

# Lochner for the Executive Branch: The Torture Memo as Anticanon

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During Attorney General Michael Mukasey's 2007 confirmation hearing, the nominee was asked about the infamous August 1, 2002 "torture memo" issued by the Office of Legal Counsel (OLC).<sup>1</sup> Mukasey could have anticipated the question. Since the torture controversy erupted in 2004, it seems that any discussion of the OLC inevitably turns to the torture memo.<sup>2</sup> Mukasey responded that the memo was "worse than a sin, it was a mistake."<sup>3</sup> Senator Patrick Leahy then asked, "Would it be a safe characterization of what you just said that you repudiate this memo as not only being contrary to law but also contrary to the values America stands for?"<sup>4</sup> Mukasey replied affirmatively.<sup>5</sup>

Mukasey's unequivocal statements echoed a consensus viewing the memo as executive branch lawyering gone wrong.<sup>6</sup> This article aims to

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<sup>1</sup> Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Memorandum], available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>.

<sup>2</sup> See, e.g., Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 21, 2011, at A27; Jack Balkin, *George W. Obama and the OLC*, BALKINIZATION (June 18, 2011, 8:35 AM), <http://balkin.blogspot.com/2011/06/george-w-obama-and-olc.html>; Noah Feldman, *Obama Team's Al-Awlaki Memo Furthered Bush Legacy*, BLOOMBERGVIEW (Oct. 16, 2011, 8:01 PM), <http://www.bloomberg.com/news/2011-10-17/obama-team-s-al-awlaki-memo-furthered-bush-legacy-noah-feldman.html>; Dawn Johnson, *Different Kinds of Wrong: The Difference Between Obama's Libya Policy and Bush's Torture Policy*, SLATE (July 5, 2011, 6:17 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/07/different\\_kinds\\_of\\_wrong.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/07/different_kinds_of_wrong.html); Mary Ellen O'Connell, *Killing Awlaki Was Illegal, Immoral, and Dangerous*, CNNWORLD (Oct. 1, 2011, 3:48 PM), <http://globalpublicsquare.blogs.cnn.com/2011/10/01/killing-awlaki-was-illegal-immoral-and-dangerous/>; Eric Posner, *Stop Complaining About Harold Koh's Interpretation of the War Powers Act*, NEW REPUBLIC (July 1, 2011, 12:00 AM), <http://www.tnr.com/article/politics/91166/harold-koh-war-powers-john-yoo-libya>; Andrew Rosenthal, *Recess Appointments and Partisan Politics*, N.Y. TIMES: TAKING NOTE (Jan. 13, 2012, 12:03 PM), <http://takingnote.blogs.nytimes.com/2012/01/13/recess-appointments-and-partisan-politics/>; Ilya Somin, *Obama, the OLC, and the Libya Intervention*, VOLOKH CONSPIRACY (June 21, 2011), <http://volokh.com/2011/06/21/obama-the-olc-and-the-libya-intervention/>.

<sup>3</sup> *Confirmation Hearing on the Nomination of Michael B. Mukasey to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 100 (2007) [hereinafter *Mukasey Hearing*].

<sup>4</sup> *Id.* at 101.

<sup>5</sup> *Id.*

<sup>6</sup> See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1690–91, 1727–28 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)) (collecting sources criticizing the torture memo); cf. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 390–91 (2011) ("Any [judicial] decision a [Supreme Court] nominee is willing to repudiate is likely to be one that a large number of well-informed and politically attuned lawyers believe it safe to repudiate.").

show that the simple consensus masks an underlying complexity. Although there is broad agreement that the memo was an error, there is little consensus on why the error occurred and what can be done to prevent similar errors in the future.<sup>7</sup> Moreover, there is evidence of ambivalence towards the memo that contradicts the widespread and unequivocal condemnation illustrated by Attorney General Mukasey's statements.

In these two respects, the torture memo resembles what constitutional law scholars have labeled the "anticanon": Supreme Court decisions considered to be not just wrongly decided, but horribly wrongly decided, examples of how not to do constitutional law.<sup>8</sup> Anticanons are tools of legal argument used to characterize another's argument as wrong. They represent the views of a community toward certain ethical propositions. Similarly, the torture memo has become a tool that enables discourse and debate about the role of the OLC and, more broadly, reinforces the shared ethical principle that the executive branch should be constrained by law.

Part I sets out the essential background on the torture memo. Part II draws on recent literature to describe what an anticanon is and what sets it apart from other decisions that are considered wrongly decided. Part III shows that the torture memo in critical respects resembles an anticanon. Part IV explores the implications of the torture memo as anticanon.

## I. BACKGROUND

The attacks of September 11, 2001, and the ensuing military action in Afghanistan set off a "flurry of legal activity."<sup>9</sup> The White House requested, and the OLC delivered, many opinions analyzing the rights of Taliban, civilian, and Al-Qaeda detainees, both on the battlefield and at the new prison at Guantanamo Bay Naval Base, Cuba.<sup>10</sup>

On August 1, 2002, the OLC issued an opinion written by Deputy Assistant Attorney General John Yoo and signed by Jay Bybee, the Assistant

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<sup>7</sup> It is important to distinguish between two questions: "What was the error?" and "Why did the error occur?" The "what" issue is an important one that implicates questions regarding how the OLC should approach issues of statutory interpretation and constitutional analysis. See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006). There is not yet consensus on exactly what the analytical errors were in the torture memo or which errors were worse than others. See Memorandum from David Margolis, Assoc. Deputy Att'y Gen., to Eric Holder, Att'y Gen., 27-59 (Jan. 5, 2010) [hereinafter Margolis Memorandum], available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf> (describing differing views regarding the Bybee Memorandum's analytical errors). To the extent we can separate the "what" from the "why," this article is concerned with the latter.

<sup>8</sup> See generally J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

<sup>9</sup> W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 77 (2005).

<sup>10</sup> See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 23-24 (2007).

Attorney General in charge of the office.<sup>11</sup> The memo analyzed which interrogation methods were prohibited by a statute implementing the Convention Against Torture.<sup>12</sup> The statute criminalizes “torture,” defined as acts “specifically intended to inflict severe physical or mental pain or suffering” upon another person.<sup>13</sup> The memo concluded that torture includes only methods producing pain equivalent to “serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function would likely result.”<sup>14</sup> The memo further argued that, even if the statute does bar certain interrogation methods, it is unconstitutional insofar as it “interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants.”<sup>15</sup> Finally, the memo described defenses to a torture charge, concluding that potential defendants could likely raise necessity and self-defense claims.<sup>16</sup>

John Yoo and Jay Bybee left the OLC in 2003. Bybee’s replacement, Jack Goldsmith, concluded that the August 1, 2002, memo was wrong and needed to be withdrawn and replaced.<sup>17</sup> To Goldsmith, the memo was overbroad, engaged in shoddy statutory interpretation, adopted a tendentious tone, and relied on “cursory and one-sided legal arguments”<sup>18</sup> in reaching an “extreme”<sup>19</sup> position on wartime presidential power.<sup>20</sup> While Goldsmith was reviewing the memo, the Abu Ghraib photos leaked, shortly followed by the interrogation opinions themselves, igniting a firestorm of public criticism.<sup>21</sup> In 2004, Daniel Levin, Goldsmith’s replacement, completed the process of officially withdrawing and replacing the memo.<sup>22</sup>

Levin’s replacement memorandum was sharply critical of the memo. In noting that “questions” had been raised about the memo’s analysis, Levin cited to a *New York Review of Books* article that accused the memo of reading “like the advice of a mob lawyer to a mafia don on how to skirt the law

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<sup>11</sup> Bybee Memorandum, *supra* note 1. This memo is not the only controversial OLC opinion from this period, but it is the one that has received the most attention and analysis.

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

<sup>13</sup> 18 U.S.C. §§ 2340(1), 2340A(a).

<sup>14</sup> Bybee Memorandum, *supra* note 1, at 13.

<sup>15</sup> *Id.* at 31.

<sup>16</sup> See *id.* at 39–46.

<sup>17</sup> See GOLDSMITH, *supra* note 10, at 146. Goldsmith also withdrew a March 2003 memo approving specific interrogation methods. See *id.* at 143.

<sup>18</sup> *Id.* at 49.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 144–51.

<sup>21</sup> See *id.* at 156; OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T 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 SUSPECT TERRORISTS 2–5 (2009) [hereinafter OPR REPORT], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

<sup>22</sup> See Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att’y Gen. (Dec. 30, 2004) [hereinafter Levin Memorandum], available at <http://news.findlaw.com/cnn/docs/terrorism/doj/torture123004mem.pdf>; see also OPR Report, *supra* note 21, at 110–31 (describing the process of withdrawing and replacing the Bybee Memorandum).

and stay out of prison.”<sup>23</sup> The Levin memo eliminated the discussion of the Commander-in-Chief power and defenses to liability because it “was—and remains—unnecessary” given “the President’s unequivocal directive that United States personnel not engage in torture.”<sup>24</sup> And it “modified in some important respects” the Bybee memo’s statutory interpretation, specifically its interpretation of “severe” pain as “excruciating and agonizing,” its reliance on an unrelated health benefits statute, its conclusion that “severe physical suffering” was not a distinct category from “severe physical pain,” its suggestion that “prolonged mental harm” requires harm to last months or even years, and its assertion that the specific-intent mens rea required that torture be the defendant’s “precise objective.”<sup>25</sup> Although the Levin memo was careful to emphasize the difficulty of the questions presented, its clear implication was that the Bybee memo answered those questions shockingly poorly.<sup>26</sup> Perhaps most damningly, the Levin memo opened with the declaration—unexplained and without citation—that “[t]orture is abhorrent both to American law and values and to international norms,”<sup>27</sup> implying perhaps that the new memo’s intended audience needed reminding of that principle.

## II. ANTICANONS

American constitutional law is defined by a canon—“the set of decisions whose correctness participants in constitutional argument must always assume.”<sup>28</sup> These decisions—*Brown v. Board of Education*,<sup>29</sup> *Marbury v. Madison*,<sup>30</sup> etc.—constrain and guide the development of constitutional law and theory. Any course in constitutional law should teach these cases and any legitimate theory of constitutional interpretation should show them to be rightly decided. Any person who questions the rightness of these cases would likely not be an acceptable judicial nominee.

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<sup>23</sup> *Id.* at 2 n.5 (citing Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, at 1).

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.* at 2, 8 n.17, 10, 14 n.24, 16 n.27; see also Marty Lederman, *Understanding the OLC Torture Memos (Part I)*, BALKINIZATION (Jan. 7, 2005, 9:15 AM), <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.html> (comparing the Bybee and Levin memoranda).

<sup>26</sup> For a comprehensive discussion of the analytical errors of the Bybee Memorandum, see OPR REPORT, *supra* note 21, at 159–226 (describing “errors, omissions, misstatements, and illogical conclusions” in the memorandum).

<sup>27</sup> Levin Memorandum, *supra* note 22, at 1.

<sup>28</sup> Greene, *supra* note 6, at 381. For more on anticanons, see, for example, Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011); Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005); Balkin & Levinson, *supra* note 8; Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

<sup>29</sup> 347 U.S. 483 (1954).

<sup>30</sup> 5 U.S. (1 Cranch) 137 (1803).

American constitutional law pairs its canon with an anticanon.<sup>31</sup> If canonical cases are the Constitution's guiding lights, anticanonical cases are the warning beacons that tell judges and scholars where not to go.<sup>32</sup> The anticanon is composed of cases that are indisputably wrong, that tell us "how the Constitution should not be interpreted, and how judges should not behave."<sup>33</sup> Any legitimate theory of the Constitution must explain these cases as wrongly decided,<sup>34</sup> and judicial nominees are expected to repudiate them.<sup>35</sup>

The anticanon is not simply the opposite of the canon. Canonical cases are themselves law and so directly define legal institutions and rules. In contrast, the anticanon has no obvious function as a source of positive law. Anticanons "lie dormant unless and until someone resolves to use them for some end."<sup>36</sup> Anticanons are thus primarily tools of legal argument, cited as negative authority, used to characterize another's argument as wrong.<sup>37</sup>

In a 2011 article, Professor Jamal Greene canvassed Supreme Court citations, law review articles, casebooks, and confirmation hearings and concluded that the American anticanon is comprised of four cases:<sup>38</sup> *Dred Scott v. Sandford*,<sup>39</sup> *Plessy v. Ferguson*,<sup>40</sup> *Lochner v. New York*,<sup>41</sup> and *Korematsu v. United States*.<sup>42</sup> These four cases were substantially more likely than other discredited cases to be discussed and repudiated by courts, scholars, and nominees.<sup>43</sup> Greene's project was to identify the criteria that distinguish the anticanonical cases from the many other Supreme Court cases that most would view as wrongly decided. In his words, he sought to explain the distinction between "judicial errors"—wrongly decided cases—and

<sup>31</sup> See Primus, *supra* note 28, at 244–45.

<sup>32</sup> Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 487 (2002) ("[A] few legal classics . . . are not read today because they stand as examples of a judicial system gone wrong.").

<sup>33</sup> JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 187 (2011).

<sup>34</sup> See Balkin & Levinson, *supra* note 8, at 1017.

<sup>35</sup> See Greene, *supra* note 6, at 390–91; *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 154–55, 162, 180, 204, 241 (2005) (nominee John Roberts rejecting *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu* as wrongly decided).

<sup>36</sup> Greene, *supra* note 6, at 385.

<sup>37</sup> See *id.* at 397–402; see also, e.g., *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting) (analogizing Texas's antisodomy law to laws prohibiting "working more than 60 hours per week in a bakery").

<sup>38</sup> Greene, *supra* note 6, at 387–402.

<sup>39</sup> 60 U.S. (19 How.) 393 (1857).

<sup>40</sup> 163 U.S. 537 (1896).

<sup>41</sup> 198 U.S. 45 (1905). *Lochner's* anticanonical status is increasingly in question. See BALKIN, *supra* note 33, at 188–98. But see Greene, *supra* note 6, at 471.

<sup>42</sup> 323 U.S. 214 (1944).

<sup>43</sup> See Greene, *supra* note 6, at 396 ("Each decision has been rejected by our legal culture, but all are sufficiently significant that legal academics confer special status upon them within the literature on antiprecedents; Supreme Court nominees believe they will curry favor with senators and the public by declaring them to be reliably bad law; and casebook authors assume that law professors should assign them to students.").

“damned judicial errors”—cases so wrongly decided as to comprise the anticanon.<sup>44</sup>

Greene rejects the two most obvious explanations. First, anticanonical cases are not distinguished by exceptionally poor legal reasoning. Applying traditional tools of constitutional interpretation in the context of constitutional law as it existed at the different times in question, Greene shows that these four decisions were not uniquely poorly reasoned.<sup>45</sup> Indeed, Greene argues, each of the four was plausibly rightly decided at the time. Second, the anticanonical cases cannot be distinguished as producing uniquely abhorrent results. Rather, “[t]he long history of the Supreme Court includes many decisions with both poor legal reasoning and moral bankruptcy of a surpassingly high order.”<sup>46</sup> For example, *Prigg v. Pennsylvania*,<sup>47</sup> which Greene labels “the worst Supreme Court decision ever issued,”<sup>48</sup> relied on an interpretation of the Fugitive Slave Clause that was “not defensible,”<sup>49</sup> reenslaved a free woman and her children, and made the *Dred Scott* holding inevitable. Yet *Prigg* is not in the anticanon.

Greene argues that anticanons are defined by two characteristics that enable the cases to be used as tools of legal argument.<sup>50</sup> First, borrowing from Cass Sunstein, Greene labels anticanons as incompletely theorized, meaning that “there is agreement that anticanonical cases are wrongly decided, but there is disagreement both as to the best explanation of their errors and as to how to apply their lessons to future specific cases.”<sup>51</sup> For example, some people, seizing on Justice Holmes’s dissent, say *Lochner* was wrong because judges should not engage in substantive-due-process analysis. Others say *Lochner* was wrong not because substantive due process is wrong per se but because the majority engaged in the wrong kind of substantive due process.<sup>52</sup> Opponents of affirmative action say *Plessy* is wrong because “[o]ur Constitution is color-blind.”<sup>53</sup> Others say that *Plessy* erred because the Constitution is not blind to the “social meaning” of race and race-based state action.<sup>54</sup> Because people with diverse views can all use the anticanons

<sup>44</sup> Greene, *supra* note 6, at 406.

<sup>45</sup> *See id.* at 405–27.

<sup>46</sup> *Id.* at 428.

<sup>47</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>48</sup> Greene, *supra* note 6, at 428.

<sup>49</sup> *Id.*

<sup>50</sup> Greene identified a third criterion of constitutional anticanons: the debates they facilitate reflect certain shared ethical commitments central to national identity. *See id.* at 463–64; *see also* discussion *infra* Part IV.

<sup>51</sup> Greene, *supra* note 6, at 461; *accord* BALKIN, *supra* note 33, at 187 (“[C]anonical and anticanonical cases are] protean—they can stand for (or be made to stand for) many different things to different theorists, and that is what makes them so useful for the work of theory.”).

<sup>52</sup> *See* Greene, *supra* note 6, at 463.

<sup>53</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>54</sup> Greene, *supra* note 6, at 460.

to support their arguments, the cases “enable discourse . . . amid dissensus.”<sup>55</sup>

The second characteristic of anticanons is counterintuitive: anticanons must, “on some replicable metric, be correct.”<sup>56</sup> The cases “are not the products of rogue judges—incompetent, drunk, or on the make.”<sup>57</sup> If a decision is obviously and outrageously wrong, then it cannot be used to attack another’s position and so it cannot function as an anticanon. Because the anticanons’ errors remain “susceptible to repetition by otherwise reasonable people,”<sup>58</sup> a rhetorical warning that an opponent’s position echoes an anticanon carries force it otherwise would not. Greene offers as an example a hypothetical *Korematsu* that, rather than authorizing internment, instead approved summary executions of Japanese Americans.<sup>59</sup> Were that the case, and a participant in legal debate accused her opponents of repeating the error of *Korematsu*, her argument would not be taken seriously. For a person opposed to substantive due process, *Lochner* remains alive as an anticanon because *Lochner* led to *Griswold*, *Roe*, and *Lawrence*.<sup>60</sup> If *Lochner* were beyond-the-pale wrong, then nothing could come of it, and it would not be an anticanon.

### III. THE TORTURE MEMO AS ANTICANON

Mukasey’s statement reflects a consensus that the torture memo was wrong. But, as with constitutional anticanons, that consensus is only at the surface level. First, the torture memo is incompletely theorized—there is agreement that the memo was wrong, but no consensus why. Second, there is evidence that the magnitude of the error is not as great as suggested by the near-uniform criticism, and as a result, the error is susceptible to repetition by reasonable people.

#### A. *The Torture Memo as Incompletely Theorized*

The apparent consensus suggested by Mukasey’s statement is, in part, a mirage. As with the constitutional anticanons, while we agree that the Bybee memo was wrong, we do not agree why the OLC erred or what can be done to prevent a similar error in the future. Legal scholarship offers three different theories of the torture memo’s error. I have labeled them the “structural error,” the “procedural error,” and the “moral error.”

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<sup>55</sup> *Id.* at 461.

<sup>56</sup> *Id.* at 463; see also Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 83 (2007) (“[A] remarkable characteristic of even the worst legal arguments is that they are often Janus-faced—they contain ideas that, in other contexts, are entirely reasonable and even admirable.”).

<sup>57</sup> Greene, *supra* note 6, at 463.

<sup>58</sup> *Id.* at 384.

<sup>59</sup> *Id.* at 462.

<sup>60</sup> *Id.* at 463.

### 1. *Structural Error*

The structural-error theory of the torture memo posits that the memo was “a symptom of deep structural pathologies”<sup>61</sup> created by the OLC’s institutional design. Professor Bruce Ackerman argues that the memo was “an entirely predictable product” of placing high-stakes national-security questions of law in the hands of a hopelessly politicized OLC.<sup>62</sup> When two or more agencies are in dispute, the OLC can function as a sort of neutral arbiter whose ability to definitively resolve the dispute is valuable to the executive. But when the “client” is the President himself, the OLC is susceptible to short-term pressures that prevent it from acting as any sort of check on unbridled executive power.<sup>63</sup>

This “partisan process” is the result of both the staffing of the OLC and its approach to producing opinions.<sup>64</sup> Unlike other offices in the Department of Justice (DOJ), the OLC is staffed mostly by political appointees and short-term attorney-advisors.<sup>65</sup> These staffers will be predisposed to support the President’s goals and want to find ways to enable his policies.<sup>66</sup> When the White House requests an opinion on rarely justiciable issues of executive power or national security, the OLC has no source of authority, like a court’s likely response, to offer in response to the Administration’s position.<sup>67</sup> The White House Counsel’s Office, staffed by the same type of young, ideologically compatible attorneys, can exert informal pressure through dialogue with the OLC throughout the decision-making process.<sup>68</sup> And because the OLC’s opinions are crafted by highly skilled lawyers and have the look and feel of neutral analyses, the process inevitably gives the President’s actions the stamp of “legal legitimacy.”<sup>69</sup>

<sup>61</sup> BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 95 (2010).

<sup>62</sup> Bruce Ackerman, *How to Keep Future John Yoos Under Control*, WASH. POST, Feb. 23, 2010, at A19.

<sup>63</sup> See ACKERMAN, *supra* note 61, at 88.

<sup>64</sup> *Id.* at 96.

<sup>65</sup> *Id.* at 97.

<sup>66</sup> See *id.* at 105; see also Bradley Lipton, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL’Y REV. 249, 254–56 (2010). Critics of the structural theory do not dispute that the OLC is designed in part to advance the President’s agenda. See, e.g., GOLDSMITH, *supra* note 10, at 34–35 (“Having the political dimension in view means that OLC is not entirely neutral to the President’s agenda.”); Morrison, *supra* note 6, at 1715 (“[The OLC’s work] should reflect . . . [in part] the views of the President who currently holds office.” (internal quotation marks omitted)).

<sup>67</sup> See ACKERMAN, *supra* note 61, at 103.

<sup>68</sup> See *id.* at 100–01; see also Morrison, *supra* note 6, at 1710 (“[Unlike agencies,] the Attorney General and the White House need not specify their requests in writing, and they are often afforded greater informal access to OLC while it is considering their requests.” (footnote omitted)).

<sup>69</sup> See ACKERMAN, *supra* note 61, at 68, 115; see also John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 428 (1993) (“The formality of the process and the product also allows the Office to appear to be more than simply another legal office within the government, but rather *the* oracle of executive branch legal interpretation.”).



Ackerman's critique of the torture memo is not about how the OLC acted in this particular case. Rather, he argues that the institution is the problem and that the error of the torture memo can only be avoided if the OLC is subject to review by a neutral, independent body that serves as judge for the executive branch—a "Supreme Executive Tribunal."<sup>70</sup> The OLC's views would, in Ackerman's vision, be only the first word, not the final one.

## 2. Procedural Error

The procedural-error theory of the torture memo holds that future torture memos can be prevented if the OLC adheres to certain procedures and "cultural norms"<sup>71</sup> that preclude it from acting as a rubber stamp for presidential action. These norms allow the OLC to "serve[ ] both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power."<sup>72</sup> In the aftermath of the withdrawal of the torture memo, the head of the OLC in 2005 issued a best-practices memorandum describing recommended norms and procedures.<sup>73</sup> In 2010, David Barron, President Obama's acting head of the office, updated the 2005 memo, largely adopting the same recommendations.<sup>74</sup>

Critiques of the torture memo reference several of these practices. First is the norm of providing "an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's . . . pursuit of desired practices or policy objectives."<sup>75</sup> Second, "[t]he legal question presented should be focused and concrete; OLC generally avoids providing a survey of an area of law or issuing broad, abstract legal opinions."<sup>76</sup> Third, the OLC should solicit the views of affected agencies before issuing an opinion.<sup>77</sup> Finally, if practical, the OLC should publish its opinions.<sup>78</sup>

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<sup>70</sup> See ACKERMAN, *supra* note 61, at 143. Ackerman is not alone in critiquing the institutional design of the OLC. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2337–38 (2006) (arguing that OLC should be stripped of its role as interagency adjudicator); Lipton, *supra* note 66, at 256–58 (arguing that OLC should be staffed by fewer political appointees and more career attorneys).

<sup>71</sup> GOLDSMITH, *supra* note 10, at 33.

<sup>72</sup> Morrison, *supra* note 6, at 1715 (quoting Walter E. Dellinger et al., Principles to Guide the Office of Legal Counsel 3 (Dec. 21, 2004) (unpublished manuscript), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty_scholarship)).

<sup>73</sup> See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office (May 16, 2005) [hereinafter Bradbury Memorandum], available at <http://www.fas.org/irp/agency/doj/olc/best-practices.pdf>.

<sup>74</sup> See Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to Att'ys of the Office (July 16, 2010) [hereinafter Barron Memorandum], available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>.

<sup>75</sup> *Id.* at 1; accord GOLDSMITH, *supra* note 10, at 33 (quoting Dellinger et al., *supra* note 72, at 1).

<sup>76</sup> Barron Memorandum, *supra* note 74, at 3; see also Bradbury Memorandum, *supra* note 73, at 1.

<sup>77</sup> See Barron Memorandum, *supra* note 74, at 3; Bradbury Memorandum, *supra* note 73, at 2.

The process of writing the torture memo has been criticized for failing to adhere to these practices. First, the memo, rather than providing an “honest appraisal of applicable law,”<sup>79</sup> engaged in “cursory and one-sided”<sup>80</sup> arguments insufficiently supported by authority.<sup>81</sup> Second, the analysis, rather than focusing on a concrete question, was “wildly broader than was necessary to support what was actually being done.”<sup>82</sup> The Bybee memo “analyzed the torture statute in the abstract, untied to any concrete practices.”<sup>83</sup> In a 2009 memorandum for the files, then-acting head of the OLC, Steven Bradbury, described the same problem.<sup>84</sup> Third, OLC did not circulate the draft opinions to “agencies with relevant expertise” such as the State Department.<sup>85</sup> In contrast, before finalizing the 2004 Levin memo, the OLC sought input from various agencies, including the State Department, and the memo makes clear that the DOJ Criminal Division had reviewed the memo and concurred in its judgment.<sup>86</sup> Finally, the Bybee memo was only disclosed later after a leak, whereas the 2004 Levin memo was published almost immediately.<sup>87</sup>

### 3. *Moral Error*

The moral-error theory of the torture memo maintains that the memo was an error because the OLC lawyers failed to take into account the morally abhorrent consequences of their work.<sup>88</sup> On this view, if torture is a moral wrong, then writing a memo authorizing torture is also a moral

<sup>78</sup> See Barron Memorandum, *supra* note 74, at 5–6; Bradbury Memorandum, *supra* note 73, at 4; see also Morrison, *supra* note 6, at 1724–30.

<sup>79</sup> See Barron Memorandum, *supra* note 74, at 1.

<sup>80</sup> GOLDSMITH, *supra* note 10, at 149.

<sup>81</sup> See Lederman, *supra* note 25; cf. Lewis, *supra* note 23, at 1 (“[The memo read like] the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison.”).

<sup>82</sup> GOLDSMITH, *supra* note 10, at 150.

<sup>83</sup> *Id.*

<sup>84</sup> See Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel 1 (Jan. 15, 2009) [hereinafter Memorandum for the Files] available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20090115.pdf>.

<sup>85</sup> GOLDSMITH, *supra* note 10, at 166–67; see also Lederman, *supra* note 25.

<sup>86</sup> Lederman, *supra* note 25; see also Levin Memorandum, *supra* note 22, at 2.

<sup>87</sup> Lederman, *supra* note 25; see also Lipton, *supra* note 66, at 259 (“[Disclosure] would probably have prevented some of the worst opinions.”); Morrison, *supra* note 6, at 1725 (stating that public disclosure of OLC’s work “may be the best way to motivate” OLC lawyers to adhere to the office’s values of independence and integrity).

<sup>88</sup> See Neil M. Peretz, *The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 CONN. PUB. INT. L.J. 23, 62 (2006) (“There is a grave risk that the client will equate legal justification for his policy as moral approval because the laws are created by society and many believe that legality equals morality because society would not enact morally unjust law. . . . Meanwhile the lawyer believes he has recused himself from considering issues of morality—a grave disconnect.”); see also Robert K. Vischer, *Tortured Ethics: Abu Ghraib and the Moral Lawyer* 6 (Oct. 5, 2004) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=601203](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=601203) (“When the response is pitched in exclusively legal terms—as was the OLC’s torture analysis—the moral component is not erased, but rather is forced into the background, where it is not susceptible to exploration by the client.”).

wrong.<sup>89</sup> The torture memo error happened because the opinion “was the product of coldly neutral, amoral legal advice.”<sup>90</sup> Soon after the memo leaked, Professor Jack Balkin expressed his horror: “The OLC memo did not state that torture was wrong and that our government should not engage in it. Instead, it offered official advice about how to engage in torture and escape criminal prosecution, or, in the alternative, to define prisoner abuse as not technically torture in order to escape criminal prosecution.”<sup>91</sup> Dan Kahan criticized the OLC lawyers for “evad[ing] moral responsibility for their actions by insisting that law is nothing but a set of formally binding rules.”<sup>92</sup> David Cole writes that the OLC lawyers “treated the law against torture not as a universal moral prohibition, but as an inconvenient obstacle to be evaded by any means necessary.”<sup>93</sup> Implicitly accepting this critique, the Levin memo’s opening line says, without citation, “Torture is abhorrent to American law and values and international norms.”<sup>94</sup>

The moral-error theory is controversial. A widely held traditional view of lawyering provides that “the lawyer is, in essence, an amoral techni-

<sup>89</sup> See Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, in *THE TORTURE DEBATE IN AMERICA* 241, 241–42 (Karen J. Greenberg ed., 2006) (“I too regard the lawyer’s moral responsibility as unproblematic: they are morally complicit in the CIA and military intelligence interrogations they ratified in retrospect, those they warranted in prospect, and even in the unauthorized abuses their memos arguably occasioned, however unintentionally, in Abu Ghraib and elsewhere.”).

<sup>90</sup> Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 *STAN. L. REV.* 1931, 1970 (2008); see also DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE* 56 (2007) (“Yoo approached the torture prohibition as if he were a tax lawyer whose only job was to find loopholes in the code.”); Noah Feldman, *Ugly Americans*, in *THE TORTURE DEBATE IN AMERICA*, *supra* note 89, at 267, 269 (“[The memo’s] arguments were astonishing. Absent from them was any serious concern about either the morality of the actions contemplated or their desirability as a matter of policy. Some of the silence may be blamed on lawyerly obtuseness, derived from the mistaken view that moral and practical questions are beyond the province of law and are best left to the client, in this case the President.”); Lewis, *supra* note 23, at 4 (“The torture and death of prisoners, the end result of cool legal abstractions, have a powerful claim on our national conscience.”).

<sup>91</sup> Jack Balkin, *It’s Official: Bush Administration Received Legal Advice Permitting Torture*, *BALKINIZATION* (June 14, 2004, 10:26 AM), <http://balkin.blogspot.com/2004/06/its-official-bush-administration.html>.

<sup>92</sup> Dan M. Kahan, Deputy Dean & Elizabeth K. Dollard Professor of Law, Yale Law Sch., Yale Law School Commencement Remarks 6 (May 22, 2006), available at <http://www.law.yale.edu/documents/pdf/KAHANrevised.pdf>.

<sup>93</sup> David Cole, *The Torture Memos: The Case Against the Lawyers*, *N.Y. REV. BOOKS*, Sept. 10, 2009, at 15; see also *id.* at 16 (“At its best, law is about seeking justice, regulating state power, respecting human dignity, and protecting the vulnerable. Law at its worst treats legal doctrine as infinitely manipulable. Had the OLC lawyers adhered to the former standard, they could have stopped the CIA abuses in their tracks. Instead, they used law not as a check on power but to facilitate brutality, deployed against captive human beings who had absolutely no other recourse.”).

<sup>94</sup> Levin Memorandum, *supra* note 22, at 1.

cian.”<sup>95</sup> John Yoo believed that this conception of the lawyer’s role applied to OLC lawyers.<sup>96</sup> In a debate with philosopher Jeremy Waldron, Yoo said:

I view the function of the lawyer . . . as to interpret the Geneva Conventions or the torture statute and not to interject my own moral views into what the government should do . . . . [The moral arguments] are the kinds of things that ought to be considered in an analysis that’s separate from the legal analysis.<sup>97</sup>

Jack Goldsmith, who made the decision to withdraw the torture memo, concurs. He did not “think there was anything inherently wrong with exploring the contours of torture law.”<sup>98</sup> “Hardly anyone would be completely immune to such [moral] concerns, but in the end a government lawyer, and especially a lawyer at OLC, must put them aside . . . . OLC’s ultimate responsibility is to provide information about legality, regardless of what morality may indicate, and even if harm may result.”<sup>99</sup>

The moralists respond that, whether or not the OLC has moral obligations generally, the Bybee memo cannot be neatly bifurcated into legal and moral components. Jeremy Waldron, responding to Yoo, argues that one cannot understand human rights law, international law, or constitutional law without “understanding that they embody certain moral ideas,” for that understanding “affects what you can do in the way of manipulating them or limiting them or restricting them out of existence.”<sup>100</sup> In the same vein, Noah Feldman contends that, contrary to Yoo’s protestations, the memo did

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<sup>95</sup> Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 6 (1975); see also Vischer, *supra* note 88, at 4 (“The dominant view of legal practice is founded on a purported demarcation between the legality and morality of a proposed course of conduct, with lawyers providing information on the former, but leaving the latter untouched, to be resolved only at the client’s discretion.”); *id.* at 26 (“In advising the Bush Administration on the interrogation and treatment of suspected terrorists, Jay Bybee and his OLC colleagues labored under a premise commonly clung to by attorneys engaged in unseemly causes: the notion that legal advice can be readily segregated from moral advice.”).

<sup>96</sup> See Peretz, *supra* note 88, at 60–61 (describing Yoo’s views).

<sup>97</sup> Marty Lederman, *Waldron/Yoo Debate on Torture*, BALKINIZATION (April 26, 2005, 5:07 PM), <http://balkin.blogspot.com/2005/04/waldronyoo-debate-on-torture.html>. Dan Kahan recounts a military intelligence officer asking Yoo if the memo meant that the President could order torture. According to Kahan, Yoo answered: “Yes, but I’m not talking policy. I’m talking law here.” Kahan, *supra* note 92, at 5.

<sup>98</sup> GOLDSMITH, *supra* note 10, at 147.

<sup>99</sup> *Id.* at 147–48. Kahan praises Goldsmith for taking “moral responsibility when he found himself in a position as a lawyer where his individual actions were likely to have a decisive role in . . . shaping the law itself.” Kahan, *supra* note 92. Kahan delivered his speech before Goldsmith published *The Terror Presidency*, but it is telling that Kahan assumed that Goldsmith’s morals drove his decision making.

<sup>100</sup> Lederman, *supra* note 97. Waldron elaborated:

I think with regard to *some* law, you can do the strict separation between the letter of the law and the moral spirit . . . . [W]ith regard to much human rights law, and much international law, and much constitutional law . . . you *cannot understand* [it] without understanding—at least in some sense—the moral ideas that inform it, imbue it, give it its coherence, shape its concepts, give us our sense of its importance. . . . You need to understand this not as a strange set of runes which we will look at as if we’ve never seen them before, and have no idea what they’re trying to

adopt an implicit moral theory that “the reason for obeying the law is the reciprocal agreement of all sides to be bound, and so the old rules could not apply in a war against the new terrorists.”<sup>101</sup> The memo relied on this “essentially moral claim” to justify “deviation from the bounds of ordinary legal interpretation and practice.”<sup>102</sup> More specifically, some have narrowed in on the Bybee memo’s analysis of the necessity defense, evaluation of which requires “a moral judgment about what is and is ‘not necessary’ in a particular situation.”<sup>103</sup>

### B. *The Torture Memo as Not So Wrong*

Anticanonical errors must, “on some replicable metric, be correct”<sup>104</sup> and so remain “susceptible to repetition by otherwise reasonable people.”<sup>105</sup> An examination of the aftermath of the torture memo suggests, contra Mukasey’s “worse than a sin,” a sense that the torture-memo error may have been defensible. And accounts of the fear and stress under which the memo was written suggest that the error of the torture memo is susceptible to repetition by otherwise reasonable people.

First, most (if not all) of the interrogation techniques authorized by the Bybee memo remain legal.<sup>106</sup> The Levin memo, for all its criticism of the Bybee memo, made clear that “[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues 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>107</sup> On this point, John Yoo, the memo’s au-

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do, but [will] try to figure out what the text requires. In some sense, that’s obtuse lawyering, as well as obtuse morally.

*Id.* (second and sixth alterations in original).

<sup>101</sup> Feldman, *supra* note 90, at 275.

<sup>102</sup> *Id.* Feldman concludes that the lawyers were perhaps right to raise the question of whether the reciprocity principle applied in the War on Terror but erred in answering that question in the negative. *See id.* at 276–78.

<sup>103</sup> Peretz, *supra* note 88, at 61; *see also* Wendel, *supra* note 9, at 103 (“[T]he memo’s necessity defense analysis slips naturally into the familiar mode of moral reasoning, in which the actor simply balances the good and bad consequences associated with various options, and selects the option that maximizes the resulting amount of good over bad.”).

<sup>104</sup> Greene, *supra* note 6, at 384.

<sup>105</sup> *Id.* at 463.

<sup>106</sup> *See* Morrison, *supra* note 6, at 1690 n.4 (“The Justice Department disavowed the opinion soon after it was leaked to the public, but in subsequent memoranda OLC continued to uphold the legality of many of the most controversial interrogation techniques in question.”); *id.* at 1726 n.144 (“Although the August 2002 memo was indeed withdrawn and replaced with a more modestly phrased opinion in late 2004, during that period and later in the Bush Administration OLC maintained its basic position on the legality of various enhanced interrogation techniques, including ‘waterboarding.’”).

<sup>107</sup> Levin Memorandum, *supra* note 22, at 2 n.8; *see also* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 180 (2007) (“[T]he Levin Memo makes only minimum cosmetic changes to the bits of Bybee that drew the worst publicity.”).

thor, and Jack Goldsmith, the memo's repudiator, are in agreement.<sup>108</sup> Moreover, although the Levin memo did not affirm the Bybee memo's extreme positions on presidential wartime-detention and interrogation power, it did not reject them either.<sup>109</sup> Finally, the Ninth Circuit later held that it was not "clearly established" law in 2001–03 that Jose Padilla's treatment rose to the level of torture.<sup>110</sup>

*Second*, given the consensus that the Bybee memo was wrong, the lack of personal consequences for the memo's author and signer is surprising. The DOJ's Office of Professional Responsibility found that Yoo and Bybee "committed professional misconduct" and intended to refer them to the relevant state bar associations.<sup>111</sup> But the Justice Department ultimately chose not to adopt the misconduct finding,<sup>112</sup> a decision criticized as letting Yoo and Bybee off the hook.<sup>113</sup> The Ninth Circuit's opinion granted Yoo qualified immunity from civil liability.<sup>114</sup> Yoo, Bybee, and David Addington (Vice President Cheney's counsel from 2001–05 and perhaps the closest to a

<sup>108</sup> See David Cole, *The Man Behind the Torture*, N.Y. REV. BOOKS, Dec. 6, 2007, at 42 (reviewing GOLDSMITH, *supra* note 10) ("Goldsmith cites this footnote as evidence that the August 2002 memo was unnecessarily broad, which it certainly was. But he expresses no concern that even after the initial memo was replaced, waterboarding and other forms of torture continued to be used and approved."); Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG., Sept. 9, 2007, at 40 ("Yoo says it is his understanding that no policies or interrogation techniques changed as a result of the withdrawal of the torture memo, noting that all policies that were legal under the withdrawn opinions are also acknowledged as legal under the opinion that eventually replaced the withdrawn ones.")

<sup>109</sup> See Levin Memorandum, *supra* note 22, at 2 ("Because the discussion in [the Bybee Memorandum] concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."); Michael Dorf, *The Justice Department's Change of Heart Regarding Torture: A Fair-Minded and Praiseworthy Analysis That Could Have Gone Still Further*, FINDLAW'S WRIT (Jan. 5, 2005), <http://writ.news.findlaw.com/dorf/20050105.html>.

<sup>110</sup> *Padilla v. Yoo*, 678 F.3d 748, 762–68 (9th Cir. 2012). Padilla alleged that he was subjected to

extreme isolation; interrogation under threat of torture, deportation and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors; denial of access to necessary medical and psychiatric care; substantial interference with his ability to practice his religion; and incommunicado detention for almost two years, without access to family, counsel or the courts.

*Id.* at 752.

<sup>111</sup> See OPR Report, *supra* note 21, at 11 & n.10, 251–57, 260.

<sup>112</sup> See Margolis Memorandum, *supra* note 7, at 67–69.

<sup>113</sup> See Jack Balkin, *Justice Department Will Not Punish Yoo and Bybee Because Lawyers Are Scum Anyway*, BALKINIZATION (Feb. 19, 2010, 7:46 PM), <http://balkin.blogspot.com/2010/02/justice-department-will-not-punish-yoo.html>; Dahlia Lithwick, *Torture Bored: How We've Erased the Legal Lines Around Torture and Replaced Them With Nothing*, SLATE (Feb. 22, 2012, 11:49 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/02/torture\\_bored.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/torture_bored.html); David Luban, *David Margolis is Wrong*, SLATE (Feb. 22, 2010, 11:49 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/02/david\\_margolis\\_is\\_wrong.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/david_margolis_is_wrong.html); Brian Tamanaha, *Why Yoo's Sincere Extremist Excuse Doesn't Work*, BALKINIZATION (Feb. 20, 2010, 5:20 PM), <http://balkin.blogspot.com/2010/02/why-yoos-sincere-extremist-excuse.html>.

<sup>114</sup> *Padilla*, 678 F.3d at 768–69.

villain in Goldsmith's account<sup>115</sup>) are all gainfully employed in prestigious positions.<sup>116</sup>

*Third*, Jack Goldsmith's account of the torture memo powerfully suggests that, whatever the error of the torture memo, that error remains susceptible to repetition by otherwise reasonable people.<sup>117</sup> He attributes the memo in part to the "fear that pervaded the executive branch" after 9/11.<sup>118</sup> Driven by frequent "threat reports," "the lawyers felt the same pressure as everyone else to do everything possible to get information" to prevent attacks.<sup>119</sup> Fear and pressure caused the lawyers, though acting in "good faith," to "push the law as far as it would allow."<sup>120</sup> Goldsmith points to Attorney General Edward Bates's opinion authorizing the suspension of habeas corpus and Attorney General Robert Jackson's opinion justifying the destroyers-for-bases deal as evidence that the torture memo was not the first time that executive branch lawyers acted inappropriately "under enormous pressure to help the President avoid what he saw as a disaster in time of crisis."<sup>121</sup> The 2009 Bradbury memo adopted this view, attributing the errors to the attorneys "confront[ing] novel and complex legal questions in a time of great danger and under extraordinary time pressure."<sup>122</sup>

These points should not be overstated. Withdrawing and repudiating the Bybee memo was an unprecedented move. The OLC sometimes overrules its opinions, but only rarely (possibly never before) within the same Administration.<sup>123</sup> Yoo has suffered reputational harm and lives under some threat of civil and criminal liability.<sup>124</sup> And the Office of Professional Responsibility explicitly concluded that the "extraordinary circumstances . . . did not excuse or justify the lack of thoroughness, objectivity, and candor reflected in [the memo]."<sup>125</sup> But these facts do hint at a continuing ambivalence underneath the surface. It is telling that, in the same hearing in which he denounced the Bybee memo as "worse than a sin," General Mukasey, in a long, awkward exchange with Senator Sheldon Whitehouse, refused to say whether or not waterboarding constituted torture.<sup>126</sup>

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<sup>115</sup> See Cole, *supra* note 108.

<sup>116</sup> This is in stark contrast to the difficulty Attorney General Alberto Gonzalez had finding employment after his involvement in the U.S. Attorneys' firing and illegal-wiretapping scandals. See Neil A. Lewis, *In Searching for New Job, Gonzalez Sees No Takers*, N.Y. TIMES, Apr. 13, 2008, at A18.

<sup>117</sup> See generally GOLDSMITH, *supra* note 10.

<sup>118</sup> *Id.* at 168.

<sup>119</sup> *Id.* at 165–66.

<sup>120</sup> *Id.* at 167.

<sup>121</sup> *Id.* at 168.

<sup>122</sup> Memorandum for the Files, *supra* note 84, at 1.

<sup>123</sup> See Marty Lederman, *Silver Linings (or, the Strange But True Fate of the Second (or was it the Third?) OLC Torture Memo)*, BALKINIZATION (Sept. 21, 2005, 6:08 PM), <http://balkin.blogspot.com/2005/09/silver-linings-or-strange-but-true.html>. See generally Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010).

<sup>124</sup> See Morrison, *supra* note 6, at 1726–29.

<sup>125</sup> OPR REPORT, *supra* note 21, at 254.

<sup>126</sup> See *Mukasey Hearing*, *supra* note 3, at 186–87.

## IV. IMPLICATIONS OF THE TORTURE MEMO AS ANTICANON

If the torture memo indeed takes the form of an anticanon for the executive branch, what of it? What values does it serve? Is it a good thing that every controversial OLC opinion is measured against the specter of the Bybee memo? The answers to these questions relate to the third criterion of anticanons that Greene identifies—in addition to incomplete theorization and plausible defensibility—that anticanons represent shared “ethical propositions” that the community has rejected.<sup>127</sup> In this case, the torture memo anticanon represents a shared ethical commitment to the principle that the executive should be bound by law.

Canons and anticanons implicate more than the meaning of a given clause of the Constitution—we have run-of-the-mill controversial constitutional decisions for that. The debates anticanons facilitate—about race and the role of unelected judges in a democratic society—are “central to national identity”<sup>128</sup> and the “way we tell the story of America.”<sup>129</sup> *Dred Scott* remains anticanonical because we retain an ongoing shared ethical commitment that race relations are different than they were in 1857.<sup>130</sup> *Lochner*, by contrast, once beyond-the-pale anticanonical, now seems less so as the consensus over the legitimacy of the progressive regulatory and welfare state fades into memory.<sup>131</sup> Anticanons, in addition to being incompletely theorized and on some metric correct, are the result of larger political and ideological projects.<sup>132</sup>

So too with the torture-memo anticanon. The Bybee memo is not just about the meaning of the torture statute or even just about the moral implications of torture. Rather, it serves as a space for debate about hard questions about the proper role of the OLC and the responsibilities of OLC lawyers.<sup>133</sup> Some argue that that an OLC lawyer should act as a client-driven “situa-

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<sup>127</sup> Greene, *supra* note 6, at 384.

<sup>128</sup> *Id.* at 463 (“[A]n important criterion of anticanonical cases is that the competing claims that they embody relate to issues of (small ‘c’) constitutional significance.”); see also BALKIN, *supra* note 33, at 192 (“[M]embership in the canon (or anti-canon) usually comes complete with a governing narrative about the nation’s history or (usually) its eventual progress.”).

<sup>129</sup> BALKIN, *supra* note 33, at 185.

<sup>130</sup> Greene, *supra* note 6, at 464.

<sup>131</sup> See BALKIN, *supra* note 33, at 192–97; see also *id.* at 191 (“We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963))).

<sup>132</sup> See *id.* at 184 (“One reason why we might be so certain that a case from an earlier era was wrongly (or rightly) decided may have less to do with the legal culture of the past and more to do with our current constitutional controversies and our current sense of constitutional correctness.”).

<sup>133</sup> See generally Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 717–28 (2005) (describing different conceptions of OLC’s role).



tional lawyer,”<sup>134</sup> working as an advocate and “proffering any reasonable argument in support of his client’s policy objectives.”<sup>135</sup> Others say the OLC should act as a “neutral expositor,” seeking the best view of the law.<sup>136</sup> Still others maintain that the answer is somewhere in the middle, that “[l]egal advice to the President from [the OLC] is neither like advice from a private attorney nor like a political neutral ruling from a court. It is something inevitably, and uncomfortably, in between.”<sup>137</sup>

Each of the theories of the torture memo error offers an answer to this question. The structural-error theory is premised on the assumption that the OLC is supposed to act as a neutral expositor.<sup>138</sup> The proceduralists argue that the OLC’s proper role is somewhere in between the situational-advocate and neutral-expositor models, and they offer a set of procedures and norms meant to help the OLC avoid either extreme.<sup>139</sup> The moralists believe that the OLC has an obligation to act as a neutral expositor when it approaches moral and policy questions, at least where the law is inherently bound up with moral judgments.<sup>140</sup>

There is, however, a key feature of constitutional anticanons not shared by the torture memo anticanon: constitutional anticanons help develop and refine *existing* discourse. Cases become anticanonical in response to already-present political, legal, and ideological projects and narratives.<sup>141</sup> In

<sup>134</sup> McGinnis, *supra* note 69, at 402.

<sup>135</sup> Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305–06 (2000). For proponents of this view, see ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011) [hereinafter POSNER & VERMEULE, *THE EXECUTIVE UNBOUND*]; see also NELSON LUND, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 447–59 (1993); ERIC POSNER & ADRIAN VERMEULE, *A ‘Torture’ Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22 [hereinafter POSNER & VERMEULE, *A ‘Torture’ Memo*]; ERIC POSNER & ADRIAN VERMEULE, *Libyan Legal Limbo: Why There’s Nothing Wrong With Obama Ignoring Some of His Own Legal Advisors on Libya*, SLATE (June 28, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/06/libyan\\_legal\\_limbo.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/libyan_legal_limbo.html) [hereinafter POSNER & VERMEULE, *Libyan Legal Limbo*].

<sup>136</sup> Moss, *supra* note 135, at 1306. For an example of this view, see ACKERMAN, *supra* note 61, at 143–52.

<sup>137</sup> GOLDSMITH, *supra* note 10, at 35; see also Moss, *supra* note 135, at 1316 (“In the end, the role of the executive branch lawyer is best understood as requiring a firm allegiance to the rule of law and a respect for the unique structure of the executive branch, including the ultimate authority and democratic accountability of the President.”)

<sup>138</sup> See ACKERMAN, *supra* note 61, at 141 (criticizing OLC lawyers for not “understand[ing] themselves as impartial judges, but as the president’s lawyers”).

<sup>139</sup> See GOLDSMITH, *supra* note 10, at 35; see also MORRISON, *supra* note 6, at 1713–15.

<sup>140</sup> This theory may actually go beyond the standard neutral-expositor model, in that it may call for the lawyers to apply their own moral judgments, not just those a court would apply. Cf. McGinnis, *supra* note 69, at 382 (describing a “court-centered model”).

<sup>141</sup> See BALKIN, *supra* note 33, at 188 (“But times change, and so does the content of the legal canon.”); *id.* at 189 (“*Lochner* became part of the anti-canon because it was a convenient symbol of the constitutional struggles over the New Deal in the 1930s.”); *id.* at 192 (“Constructing the canon with its accompanying narratives helps legitimate a certain view of the Constitution, the Court, and the country.”); BALKIN & LEVINSON, *supra* note 8, at 1010 (“Cases and opinions become timeless, in other words, when the time is right.”).

that sense, constitutional anticanons “might be a predictable sign of a mature constitutional system.”<sup>142</sup>

In contrast, the torture memo anticanon, rather than working as a tool in furtherance of already-existing discourse, works itself to *create* discourse. Before the torture memo, the OLC received a level of public attention and scrutiny disproportionately small to the office’s power and importance.<sup>143</sup> The memo ignited a vigorous academic and political debate.<sup>144</sup> Today it is inconceivable that the OLC could release a significant opinion that didn’t trigger comparisons to the torture memo. Nor can we imagine a nominee to head the office not being expected to express an opinion about the memo.<sup>145</sup> In this case, the anticanon created the mature system, not the other way around.

As a result, the torture memo anticanon dramatically expands the community that argues over and ultimately decides how the OLC should work. Constitutional anticanons have the opposite effect—because only the most sophisticated participants in legal discourse can define anticanons, anticanons may contribute to elite control of constitutional interpretation.<sup>146</sup> The torture memo, by providing a reference point and site for discourse for an otherwise obscure issue, engages more people—lawyers, academics, senators, and the media—in a debate that was previously limited to the small community of OLC alumni.

This debate is a critical piece of a larger argument—whether and how the executive branch should be bound by law. The three theories of the torture memo to varying degrees all reject the situational-advocate model of the OLC and so adopt two assumptions: a general one that the executive should be constrained by some “neutral” conception of “law” and a specific one that OLC is an appropriate institution to effect that constraint.

Recent scholarship has produced a powerful challenge to these assumptions. Eric Posner and Adrian Vermeule argue that what they label as “liberal legalism”—the view that the executive is meaningfully constrained by

<sup>142</sup> Greene, *supra* note 6, at 467.

<sup>143</sup> See Daniel Klaidman, Stuart Taylor, Jr. & Evan Thomas, *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34 (describing OLC as “the most important government office you’ve never heard of”); Eric Lichtblau, *Obama Pick to Analyze Broad Powers of President*, N.Y. TIMES, Jan. 8, 2009, at A22 (“Historically, the assistant attorney general for the Office of Legal Counsel, or O.L.C., has operated in obscurity, issuing dry, analytical legal opinions that often never become public. But it has become a magnet for controversy since the Sept. 11 attacks because of its legal rationales in defense of the President’s wartime authority, and Ms. Johnsen’s nomination has generated unusually intense reactions.”).

<sup>144</sup> As a rough indicator, a search of Westlaw’s Journals and Law Reviews Database for the phrase “Office of Legal Counsel” identifies 1,389 articles for all of the years preceding 2004, and 1,923 articles from January 1, 2004, through November 3, 2012. Similarly, a Lexis search of all news sources for the phrase “Office of Legal Counsel” shows 2,728 results from 1990 until 2004, and 9,880 results from January 1, 2004, to November 3, 2012.

<sup>145</sup> See, e.g., *Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary*, 111th Cong. 341, 351, 360–62 (2009) (questioning of Dawn Johnsen, Nominee to be Assistant Att’y Gen., Office of Legal Counsel).

<sup>146</sup> See Greene, *supra* note 6, at 469.

constitutional or statutory law—is simply naïve in light of the realities of the modern state.<sup>147</sup> The authors suggest, moreover, that a lack of legal constraint ought not to be cause for alarm because the President will be instead constrained by “politics and public opinion.”<sup>148</sup> Accordingly, they argue, the OLC’s role is to “supply the legal justification” for the President’s goals.<sup>149</sup> If the OLC fails to do so, as it did in the Libya War Powers Resolution controversy, its views should be disregarded.<sup>150</sup> The OLC, under this view, is merely the “Keeper of the Presidential Fig Leaf.”<sup>151</sup>

Unlike the constitutional anticanons, the torture memo anticanon is of such recent vintage that any conclusions about its implications must be tempered by the realization that the picture could look very different in a few years. But right now, for those that believe in an executive meaningfully constrained by law, the torture memo anticanon is “shorthand”<sup>152</sup> for the dangers of an OLC run wild, untethered to any neutral view of the law, serving only to enable the President’s policies. As such, the anticanon helps build a community engaged in discourse that maintains and so reinforces a shared “ethical proposition”<sup>153</sup> that the executive should be bound by law in a meaningful way. The anticanon’s incomplete theorization allows its use to be shared by those who agree on the basic proposition that the executive should be constrained by law, but who disagree on the precise way the OLC should go about enforcing that constraint. And its plausible defensibility gives its invocation—a warning that the OLC risks repeating the anticanonical error—rhetorical force it would otherwise lack.

For those who seek an executive bound by the “rule of law,”<sup>154</sup> the torture memo is a highly regrettable incident in history, but the anticanon it has become is a powerful tool in preventing its recurrence. Those in opposition, who believe in an executive unbound by law, are necessarily stuck defending the position that the torture memo was not an error at all, that it was “standard lawyerly fare, routine stuff.”<sup>155</sup>

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<sup>147</sup> POSNER & VERMEULE, *THE EXECUTIVE UNBOUND*, *supra* note 135, at 4.

<sup>148</sup> *Id.* For an application of this view, see Eric A. Posner & Adrian Vermeule, Op-Ed, *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES, July 22, 2011, available at <http://www.nytimes.com/2011/07/22/opinion/22posner.html>. For a critique of Posner and Vermeule’s theory, see Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012) (reviewing POSNER & VERMEULE, *THE EXECUTIVE UNBOUND*, *supra* note 135).

<sup>149</sup> Posner & Vermeule, *Libyan Legal Limbo*, *supra* note 135.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Greene, *supra* note 6, at 467.

<sup>153</sup> *Id.* at 384.

<sup>154</sup> Ackerman, *supra* note 2.

<sup>155</sup> Posner & Vermeule, *A ‘Torture’ Memo*, *supra* note 135, at A22.

