimes. If

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<sup>202</sup> For a valuable discussion of this point, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). For applications of this principle to the particular context of the Office of Legal Counsel, see LUBAN, *supra* note 18, at 192-204; and W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1356-62 (2009).

the academy is increasingly less concerned with doctrine, however, it should be unsurprising that its members have less facility in understanding and applying doctrine.

Professor Yoo's work in the OLC illustrates the point. Professor Yoo presumably wished to advance the interests of his client, and his acquaintance with political philosophy and the theoretical justifications for a strong executive may have helped to persuade him of the soundness of the client's position.<sup>203</sup> But a deeply felt and well-grounded understanding of the client's objectives is no substitute for facility in the craft of lawyering. Indeed, Professor Yoo's deficiencies as a lawyer may well have originated in his orientation toward theory rather than craft. Theoreticians often lack interest in legal doctrine; many even refuse to take doctrine seriously. In this vein, after leaving government service, Professor Yoo wrote: "[L]aw is not the end of a matter; indeed, it is often the beginning. Sometimes people look to the law as if it were a religion or a fully articulated ethical code that will make these decisions for us, relieving us of the difficult job of making a choice."<sup>204</sup> The role of a practicing lawyer, however, is to ensure that the client's choices can be reconciled with applicable legal restraints; in this task, law is "the end of the matter." Professor Yoo, however, so failed in reconciling his (or his client's) political philosophy with applicable legal constraints that the Bush Administration ultimately concluded that his most important legal work was indefensible.

Indeed, it appears that Professor Yoo was more attached to the concept of a strong executive than his own client; as we have seen, the Bush Administration itself ultimately repudiated an extraordinary number of the positions taken in Professor Yoo's OLC memos. Even as he rejected the Office of Professional Responsibility's finding that Professor Yoo should be

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<sup>203</sup> For Professor Yoo's views on the virtues of a strong executive on matters of national security, see JOHN YOO, *CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 401-10 (2009); John Yoo, *Courts at War*, 91 *CORNELL L. REV.* 573, 590-600 (2006); and John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 *STAN. L. REV.* 793, 812-22 (2004).

<sup>204</sup> YOO, *supra* note 9, at xii.

subject to professional discipline for his role in the OLC memos relating to the interrogation of suspected terrorists, Associate Deputy Attorney General David Margolis wrote: “I fear that 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 while speaking for an institutional client.”<sup>205</sup> This is surely a powerful statement on the extent to which the practice of law can be distorted by those who exalt the value of theory and ideology not anchored in professional norms. Among Professor Yoo’s victims were his own clients.

No matter how well versed in the liberal arts or social sciences, lawyers who cannot advance defensible legal positions are of no use to anyone—surely not their clients. As we have seen, whatever the merits of Professor Yoo’s legal work during his tenure at the OLC in terms of policy or political philosophy, that work consistently transgressed the norms of craft. This should be unsurprising; as we have also seen, Professor Yoo is typical of the current generation of legal scholars—especially at the highest ranked institutions—whose concerns center on theory and not legal doctrine or practice. Those who find doctrine and the norms of craft to be of subsidiary importance at best are unlikely to be adept at their use.

We should not be surprised that Professor Yoo lacked the requisite skills given the paucity of his own experience with the practice of law prior to joining the OLC. One recent analysis of legal education usefully explicated the relation of theory and practice of law:

The expert’s knowledge is well grounded in subtle, analogical reasoning achieved through a long apprenticeship to more expert practitioners. In this process of learning, formal models and rules play an essential role . . . but the formal models are themselves based on practice. Put another way, in the teaching and learning of expertise, practice is often ahead of theory. Formal knowledge is not the source of expert practice. The reverse is true: expert practice is the source of formal

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<sup>205</sup> Margolis MoD, *supra* note 17, at 67.

knowledge about practice. Once enacted, skilled performance can be turned into a set of rules and procedures for pedagogical use, as in the cognitive apprenticeship. But the opposite is not possible: the progression from competence to expertise cannot be described as simply a step-by-step build-up of the lower functions. In the world of practice, holism is real and prior to analysis. Theory can—and must—learn from practice.<sup>206</sup>

Or, to put it more simply: “We teach doctrine and policy in our courses, but we should also teach problem solving, which is what lawyers do for their clients.”<sup>207</sup>

If there has been a refutation of this view, I have never encountered it. Indeed, Professor Yoo’s experience at the OLC illustrates its truth. Whatever the merits of Professor Yoo’s view of executive power, he lacked the professional skills necessary to convert that view into a legally defensible position on which his client could rely—the kind of professional skills that are rarely developed except through practical experience. Even a brilliant academic, well versed in theory but lacking practical experience, is all too likely to lack the professional skills necessary to reconcile the client’s position with applicable rules of statutory construction or relevant precedent, and for just that reason will lack the ability to impart these skills to students as well.<sup>208</sup> Indeed, it is likely all too easy for an academic to rationalize away his lack of professional skill by claiming that only theory is important—a view that, as we have seen, Professor Yoo appears to embrace. Yet, what Professor Yoo’s clients needed is what virtually all clients need – an adept problem-solver. The solutions that Professor Yoo offered to his clients’ legal problems, however, proved untenable, as we have seen.

To be sure, one might conclude that even with ample practical experience, Professor Yoo might have permitted a theory of executive power to trump the demands of legal craft. Still, a

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<sup>206</sup> SULLIVAN ET AL., *supra* note 188, at 118.

<sup>207</sup> William L. Reynolds, *Back to the Future in Law Schools*, 70 MD. L. REV. 451, 458 (2011) (footnote omitted).

<sup>208</sup> For a similar argument, see Newton, *supra* note 179, at 146-48.

practitioner schooled in the Darwinian world of representing real clients with real problems inevitably learns that ideology is no substitute for legal craft. Few clients, after all, are looking to hire someone who will provide them with ideologically pleasing but legally untenable advice. Professor Yoo, however, lacked the seasoning that comes with such a Darwinian experience. Beyond that, while practical experience is surely not either a necessary or sufficient condition for success in teaching law, a theoretician is far more likely to lack an adequate appreciation of the norms of professional craft that are central to success in the practice of law. Had Professor Yoo been more engaged with the norms of craft, he would have been far less likely to produce work product so consistently at odds with those norms.

Even Professor Yoo's rather modest self-criticism—that he did not anticipate that the Torture Memo would become public and that certain portions of the memo were “susceptible to quotations out of context”<sup>209</sup>—powerfully reflects the limitations of the theoretician. A lawyer with even a modicum of practical experience would understand that leaks are ubiquitous. In my own experience as a government lawyer handling matters far less sensitive than those crossing Deputy Assistant Attorney General Yoo's desk, I learned to assume that all of my work product might find its way into the public realm, regardless of the wishes of the client. Beyond that, it is hard to understand how Professor Yoo could not have expected that his work would eventually become public, if only by virtue of the client's decision to release it. If those subject to the interrogation practices condoned in his memos, for example, were one day placed on trial, or merely given access to the media, there was clearly some likelihood that the interrogation techniques employed on these detainees would become public, which might result in a need to disclose the pertinent OLC memos. At a minimum, Professor Yoo knew that the President he served would not remain in office forever, and a successor might deem it appropriate to release his work product. Professor Yoo's failure to anticipate

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<sup>209</sup> YOO, *supra* note 9, at 177.

the release of the memos speaks volumes about his own judgment.<sup>210</sup> Even if one believes that the only reason Professor Yoo's successors in the Bush Administration repudiated so many of his legal positions was because they proved politically untenable, that illustrates the importance of this type of practical judgment. One of the jobs of a government lawyer is to anticipate when legal advice may become public and produce a political backlash that will ultimately harm the interests of the client. Even sound theory that proves politically untenable is ultimately of little use to a governmental client. The conclusion to be drawn, of course, is that theoretical expertise divorced from the practical judgment is of little use in the legal profession. As we have seen, acquiring facility in problem solving is central to the development of sound legal judgment. Professor Yoo's clients needed someone who appreciated that part of the problem to be addressed was to take a legal position that could stand the light of day, which was eventually coming. That practical reality may not have been evident to a theoretician, but an awareness of that reality was essential to sound lawyering under the circumstances.

To be sure, a lawyer is entitled, indeed obligated, to utilize whatever indeterminacy can be found in applicable legal rules to advance the interests of a client. A grounding in philosophy, political science, economics, or other pertinent liberal arts and social sciences, in turn, may well enhance the skill with which a lawyer can utilize such indeterminacy to the benefit of one's client. No doubt Professor Yoo's knowledge of and views on political philosophy contributed mightily to his view of the value of a strong executive. But teaching political philosophy without the skills necessary to reconcile the client's position with applicable legal restraints is not teaching law; it is teaching political philosophy. There is nothing wrong with teaching political philosophy; it is a staple in philosophy and political science pro-

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<sup>210</sup> As one experienced government official observed of the Torture Memo: "Even though the memorandum was intended for a limited audience, Yoo and Bybee certainly could have foreseen that the memorandum would someday be exposed to a broader audience, and their failure to provide a more balanced analysis of the issues created doubts about the *bona fides* of their conclusions." Margolis MoD, *supra* note 17, at 68.

grams at both the graduate and undergraduate levels. But in law schools, teaching political philosophy divorced from the skills and constraints of the lawyer is dangerous—profoundly so. Nor is there any clear rationale for having law schools duplicate the work of philosophy and political science departments. If unadorned political philosophy is an appropriate part of legal education, surely it is better to have students register for appropriate courses in political science or philosophy departments than somehow lead them to believe that unadorned political philosophy is an acceptable approach to learning how to practice law.

We do not know how closely Professor Yoo's teaching hews to the approach to his duties that Professor Yoo took at the OLC. Most law professors work diligently to present all sides of legal issues to their students; I assume Professor Yoo does the same. The problem, however, is not that Professor Yoo may be indoctrinating students ideologically, but that his example shows the pitfalls of relying on a theoretician who lacks an adequate appreciation of the virtues of craft and sound professional judgment. It is the theoretician who denigrates the centrality of doctrine and craft who is least likely to recognize when ideology and theory must be subordinated to the demands of legal craft if the client is to be given a defensible legal position. A theoretician who lacks the practical problem-solving skills so central to the craft of lawyering, moreover, is hardly in a position to impart those skills to his students. The problem, of course, is not limited to the training of future government lawyers; some worry that the private sector is coming to be hobbled by the prevalence of lawyers who graduate law school with ample theoretical knowledge but little practical problem-solving ability.<sup>211</sup>

Professor Yoo's experience illustrates the dangers of a theoretician in a profession in which practical experience plays such a central role. Perhaps one can impart preprofessional skills to law students without the knowledge that comes from

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<sup>211</sup> See, e.g., Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 MD. L. REV. 484, 487-90 (2011).

experience, but Professor Yoo's experience suggests that the skills required to reach the highest ranks of the legal academy have diverged radically from the skills necessary to succeed in the practice of law. There is surely reason to doubt that those who lack the professional judgment necessary to succeed in the practice of law are in a position to begin the process by which their students acquire that very professional judgment. To acknowledge, with Dean Edley, that Professor Yoo was guilty of "bad judgment,"<sup>212</sup> is, in other words, to say that he lacked the skill most critical to success in the legal profession.

### C. *Academic Freedom and the Legal Theoretician*

Then there is the matter of academic freedom and its associated constitutional protections, referenced by Dean Edley in his statement on Professor Yoo's work at the OLC. While there are many formulations of the concept of academic freedom, one constant is that academic freedom functions to promote high-quality scholarship consistent with professional norms for scholarly work rather than protecting those who lack the requisite qualification for teaching within the university.<sup>213</sup> As one recent account put it, academic freedom "is the freedom to pursue the scholarly profession, inside and outside the classroom, according to the norms and standards of that profession."<sup>214</sup> No one, for example, would think that an assessment of the quality of a candidate's teaching or scholarship works an infringement on academic freedom when undertaken in connection with an application for employment, promotion, or tenure. After all, the concept of academic freedom exists to enable the university to pursue excellence, not to protect mediocrity.

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<sup>212</sup> See *supra* text accompanying note 5.

<sup>213</sup> See, e.g., J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 276-79 (1989); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 475-80 (2005); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 241-42 (1990); William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 61-63 (Edmund L. Pincoffs ed., 1975).

<sup>214</sup> MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 149 (2009).

To be sure, Professor Yoo was not acting as a teacher or scholar when working at the OLC. For that reason, one might conclude that academic freedom is entirely inapplicable to his work there. Still, prevailing conceptions of academic freedom generally recognize that it reaches outside the realm of scholarly work, although they recognize as well that with academic freedom comes correlative responsibility, even with respect to nonscholarly work. For example, the 1915 American Association of University Professors' statement on academic freedom, the foundational document when it comes to academic freedom in the United States,<sup>215</sup> explained that "[i]n their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression."<sup>216</sup> It also acknowledged the obligation of the academy "to purge its ranks of the incompetent and the unworthy, [and] to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical or intemperate partisanship."<sup>217</sup> These principles have remained widely accepted within the academy.<sup>218</sup>

The constitutional conception of academic freedom is a little different. In *Regents of the University of Michigan v. Ewing*,<sup>219</sup> for example, the Court upheld an academic dismissal of a medical student against a due process challenge concluding that academic decisions are immune from constitutional attack absent "such a substantial departure from accepted academic norms as to demonstrate that the person or committee respon-

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<sup>215</sup> See, e.g., RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 468-506 (1955); Byrne, *supra* note 213, at 276-79; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1267-85 (1988).

<sup>216</sup> Am. Ass'n of Univ. Professors, *The 1915 Declaration of Principles*, reprinted in AM. ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE app.a, at 172 (Louis Joughin ed., 1967).

<sup>217</sup> *Id.* at 170.

<sup>218</sup> For a discussion of the evolution of professional norms with respect to standards of professionalism in particular, see Neil W. Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 J.C. & U.L. 609 (2000).

<sup>219</sup> 474 U.S. 214 (1985).

sible did not actually exercise professional judgment”<sup>220</sup> and invoking the concept of academic freedom as supporting a university’s freedom to make academic decisions free from intrusive judicial review.<sup>221</sup> Thus, academic freedom as a constitutional concept is no protection for the incompetent. To the contrary, it protects the university when it imposes discipline in an effort to preserve academic standards consistent with professional norms of excellence.

Accordingly, both scholarly and constitutional conceptions of academic freedom offer rights and correlative responsibilities; scholars are expected to conform to professional norms. Thus, any discussion of Professor Yoo’s legal work and academic freedom necessarily focuses to the question whether, under the norms that govern preprofessional education, those who lack the skills to practice law at an acceptable level should nevertheless teach the practice of law.

Dean Edley agrees that “Professor Yoo offered bad ideas and even worse advice during his government service.”<sup>222</sup> The concept of academic freedom therefore requires inquiry into the question of whether shielding “bad ideas and even worse advice” from academic scrutiny is consistent with relevant preprofessional norms. According to the accrediting authority, “[a] law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”<sup>223</sup> At a minimum, that ought to mean that the faculty is capable of understanding and conveying to students the ability to provide re-

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<sup>220</sup> *Id.* at 225.

<sup>221</sup> *Id.* at 225-26. I have elsewhere developed a more elaborate account of the First Amendment’s conception of academic freedom. See Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 96-110 (2008).

<sup>222</sup> Christopher Edley, Jr., *The Torture Memos and Academic Freedom*, Apr. 10, 2008, <http://www.law.berkeley.edu/news/2008/edley041008.html>. Similarly, although rejecting the OPR’s finding that Yoo and Bybee were subject to professional discipline, Associate Deputy Attorney General Margolis concluded that “Yoo and Bybee exercised poor judgment by overstating the certainty of their conclusions and underexposing countervailing arguments.” Margolis MoD, *supra* note 17, at 68.

<sup>223</sup> ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 301(a) (2009).

sponsible advice to clients concerning pertinent legal constraints. A teacher charged with conveying the skills necessary to practice law surely ought to be capable of recognizing “bad ideas and even worse advice” before passing them along to his client. One would hope that academic standards for preprofessional education cannot be satisfied by such a performance; certainly that seems to be the view of the accrediting authority. Beyond that, Professor Yoo’s work at the OLC is just the kind of shoddy, superficial, and intemperate work for which prevailing norms of academic freedom provide no safe haven.

Dean Edley doubtless would not worry about the “chilling effect” of a tenure review that would assess the quality of a candidate’s scholarship—or even post-tenure review of scholarship, which is required by the pertinent accreditation standards for all faculty members, including those with tenure.<sup>224</sup> The fact that Dean Edley seems averse to any consideration of the quality of a faculty member’s legal work at an institution devoted to preparing students for the practice of the law should be distressing. The concept of academic freedom is recognized to foster excellence, not mediocrity or worse. As institutions devoted to preprofessional education, law schools should endeavor to maintain a faculty capable of inculcating excellence in the practice of law, not merely excellence when it comes to producing scholarship. At a minimum, the pertinent accreditation standard requires law schools to concern themselves with the question of whether their faculties are preparing students for the “responsible” practice of law. Such a concern, however, seems absent in Dean Edley’s calculus.

*D. Professor Yoo and the Current Generation of Legal Scholars*

One might react to the preceding by claiming that Professor Yoo is little different from the typical scholar of his generation—especially at the highest ranked schools—who all too often lack practical experience and are for that reason unlikely to be able to convey critical professional skills that are essential

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<sup>224</sup> See *id.* Standard 404(b).

to the practice of law. It would be anomalous to concern ourselves only with those academics that enter practice and prove themselves lacking in professional judgment—the upshot of that approach would be to encourage legal scholars to stay in the academic cocoon where their professional deficiencies may not be exposed. Yet, surely any concern along these lines provides no reason to maintain a status quo in which all too many preprofessional educators are likely to lack the kind of professional skills that students should expect in their teachers. The proper course of action is not to ignore the problem that John Yoo represents, but to address it comprehensively.

To be sure, the conclusions offered here can be no more than tentative. Professor Yoo may represent a natural experiment in the legal theoretician suddenly tasked with important professional responsibilities, but he represents a sample of one. One needs little grounding in statistics to agree that the sample size makes any conclusion hazardous. Nevertheless, as we have seen, the emergence of the theoretician in the legal academy has corresponded with growing concerns about the ability of law schools to prepare their students for competent legal practice. There is surely enough smoke to warrant serious discussion and debate, if not yet a declaration that the legal academy is on fire.

It is, moreover, possible to take the position advanced here too far. I do not mean to argue that any academic would replicate Professor Yoo's errors if given the chance.<sup>225</sup> Nor do I mean to suggest that there is no place on law faculties for philosophers, social scientists, or others who may lack competence to practice law, but who can nevertheless make an important contribution to the intellectual growth of law students. It may also be that there are other means by which academics can develop and demonstrate professional judgment other than spending substantial time in practice. Nevertheless, it is critical that law

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<sup>225</sup> Assistant Attorney General Bybee's successor at the OLC, Jack Goldsmith, had spent most of his career in the academy (although he did have somewhat more pertinent practice experience than Professor Yoo), *see* GOLDSMITH, *supra* note 9, at 17-18, 20-22, and yet, as we have seen, he repudiated the Torture Memo. *See supra* text accompanying notes 174-75.

schools understand which of their faculty are capable of teaching students to practice law, and ensure that their own students do not mistake a course in social or political philosophy as providing guidance for representing clients in the practice of law. Judge Posner, for example, has proposed that law schools identify faculty skilled in legal analysis by placing them in an appropriate department, while placing scholars with a primarily interdisciplinary expertise in departments with an interdisciplinary focus.<sup>226</sup> Short of such a reform, however, there is a real problem illustrated by Professor Yoo. The University of California at Berkeley did not label him as competent only in areas unrelated to the practice of law. Indeed, he thought himself competent to practice law and took a position at the OLC doing just that. Yet, he made quite a hash of things. Perhaps Professor Yoo's work did not fall below the standard of minimum competence that would subject him to professional discipline, but surely law schools ought to aspire to something more than simply refraining from employing those who teach because they are not competent to practice law.

To be sure, one can argue that the virtues of Professor Yoo and his like as theoreticians outweigh their vices as practitioners. Still, one must ask whether there is an adequate nexus between his virtues and the purpose of legal education. Perhaps Professor Yoo's theoretical grasp of the virtues of a strong executive warrant his employment as a teacher of political philosophy, but they offer little justification for employing him at a law school teaching courses that purport to prepare students for practice. Law schools are, after all, in the business of providing preprofessional education.

I have suggested that central to Professor Yoo's failings as a lawyer is his lack of experience in the practice of law, which limited his ability to develop sound professional judgment. As we have seen, Professor Yoo's lack of experience is more of the rule than the exception, especially at the highest ranked law schools. Professor Yoo's sojourn in practice provides a particu-

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<sup>226</sup> See Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L.J. 845, 854-55 (2009).

larly vivid illustration of the deficiencies of the theoretician as practitioner, but it is hard to tell how widespread the problem that he represents is. Professor Yoo is an unusual case; academics rarely move back into practice, and when they do, they presumably are subject to more exacting supervision than Professor Yoo seems to have received. Professor Yoo may reflect something of a natural experiment in the deficiencies of the legal theoretician as a practitioner of law that is rarely, if ever, replicated. Still, Professor Yoo's example, coupled with the evidence that his lack of professional experience is far from unique among those in the legal academy, suggests that the problem of law professors who have too little familiarity with the type of professional judgment that young lawyers must develop is not rare. It may be that a great many law students receive insufficient instruction in the interaction between theory and practice from teachers who are only theoreticians with little understanding of the interaction of theory and practice. As we have seen, complaints about the quality of professional preparation at law schools among their graduates are prevalent and may, in turn, be explained by the prevalence of the theoretician in legal education.

Whatever the value of creating within the academy repositories for theoretical scholarship unconnected to the practice of law, as we have seen, the vast majority of law students devote considerable time and money to law school on the understanding that they will obtain marketable skills. Surely law schools have some obligation to provide faculties capable of imparting those skills—anything else is a species of consumer fraud. The fact that our leading law schools have on their faculties individuals who claim to be able to teach students to practice law, but in fact cannot provide their own clients with defensible legal advice and may well be incapable of teaching their students how to do so, suggests that something has gone very wrong in the legal academy.

Perhaps it is time for a change.