Chairman Whitehouse,

Thank you for inviting me to submit written testimony about Torture and the Office of Legal Counsel (OLC) in the Bush Administration.

In this testimony, I will focus on the legal ethics implications of the Aug. 1, 2002 legal memorandum regarding “Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,” (hereinafter Bybee-Gonzales Memorandum)\(^1\) which was written in response to White House Counsel Alberto Gonzales’ request for legal advice about the scope of the torture statute. Deputy Assistant Attorney General John Yoo drafted the memorandum, and Assistant Attorney General Jay Bybee signed it.\(^2\)

In the testimony below, I will show that two legal assertions in this memorandum are grossly inaccurate. Then I will discuss the legal ethics implications of these inaccuracies.\(^3\)

Substantive Inaccuracies in the Memorandum

In this section, I will discuss two key inaccuracies in the legal memorandum: its assertion that the torture prohibition is narrow in scope and its claim that the President can authorize torture despite the criminal prohibition.

The memorandum asserts that the federal criminal statute prohibiting torture is very narrow in scope, applying only where a government official specifically intends to and actually causes pain so severe that it "rises to . . . the level that would ordinarily be associated with . . . death, organ failure, or serious impairment of body functions."\(^4\) This claimed standard is bizarre for a number of reasons. In the first place, organ failure is not necessarily associated with pain at all. In addition, this legal standard is lifted from a statute wholly unrelated to torture -- a Medicare statute setting out the conditions under which hospitals must provide emergency medical care.\(^5\) That statute mentions severe pain as one possible indicator that a person is in a condition calling for such care, and defines "emergency medical condition" as one in which failure to provide medical care could result in "serious jeopardy" to an individual's health, "serious impairment to bodily functions," or "serious dysfunction of any bodily organ or part." The Bybee-Gonzales Memorandum twists this legal standard, and asserts that "severe pain" occurs only in connection with a "serious physical condition or injury such as death, organ failure, or serious impairment of body functions."\(^6\) It purports to give interrogators wide latitude to cause any kind of pain short of that kind of severe pain.

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\(^1\) This memorandum was made public by the Washington Post in June of 2004, and can be found at http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.
\(^2\) John Yoo, Behind the 'Torture Memos'; As Confirmation Hearings Near, Lawyer Defends Wartime Policy, San Jose Mercury News, Jan. 2, 2005, at 1P (acknowledging that he "helped draft" the Bybee-Gonzales Memorandum); Toni Locy & Joan Biskupic, Interrogation Memo To Be Replaced, USA Today, June 23, 2004, at 2A (identifying Yoo as "the memo's principal author").
\(^3\) This testimony is based in part on my article, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NATIONAL SECURITY L. & POL’Y 455 (2005).
\(^4\) Bybee-Gonzales Memorandum at 6.
\(^6\) Bybee-Gonzales Memorandum at 6.
Another major inaccuracy is found in the memorandum's discussion of presidential authority. The Bybee-Gonzales Memorandum asserts that the President can, at least under some circumstances, authorize torture despite the federal criminal statute prohibiting it.\(^7\) This position is based on an expansive view of inherent executive power, but the memorandum does not even mention - let alone address - *Youngstown Sheet & Tube Co. v. Sawyer*, the leading Supreme Court case on this aspect of separation of powers.\(^8\) *Youngstown*, which invalidated President Truman's seizure of the nation's steel mills during the Korean War, seriously undermines any claim of unilateral executive power. The Bybee-Gonzales Memorandum does not even acknowledge that the Constitution explicitly grants to Congress the powers to define "Offences against the Law of Nations; . . . make Rules concerning Captures on Land and Water; . . . [and] make Rules for the Government and Regulation of the land and naval Forces,"\(^9\) all of which suggest that Congress was well within its constitutional authority in banning torture.

On both of these points -- the threshold of pain that constitutes torture and unilateral executive power -- the Bybee-Gonzales Memorandum presents highly questionable legal claims as settled law. It does not present either the counter arguments to these claims or an assessment of the risk that other legal actors - including courts - would reject them. The legal analysis in this memorandum was so indefensible that it could not -- and did not -- withstand public scrutiny. Press reports about and excerpts from the memorandum began to surface in early June, 2004, and there was a wave of criticism.\(^10\) The Justice Department resisted congressional pressure to turn over the memorandum, insisting that the President had a right to confidential legal advice.\(^11\) When The Washington Post posted the complete text of the memorandum on its Web site, the wave of criticism turned into a flood.\(^12\) Eight days later, the Bush administration disavowed the memorandum.\(^13\)

**Ethical Analysis of the Bybee-Gonzales Memorandum**

The substantive inaccuracies in the Bybee-Gonzales Memorandum are so serious that they implicate the legal ethics obligations of its authors. In analyzing the legal ethics issues, it is important to make three preliminary observations. First, lawyers who work for the federal government are subject to state ethics rules. Under the McDade Amendment,\(^14\) federal government lawyers must comply with state ethics rules in the states where they represent the government, so both Jay Bybee and John Yoo were subject to the D.C. Rules of Professional Conduct.

Second, these OLC lawyers had as their client an organization - the executive branch of the United States government - rather than any individual officeholder.\(^15\) Although White House Counsel Alberto Gonzales requested the Bybee-Gonzales Memorandum, he was not the client. Instead, he was simply a constituent of the organizational client. Ordinarily, lawyers must accept the decisions made by such constituents when those constituents are authorized to act on behalf of the organization. But where a

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\(^7\) Bybee-Gonzales Memorandum at 31-39.
\(^8\) 343 U.S. 579 (1952).
\(^9\) U.S. Const. art. I, 8, cls. 10, 11, 14.
\(^13\) See Mike Allen & Susan Schmidt, Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible, Wash. Post, June 23, 2004, at A1; Locy & Biskupic, supra note 15 (quoting a Justice Department official as saying, "We've scrubbing the whole thing . . . . It will be replaced.").
lawyer knows that a constituent is acting illegally and that conduct could be imputed to the organization, the lawyer must take action to prevent or mitigate that harm. Where the constituent can exercise control over the lawyer's future career, taking such action may jeopardize the lawyer's advancement. Nevertheless, the legal ethics rules require lawyers to take action to protect entity clients from harm committed by their constituents.

Third, in analyzing the performance of the lawyers who wrote the Bybee-Gonzales Memorandum, it is important to determine whether they were acting as legal advisors or as legal advocates. Different ethics rules apply to these two distinct functions. The role of the lawyer as an advocate before a tribunal is a familiar one. In that role, the lawyer may make any legal argument as long as it is not frivolous. Her only obligation of candor regarding legal argument is that if her opponent fails to mention directly adverse controlling authority, she must bring it to the tribunal's attention. When a lawyer gives legal advice, on the other hand, she has a professional obligation of candor toward her client. One finds this obligation in Rule 2.1, which states that in representing a client, "a lawyer shall . . . render candid advice." In advising a client, the lawyer's role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible. The lawyer must not simply tell the client what the client wants to hear, but instead must tell the client her best assessment of what the law requires or allows. Similarly, Rule 1.4(b) requires a lawyer to explain the law adequately to her client, so that the client can make informed decisions about the representation.

In giving legal advice, a lawyer may provide advice that is contrary to the weight of authority, spinning out imaginative legal theories for the client to use. When doing so, however, the candor obligation requires the lawyer to inform the client that the weight of authority is contrary to that advice, and that other legal actors may come to the opposite conclusion. A lawyer who fails to warn a client about the possible illegality of proposed conduct has violated her professional obligations. If a lawyer inaccurately advises a client that proposed illegal action is legal, she harms the client. A client may want to hear that conduct she wants to engage in is legal, but the client may face serious long-term consequences for such illegal conduct. While a client can choose to act illegally, the consequences of illegal conduct should not come as a surprise to the client. Just as a patient can take action that is contrary to medical advice, a client can take action even though it is against the law. But such a decision should not be accompanied by his lawyer's false assurance that the conduct is legal.

The harm to the client from failing to advise about the illegal character of proposed conduct may be even greater when the client is an entity rather than an individual. Indeed, a lawyer working for an entity client has an enhanced obligation to guard the interests of the entity against wrongdoing by the entity's constituents.

The Bybee-Gonzales Memorandum purports to offer legal advice. Its authors, Jay Bybee and John Yoo, had an obligation to be candid with their client, the executive branch. The constituent who requested the memorandum, then White House Counsel Alberto Gonzales, may have wanted a particular answer to his questions about the torture statute. But the OLC lawyers had a professional obligation to give accurate legal advice to their client, whether or not the client's constituent wanted to hear it. Based on the available facts, it appears that Bybee and Yoo failed to give candid legal advice, violating D.C. Rule 2.1, and that they failed to inform their client about the state of the law of torture, violating D.C. Rule 1.4.

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16 D.C. Rule 2.1.
17 Comment 1 to D.C. Rule 2.1 states that "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."
18 D.C. Rule 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."
20 D.C. Rule 1.13.
Legal Uncertainty and Second-Guessing

The legal ethics issue with respect to the Bybee-Gonzales memorandum is not simply whether the memorandum got the law wrong. Other OLC memoranda have made legal claims that courts have later rejected, and yet there is no issue about whether the authors of those memoranda violated their ethical obligation to give candid legal advice.

For example, during the fall of 2001, when the George W. Bush administration wanted to imprison and interrogate alleged al Qaeda members in a place insulated from the supervision of United States courts, the Defense Department asked the Justice Department's OLC whether federal courts would entertain habeas corpus petitions filed by prisoners at the Naval Base at Guantanamo Bay, Cuba, or whether they would dismiss such petitions as beyond their jurisdiction.

On December 28, 2001, OLC responded with a thorough and balanced analysis of how the federal courts were likely to resolve the jurisdictional question. The memorandum explained the arguments against such jurisdiction, but it also explored possible strengths in the opposing position. The memorandum predicted that federal courts would not exercise jurisdiction but explained the risk of a contrary ruling. Acting in reliance on this memorandum, the government started imprisoning and interrogating alleged al Qaeda members at Guantanamo the following month, cognizant of the risk that a federal court might find habeas jurisdiction.

In 2004, the Supreme Court considered habeas corpus claims by prisoners at Guantanamo, and reached a result contrary to that predicted by the Justice Department memorandum, ruling that the district court did have jurisdiction. The fact that the Court came to a different conclusion than that advanced by OLC does not, however, mean that the OLC attorneys failed to fulfill their professional obligations to their client. The authors appropriately explained the risk of an adverse decision, and they provided enough information for the client to understand that risk and make decisions accordingly.

Whenever a lawyer offers a legal opinion, there is always a possibility that other legal actors will take a contrary view. If that risk is substantial and the lawyer apprises the client of the magnitude of that risk, the lawyer has adequately advised and informed the client. Even if a court later disagrees with the lawyer’s opinion, that does not mean that the lawyer failed to fulfill her professional obligation to her client. As long as the lawyer explained the risk of an adverse decision and provided enough information for the client to understand that risk, the lawyer has fulfilled her obligations to candidly advise and adequately inform her client. That is where the Bybee-Gonzales memorandum fails.

Accountability for the OLC Lawyers

Lawyers at the Office of Legal Counsel played a key role in the Bush Administration’s decisions about the treatment of captured al Qaeda prisoners. Their inaccurate statements about the criminal prohibition on torture may have contributed to the torture of these prisoners. These inaccuracies are so glaring that these lawyers appear to have violated their professional duty to candidly inform their client of the law. The authors of this memorandum should be held accountable for their conduct.

Last year, bar authorities dismissed an ethics complaint against one of these lawyers, noting that “[m]any of the witnesses and documents relevant to an investigation into his conduct are beyond the subpoena power of this office.” This week, news reports indicate that additional ethics charges are

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23 I Geoffrey C. Hazard, Jr. & William W. Hodes, The Law of Lawyering 3.2, at 3-5 (3d ed. 2001) (“A thoughtful opinion on a difficult or unsettled question is not incompetent even if it later proves to have been wrong. . . . On the other hand, . . . failure to ascertain readily accessible precedents . . . may . . . be a violation[] of [Model] Rule 1.1.”)
being filed against Yoo, Bybee and other Bush Administration lawyers. If bar authorities are going to investigate these charges, they will need access to information about what these lawyers did.

Congress can play an important role in ensuring that these lawyers are held accountable. By investigating and disclosing information about what these OLC lawyers did, Congress can help ensure that bar authorities will have access to the information they need to determine whether John Yoo and Jay Bybee complied with their professional obligations.

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