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1. *See* Adam Liptak, *The Reach of War: Penal Law; Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14.

2. U.S. Dep't of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf [hereinafter OLC Interrogation Conduct Memo].

3. For a small sampling of references to the OLC Interrogation Conduct Memo as the "torture memo," see Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1072 (2008); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 188 n.470 (2008); David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 478–79 (2008); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68 (2005).

already been specifically authorized to do."[12] Nor is such skepticism limited to "liberal" critics.[13] Yoo himself has argued that the superseding OLC memorandum on torture was "basically the same" as the one he authored, but without the advantage of "the bright lines the 2002 memo attempted to draw."[14]

In this Article, drawing upon recent books that John Yoo and Jack Goldsmith have written about their work in OLC,[15] I analyze the specific condemnation that Yoo's work is not just substantively flawed, but also unethical and unprofessional in putting forth a piece of written advocacy as opposed to a neutral analysis. The latter criticism assumes, however, that neutral analysis not only exists but would be recognized as correct in all instances by liberals and conservatives. Given the indeterminate nature of law, this assumption cannot be valid in all instances. I analogize the OLC-Attorney General relationship to that between law clerks and judges, and use one case study (*Teague v. Lane*)[16] to show that neutral analysis is instead displaced by ideological alignment between subordinate and supervisor. Finally, I conclude that the assertion of ethical or professional conduct standards is unlikely to restrain OLC lawyers the way that critics hope; instead, greater transparency, while not a panacea, is more likely to achieve that result. Therefore, Congress should pass the pending "OLC Reporting Act of 2008" bill.

I. THE OLC, 9/11, AND ANTITERRORISM OPINIONS

Today, when the President requires legal advice in his official capacity,[17] the top two options are the White House Counsel and the

12. Marty Lederman, *Understanding the OLC Torture Memos (Part III)*, BALKINIZATION, Jan. 7, 2005, http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part_07.html. To be clear, Goldsmith did not write the memo that replaced the Yoo/Bybee memo; that was written by Daniel Levin after Goldsmith had left OLC.

13. *See, e.g.*, Douglas W. Kmiec, *Yoo's Labour's Lost: Jack Goldsmith's Nine-Month Saga in the Office of Legal Counsel*, 31 HARV. J.L. & PUB. POL'Y 795, 818 (2008) (challenging Goldsmith's self-assessment of having conferred legal protection to purported terror5u4h arnd askng Ghero8t3 0 TD-0.000s Nine-Month

The White House Counsel—officially, Counsel to the President—on the other hand, sits within the White House. A relatively modern development, the White House Counsel differs from OLC in having a much smaller staff, fewer resources, and a smaller mandate. Instead of providing analytical legal responses to specific inquiries, the White House Counsel serves more generally to monitor potential conflicts of interest within the White House,[23] to help vet judicial and cabinet nominees,[24] and to provide an informal channel between the President and the Attorney General.[25]

A. *The Characters*

On September 11, 2001, OLC was headed by Assistant Attorney General Jay S. Bybee, a former constitutional law professor at Louisiana State University[26] and later the University of Nevada at Las Vegas, who had also served as a Justice Department lawyer and the White House Counsel in the Reagan and Bush Administrations respectively.[27] The Deputy Attorney General in charge of foreign affairs and national security for the office was John Yoo, a law professor on leave from the University of California, Berkeley, where he specialized in constitutional and foreign relations law.[28] John Ashcroft, a former United States Senator, was the Attorney General, and Alberto Gonzales, a former Texas Supreme Court Justice, served as White House Counsel.[29]

Over the next year, Bybee and Yoo authored a number of legal memoranda on topics such as the application of the War Crimes Act and the Geneva Conventions to the global war on terrorism,[30] and the

23. Anthony Saul Alperin, *The Attorney-Client Privilege and the White House Counsel*, 29 W. ST. U. L. REV. 199, 209–10 (2002).

24. *Id.*

25. Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 LAW & CONTEMP. PROBS. 63, 80–81 (1993).

26. PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES 74 (2008).

27. YOO, WAR BY OTHER MEANS, *supra* note 14, at 19–20.

28. *Id.* at 20.

29. Gonzales was later nominated and confirmed to replace Ashcroft as Attorney General. Gonzales resigned in 2007 and was replaced by former federal district judge Michael Mukasey.

30. U.S. Dep't of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf; U.S. Dep't

legal limits on interrogation of suspected al Qaeda and Taliban detainees.[31] These memos collectively provided legal justifications for the Bush Administration's aggressive antiterrorism policies.

President Bush then nominated Bybee in mid-2002 to fill a vacancy on the U.S. Court of Appeals for the Ninth Circuit, and the

was signed by Bybee, but generally understood to have been written by Yoo.[36]

As can be gleaned from the title—"Standards of Conduct for

Recognizing that these statutes did not address torture, the OLC memo nevertheless opined that they provided useful guidance toward interpreting the phrase "severe pain or suffering."[50] The OLC memo concluded that, because emergency benefits would accrue only to those suffering damage "ris[ing] to the level of death, organ failure, or the permanent impairment of a significant body function," torture too would require the infliction of pain "ris[ing] to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."[51]

In its most controversial sections, the OLC Interrogation Conduct Memo discussed potential defenses to violations of section 2340A. In one part, the OLC memo concluded that a criminal statute such as section 2340A could not constitutionally restrict the "President's complete authority over the conduct of war."[52] This conclusion followed from the inherent powers thesis, which John Yoo advanced in an early law review article and developed further in a book published after he left OLC to return to Boalt Hall.[53] Finally, the OLC memo raised the applicability of the necessity defense against 0tc(,2ohn)5.2(Yoo)]TJ0 -C5.2

One avenue of criticism challenged the substantive validity of the legal analysis contained within the memo. The interpretative strategy of defining "severe pain and suffering" as equivalent to that caused by organ failure, for example, was attacked on the ground that the health benefit statutes were hardly analogous to section 2340A;[60] one concerned eligibility for a discretionary government benefit, while the other concerned limits on the government's ability to extract information from detainees. Moreover, even if the health benefit statutes were contextually relevant, the sections relied upon by the OLC memo do not define severe painSneategy g6TJy do notg6TJeppaieted1 327 0.72003 rt0 1169o

Admittedly, it is sometimes difficult to see the difference between this criticism and the merits-based criticism described earlier. For example, the widely circulated "Lawyers' Statement on Bush Administration Torture Memos," while agreeing that a lawyer has a duty to help a client achieve a desired lawful goal, contends that "the lawyer has a simultaneous duty . . . to uphold the law."[64] This argument necessarily rests on an assumption that Yoo and Bybee

Agency's (NSA's) warrantless electronic surveillance,[68] while relying on the Commander in Chief Clause, did discuss the *Steel Seizure Case*.[69] There, the Justice Department argued that the NSA's surveillance program was authorized under the President's inherent powers as augmented by Congress through the September 18, 2001, Authorization for Use of Military Force,[70] thus putting the program into the top category in the *Steel Seizure Case*.[71]

Finally, some critics have argued that, as a government lawyer, Yoo should not have acted as a private lawyer would have. In his written account of his time at OLC, Yoo encapsulates his view of his professional responsibilities as a government lawyer in a single sentence: "What the law forbids and what policy makers choose to do are entirely different things, and analyzing the laws is what the Department of Justice and the OLC exist to do."[72] Goldsmith's expressed view is similar:

> When appropriate, I put on my counselor's hat and added my two cents about the wisdom of counterterrorism policies. But ultimately my role as the head of OLC was not to decide whether these policies were wise. It was to make sure that the policies were implemented lawfully. . . . OLC's ultimate responsibility is to provide information about legality, regardless of what morality may indicate, and even if harm may result.[73]

Critics disagree, contending that private lawyers are free to construct non-frivolous arguments to support their clients' desired lawful goals; government lawyers, however, have a duty to provide their best assessment of the law, even if it does not support their

68. For a more detailed account of the NSA program based on Pulitzer Prize winning journalism, see ERIC

degree of independence from political leaders; (2) just as prosecutors have a duty to see that justice is done (as opposed merely to securing a conviction), so too do government lawyers; and (3) elected government lawyers such as Attorneys General or district attorneys answer directly to the public.

A. Government Lawyers and Independence

As Jack Goldsmith explains, OLC has traditionally attempted to maintain a degree of independence from the White House; faced with the pressure of bending to the President's will, OLC "developed powerful cultural norms about the importance of providing the President with detached, apolitical legal advice, as if OLC were an independent court inside the executive branch."[79] This position is perhaps best articulated by a group of former OLC lawyers (largely from the Clinton Administration) who wrote in 2004, that "OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desirable policies."[80] Boalt Hall Dean Christopher Edley put it another way; even as he defended Yoo against calls for firing, Edley stated that "government lawyers have a larger, higher client than their political supervisors; there are circumstances when a fair reading of the law must—perhaps as an ethical matter?—provide a bulwark to political and bureaucratic discretion."[81]

Yet, even as Goldsmith indicated agreement with and approval of the OLC's norm of independence, he later described an apparently different mindset:

> Michael Hayden, former NSA Director General and now the Director of the CIA, would often say that he was "troubled if [he

To be clear, Goldsmith's rhetorical point was that, despite his intention to "live on the edge" and to get "chalk" on his "spikes," he could not prepare a legal opinion justifying the Bush Administration's desire to strip Iraqi nationals of Geneva Convention protection, notwithstanding apparent membership in the terrorist group al Qaeda in Iraq. Substantively, this suggests how extreme of a position Vice President Cheney and his Chief of Staff, David Addington, were pushing. Nonetheless, the expressed mindset here was that Goldsmith wanted to find a way to justify the President's course of action and that he would have done so if he could have stayed on the chalk, so to speak.

Criticism of John Yoo must take into account the fact that he was a political appointee, not a career lawyer within OLC. Dean Edley's observation that "government lawyers have a larger, higher client than their political supervisors" seems to gloss over Yoo's actual status; he was hired to help carry out the Bush Administration's legal agenda.[83] Of course, even political appointees cannot be totally dependent on the political officials; Goldsmith, for example, wanted to justify Cheney and Addington's conclusion regarding Iraqi insurgents, but was unable to do so.

OLC is not the only sub-department to face this tension between political appointments and independence; so too does the Solicitor General's Office, which represents the United States before the Supreme Court. A consistent theme through Lincoln Caplan's account of the Solicitor General's Office, *The Tenth Justice*,[84] is the "paradox" of independence that an executive branch lawyer needs to exhibit even as he or she "serve[s] at the pleasure of the President."[85]

But it is hardly clear that this kind of "independence" was at issue in Yoo's execution of his duties. For example, one of the more notable instances of White House interference with the Solicitor General's Office took place during the *Bob Jones University* case.[86] Bob Jones University, a private school offering fundamentalist Christian-based instruction for kindergarten through graduate school students, lost its non-profit tax-exempt status in 1970 because it violated an IRS regulation stating that private schools with racially

discriminatory policies were not "charitable" entities within the meaning of section 501(c)(3) of the Code;

execute the laws [but] must execute them by the assistance of subordinates."[108] Thus, in that case, the Court struck down a statute that conditioned the President's firing of federal postmasters on the Senate's consent, because the President must be able to "remov[e] those for whom he cannot continue to be responsible."[109] The linchpin of the Court's reasoning was the foundation of what has been called the "unitary executive":

> [T]he discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. . . . The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them, he must have the power to remove him without
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[112] The Court distinguished *Myers* on the ground that the Postmaster was "merely one of the units in the executive department and, hence, inherently

The FTC, on the other hand—being an administrative agency "created by Congress to carry into effect legislative policies embodied in the statute"—"acts in part quasi-legislatively and in part quasi-judicially," and therefore must be insulated from the President.

The most recent pronouncement on the inde

appointed lawyers comes from in which the Court upheld, by an 8–1 vote, the constitutionality of the independent counsel established by the Ethics in Government Act of 1978bi..4(01 Tw8 Tw)0432.36 302.58 Tmj0

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Attorney General Elliot Richardson

and Deputy Attorney General William Ruckelshaus resigned rather than carry out President Nixon's order to fire Watergate Special Prosecutor Archibald Cox.[117] Solicitor General Robert Bork then stepped up as Acting Attorney General and fired Cox.[118] Cox's firing set off a furor that galvanized the effort to impeach President Nixon; years later, the Senate failed to confirm Bork's appointment to the Supreme Court in part because of lingering questions about his judgment in light of his actions that Saturday night.[119] Cox was subject to summary dismissal because he held an ad hoc position as a special prosecutor and served at the pleasure of the Attorney General, who appointed him. Accordingly, Congress lodged the power to appoint the independent counsel with a panel of federal judges selected by the Chief Justice of the Supreme Court.[120] Congress further provided that the independent counsel could be removed from office by the Attorney General only for cause.

The Court concluded that the "good cause" removal restriction did not impermissibly infringe on the President's constitutional duty to execute the laws, essentially because the independent counsel's duties were sufficiently limited so as not to require the President's "control [of] the exercise of [her] discretion."[121] *Myers* was different, the Court explained, because there Congress was seeking to aggrandize itself at the President's expense; here, there was no indication that Congress itself sought to exercise removal power over the independent counsel.[122] In a prophetic but lonely dissent, Justice Scalia argued that the independent counsel was a potential source of extreme mischief and that the Framers intended the executive branch to be unitary, answering only to the President: "[W]hen crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable

117. *See* BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS 69–70 (1976).

118. *See* Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*

sense of proportion, the President pays the cost in political damage to his administration."[123]

Whether or not *Morrison* was correctly decided, it deals with a significantly differently situated government lawyer than an OLC attorney. The independent counsel, though an inferior officer in the executive branch, stood essentially in an adversarial position; indeed, the very justification for the independent counsel was the need to remain free from undue influence and pressure by the President and the Attorney General. If the independent counsel was not protected from dismissal except for cause, then she would be superfluous, since the Attorney General could do exactly what the independent counsel could do: investigate possible wrongdoing in the executive branch, subject to being dismissed without cause by the President.

OLC lawyers, by contrast, do not investigate alleged executive branch wrongdoing; rather, they are in the business of giving legal advice to federal agencies and executive branch officials. The relationship between OLC lawyers and the executive branch is thus intimate, not adversarial, and *Morrison*'s endorsement of the independent counsel's independence from the President need not dictate similar independence on the part of OLC lawyers.

III. LAW CLERKS AND JUDGES

Although demonstrably different from the relationship between OLC lawyer and the White House in some important ways, the relationship between law clerk and judge provides some further insight into the complicated nature of subordinate "independence" and the normative judgment that government lawyers should serve the public interest, not tionship e(latiS57 ause, then)4 397.56 Tm-0.001 Tc Law C la005Iat the Prs, orris

"judicial ghostwriter[s]" on legal opinions.[125] Though law clerks are not the secret brains behind the Justices, they "are not merely surrogates or agents," and arguably clerks are playing too large a role in "judging."[126]

In *Closed Chambers*, his controversial exposé of the Supreme Court,[127] former Justice Blackmun law clerk Edward Lazarus described a bitter divide between liberal and conservative law clerks (the latter having organized themselves in a "cabal") during the 1988–1989 term that largely mirrored the divide between the Justices.[128] Lazarus' account of the in-Court evolution of the *Teague* doctrine best illustrates the law clerk-Justice dynamic.

In *Teague v. Lane*,[129] the Court held that "new" rules of criminal procedure would not apply retroactively to benefit habeas petitioners.[130] Prior to *Teague*, the Court had decided whether a criminal procedure decision would apply retroactively—that is, to prisoners who could have, but generally failed to have, raised the issue in their own appeals, and now sought to benefit in post-conviction proceedings—on an ad hoc basis. For example, after the Court decided in *Mapp v. Ohio*[131] to enforce the exclusionary rule in state court convictions, it held in *Linkletter v. Walker*[132] that state prisoners who had been subjected to unconstitutional searches could not claim the benefit of the exclusionary rule. In other words, *Mapp* was not retroactive. More generally, whether a given decision would apply retroactively would depend on the application of a three-factor test.[133] A few years later, Justice Harlan came to decry the Court's retroactivity jurisprudence as inconsistent and arbitrary, with some

criminal procedure decisions fully retroactive for cases still on direct appeal, and, with two narrow exceptions, non-retroactive for cases on collateral review. Not until 1987, however, did the Court adopt the first part of Justice Harlan's proposal in *Batson v. Kentucky.*[135]

According to Lazarus, a conservative law clerk named Andrew McBride came up with the idea of using Teague's case as the vehicle to implement the second part of Justice Harlan's proposal—the non-retroactivity rule for habeas cases.[136] Justice O'Connor, for whom

one's underlying beliefs about the purpose of habeas corpus will heavily influence how one thinks the problem should be addressed. Those who believe that federal courts are inherently superior to state courts at deciding questions of federal law will be inclined to view the non-retroactivity rule as an unnecessary procedural roadblock. On the other hand, those who believe that state courts are equivalent to federal courts, or at least adequate, at resolving federal questions, will be likely to see the *Teague* rule as reinforcing the "Legal Process" school of thought.[140] Unless one can persuasively argue that the parity debate can be settled one way or the other,[141] it seems impossible to maintain that the non-retroactivity rule is "best" or "worst" as a baseline principle.[142]

Once we accept that judges can legitimately differ on basic legal philosophies, the question turns to whether judges screen law clerk applicants on their legal philosophies. One federal appellate judge has written that "[m]ost judges will not screen for ideology,"[143] and a survey of federal district judges suggested the same indifference to ideology.[144] At the Supreme Court level, however, the evidence appears otherwise,[145] particularly given the rise of "feeder" judges who send ideological clerks to like-minded Justices.[146] One empirical study found "remarkable congruence" between the ideological

140. The classic argument is set forth in Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

141. *Cf.* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 273 (1988) (suggesting that "[a]lthough parity is an empirical question, no empirical answer seems possible").

142. I say "as a baseline principle" to mean the general concept of having a gatekeeping doctrine to cut off claims from prisoners seeking habeas review of their convictions based on new Court decisions. I do not mean the specific execution of the gatekeeping doctrine in the form of *Teague*, which, of course, one could criticize on various doctrinal grounds. *See generally* Yin, *supra* note 138.

143. Ruggero J. Aldisert et al., *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN ST. L. REV. 835, 846 (2006).

144. Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 634 (2008) (noting result of survey of district judges ranking "political ideology" as the least important factor in hiring).

145. *See* TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT

lawyer-Attorney General. Thus, even if OLC attempts to provide advice as if it were an independent court within the executive branch, the fact that judges can have legitimately different judicial philosophies and, in turn, select law clerks in part based on compatibility with those philosophies suggests that independence in this context may be narrower than expected.

B. Law Clerks Versus OLC Lawyers

Still, law clerks are not OLC lawyers, and judges are not political cabinet heads. The differences between law clerks and OLC lawyers are worth exploring to understand the limits of the analogy.

1. Experience and Expertise

OLC lawyers are generally elite lawyers who have completed prestigious clerkships and have experience in federal statutory and constitutional analysis.[151] The political appointees in OLC during the early Bush Administration—Yoo, Bybee, and Goldsmith—were all tenured law professors with expertise not just in constitutional law but also foreign relations. Law clerks, on the other hand, often have had no legal experience apart from internships over the summer or during the school year, although some, including those at the Supreme Court, have had a prior year of clerking. Accordingly, one could argue that the OLC lawyer is entitled to a greater degree of independence than is the law clerk, who, after all, is writing a bench memorandum only for use in chambers.

This distinction is certainly important when it comes to determining how free the supervising entity (i.e., the Attorney General or the federal judge) should feel about overriding the subordinate's written analysis and recommendation. The Attorney General (and President) should be wary of overruling OLC, since it is

and thereby produce bench memos that reinforce the judge's viewpoint.

2. Binding Effect of Opinion

decide whether to do so. The OLC lawyer, on the other hand, may feel more constrained because the opinion that he or she writes will be, absent overruling by the Attorney General, the end result that dictates the legal boundaries of action for a government agency.

That there may be more normative constraints on the OLC lawyer's freedom to experiment with legal doctrine and theory, however, does not mean that the OLC lawyer has no freedom at all to do so. Moreover, the OLC lawyer's prior experience may well mean that the OLC lawyer feels more certain and less experimental about his or her legal conclusions than would a law clerk.

IV. IMPLICATIONS: TRANSPARENCY TO THE RESCUE?

My analysis undoubtedly has a pessimistic edge: ethical or professional conduct restraints are not likely to be successful restraints on OLC lawyers, because those lawyers will either not recognize or not agree as to the applicability of the ethical restraints. If anything, presidential administrations that are most in need of having their policy preferences tempered by cautious legal analysis are least likely to get such analysis if they are intent on hiring like-minded lawyers to fill the political positions in OLC. Even if one accepts the "bad Yoo, good Goldsmith" narrative, one must keep in mind that Goldsmith left OLC after only nine months.[157]

Recent research by Dan Kahan and Donald Braman may shed some light on the nature of the problem. According to Kahan and Braman, the cultural division of the country into "red states" and "blue states" is reflected in a heuristic bias where voters, among others, process information about public policy matters through their "cultural commitments."[158] As a result, voters not only look to experts or other public figures with whom they agree about cultural values, they accept or discount empirical data based on whether it conforms to or conflicts with those same cultural values.[159] Since law is at its heart a humanities-based, as opposed to science-based, discipline, the persuasiveness of legal analysis is not capable of absolute determination of being "right" or "wrong." This means that

157. *See* Kmiec, *supra* note 13, at 824 (questioning what Goldsmith was able to accomplish in those nine months in terms of altering the Bush Administration's substantive policy).

158. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 151 (2006).

159. *Id.* at 150.

incentive to engage in consultation with government lawyers in other agencies with primary or overlapping jurisdiction over the subject matter at hand; in the case of the OLC Interrogation Conduct Memo, for example, circulation of the draft version of the memo to Justice Department lawyers might have alerted OLC to some of the substantive criticisms that were subsequently leveled. This is not to say that OLC would necessarily feel obligated to accept conflicting suggestions from other agencies, particularly if those suggestions would alter the ultimate conclusion. However, the input of other agencies may well impact the content of the analysis.

By way of example, as noted above, the OLC Interrogation Conduct Memo did not cite, much less discuss the *Steel Seizure Case*. Had the memo received input from other agencies and had the absence of the *Steel Seizure Case* been raised, the memo may well have been rewritten to incorporate that observation. The ultimate conclusion may have remained the same, as OLC could have argued that, given the AUMF, the President's ability to order coercive interrogation lay in the top *Steel Seizure Case* category, as opposed to the bottom category. However, the analysis arguably would have been evenhanded in alerting the reader to the existence of potentially adverse authority.

CONCLUSION

The OLC has enjoyed a stellar reputation based not just on the impressive quality of lawyers who have populated the office, but also its internal ethos of providing the "best" legal advice to executive branch clients. Yet, for issues of first impression, OLC, like law clerks and judges, may not be able to give an obviously "correct" answer. Therefore, one cannot expect notions of professional responsibility and lawyerly obligations to the "public" to guard against the issuance of substantively disagreeable OLC opinions such as the OLC Interrogation Conduct Memo. Indeed, identifying exactly what was unprofessional or unethical—as opposed to unpersuasive or downright wrong—about the drafting of the OLC Interrogation Conduct Memo, when assessed against a case study of *Teague v. Lane*, turns out to be challenging. Greater transparency in the form of disclosure of OLC opinions, as called for by the OLC Reporting Act, while not a panacea, appears more likely to achieve the goal of curbing excessively pro-executive branch opinions.