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THE CRIME OF CONVICTION OF JOHN CHOON YOO: THE ACTUAL CRIMINALITY IN THE OLC DURING THE BUSH ADMINISTRATION

Joseph Lavitt^{*}

I. INTRODUCTION

At the outset of the administration of President Barack Obama, there is intense debate about whether to prosecute members of the former administration of President George W. Bush. This Article first considers whether officers who were in command and control of the Executive Branch of the government of the United States during the Bush administration can be excused from criminal responsibility on charges of illegal torture, based on their claim to have acted in good faith reliance upon the advice of attorneys employed by the Department of Justice.

Focus then turns to the accountability, if any, of those attorneys in the Justice Department's Office of Legal Counsel ("OLC") who opined that so-called enhanced interrogation of persons in the custody of the United States was legally permissible. The answer to this question turns not on the doctrine of command responsibility (as many have presupposed), but on its logical converse—whether subordinate members of an executive branch of government are responsible as principals for the conduct of superior officers who relied on their opinions.

Finally, the doctrine of the unitary executive is examined through the prism of the conclusions about legal responsibility reached on the first two questions. The projection of a "leadership principle" by John Choon Yoo and others into modern American scholarship and governance became the basis for putative criminality during the Bush administration. That principle, as conceived by its proponents, is patently repugnant to American constitutional republicanism. Until a court imposes punishment for criminal wrongs over a defense based upon it, the exercise of presidential authority in times of crises in the United States will be likely to repeat the terrible mistakes of the all too recent past.

II. THE CIRCUMSTANCES

Following the devastating attacks on the United States on September 11, 2001, President George W. Bush ordered various forms of retaliation against persons and countries believed to be harboring those responsible for the attack. President Bush first obtained a resolution by Congress that authorized the "use [of] all necessary and appropriate force against those nations, organizations, or persons" connected to the September 11 attacks, "in order to prevent any future acts of international

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terrorism against the United States.”¹

During the course of military and quasi-military operations following the September 11 attacks, numerous persons were captured and detained by agents of the United States.² Those persons were found in plain clothes and apparently not fighting under the flag of any nation.³ The captured were deemed “enemy combatants” by the Bush administration.⁴ Many were subjected to intense questioning by the Central Intelligence Agency (CIA) in an effort to gain information to prevent further attacks against the United States. Among those persons held and questioned by the CIA was Abu Zubaydah, one of the alleged planners of the September 11 attacks.⁵

The CIA came to believe by August 2002 that Zubaydah held information about planned, but not yet executed attacks on the United States by the members of an organization known as “Al Qaeda.”⁶ Absent coercion, they believed, Zubaydah,

1. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

2. *See, e.g.*, *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009). In *Gherebi*, the court observed how quickly the Bush administration developed an understanding about the scope of its authority to detain persons perceived to be in conflict with the United States after the attacks of September 11, 2001:

The scope of the detention authority claimed by the President in the armed conflict authorized by the [Authorization for Use of Military Force] began to take shape within months of the passing of the joint resolution. On November 13, 2001, President Bush issued a Military Order entitled Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.

Id. at 43 (internal citations omitted).

3. During a news conference delivered on April 4, 2009, President Obama remarked that “[a]fter 9/11, our allies declared the attacks on New York and Washington an attack on all. And together, we embarked on the first mission beyond Europe against an enemy that recognizes no borders or laws of war.” President Barack Obama, News Conference at Palaiz de la Musique et Des Congres, Strasbourg, France (Apr. 4, 2009), available at http://www.whitehouse.gov/the_press_office/News-Conference-By-President-Obama-4-04-2009/.

4. Memorandum from Jay Bybee, Assistant Attorney General, to John Ashcroft, Attorney General (June 8, 2002), available at <http://www.usdoj.gov/opa/documents/memomilitarydetention06082002.pdf> (advising that “the President [can] direct the capture of those in the service of an enemy whenever the United States [is] engaged in hostilities - even without a declaration of war”). *See also Gherebi*, 609 F. Supp. 2d, at 47 (“Individuals detained by President Bush’s Military Order were subsequently labeled ‘enemy combatants’ by the Department of Defense, harkening back to a phrase used by the Supreme Court in a World War II-era case known as *Ex parte Quirin*, 317 U.S. 1 (1942).”).

5. Memorandum from Jay Bybee, Assistant Attorney General, to John Rizzo, Acting General Counsel, Central Intelligence Agency (Aug. 1, 2002) [hereinafter “Bybee-Rizzo Memorandum”]. In the Bybee-Rizzo Memorandum, the OLC affirmed information already acquired that suggested that:

Zubaydah has been involved in every major terrorist operation carried out by Al Qaeda. He was a planner for the Millennium plot to attack U.S. and Israeli targets during the Millennium celebrations in Jordan. . . . He also served as a planner for the Paris Embassy plot in 2001. Moreover, he was one of the planners of the September 11 attacks. Prior to his capture, he was engaged in planning future terrorist attacks against U.S. interests.

Id. at 7.

6. *Id.* In the Bybee-Rizzo Memorandum, the OLC noted ominously that:

The interrogation team is certain that [Zubaydah] has additional information that he refuses to divulge. Specifically, he is withholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas. . . .

a person highly trained in resistance to interrogation, would not divulge such information to his CIA interrogators.⁷ The CIA concluded that Zubaydah was reinforced in this refusal by his belief that the CIA would not harm him to obtain it.⁸

The CIA devised a program of steadily escalating violence to persuade Zubaydah that any continued refusal to divulge the information sought would result in imminent physical harm.⁹ In anticipation of the possible criminal prosecution of any person authorizing or engaging in torture of Zubaydah to so convince him, the then Counsel to the President, Alberto Gonzales, and John Rizzo, the then Acting General Counsel of the CIA, sought formal legal advice from the attorneys in the Office of Legal Counsel of the Department of Justice about the scope of permissible use of “enhanced interrogation techniques” to be employed upon Zubaydah (and, by inference, upon other “enemy combatants” held in the custody of United States).

In response, the OLC prepared two legal memoranda, signed by now United States Court of Appeals Judge Jay S. Bybee, both dated August 1, 2002. These “Bybee Memoranda” (which have come also to be known as the “torture memos”) advised Messrs. Gonzales and Rizzo (and thereby, their principals) about the limits of executive power in the United States — and, specifically, about the scope of the power of the executive to harshly interrogate captured enemy combatants.

The first of these so-called “Torture Memoranda” of August 1, 2002 (“the Bybee-Gonzales Memorandum”), advised Gonzales that otherwise illegal orders by the President of the United States to torture an enemy combatant might be justified by reason of the doctrines of necessity and self-defense.¹⁰ In any case, the OLC concluded that binding the actions of the President of the United States (or his

Moreover, your intelligence indicates that there is currently a level of “chatter” equal to that which preceded the September 11 attacks.

Id. at 1.

7. *Id.* In the Bybee-Rizzo Memorandum, the OLC summarized the stated belief by his CIA interrogators that “Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information. . . .” *Id.* at 1.

8. *Id.* at 15. In the Bybee-Rizzo Memorandum, the OLC memorialized that “[a]s we understand it, based on his treatment so far, Zubaydah has come to expect that no physical harm will be done to him.” *Id.*

9. In the Bybee-Rizzo Memorandum, the OLC introduced its analysis of the planned enhanced interrogation of Zubaydah by stating “you would like to employ ten techniques that you believe will dislocate his expectations regarding the treatment he believes he will receive and encourage him to disclose the crucial information mentioned above.” *Id.* at 1-2. The OLC understood that, “[b]y using these techniques in increasing intensity and in rapid succession, the goal would be to dislodge this expectation.” *Id.* at 15.

10. See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Attorney General, on Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A (Aug. 1, 2002), available at <http://www.usdoj.gov/olc/docs/memo-gonzales-aug2002.pdf> [hereinafter “Bybee-Gonzales Memorandum”]:

We . . . believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability. Standard criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens.

Id.

delegates) in conduct of the War on Al Qaeda to laws proscribing torture would be “unconstitutional.”¹¹

The second Bybee Memorandum of August 1, 2002 (the “Bybee-Rizzo Memorandum”), considered whether the finely detailed particulars of anticipated violence to be inflicted by the CIA on Zubaydah would violate the prohibition against torture found at Section 2340A of title 18 of the United States Code.¹² The Bybee-Rizzo Memorandum essentially authorized a plan of escalating violence that was described as beginning with sleep deprivation and confinement in a box with vermin. After slapping Zubaydah’s face and banging his head against a specially constructed wall, the OLC-endorsed enhanced interrogation was expected to reach its dénouement by means of an ancient practice known as “waterboarding.”¹³ Waterboarding is a form of torture that for centuries has been widely condemned.¹⁴

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

Id. at 39.

12. Section 2340A makes it a criminal offense for any person “outside of the United States to commit, or attempt, to commit torture . . .” 18 U.S.C. § 2340(1) (2006). Section 2340(1) defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control . . .” 18 U.S.C. § 2340(1) (2006).

13. In the Bybee-Rizzo Memorandum, the OLC described “waterboarding” as follows: [Y]ou would like to use a technique called the “waterboard.” In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual’s blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of “suffocation and incipient panic,” i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout. You have orally informed us that this procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning. You have also orally informed us that it is likely that this procedure would not last more than 20 minutes in any one application.

Bybee-Rizzo Memorandum, *supra* note 5, at 4.

14. See Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1 (2008). Professor Clark has provided numerous examples to support the conclusion that waterboarding has been consistently considered to be torture in the courts of the United States:

The stated goal of using enhanced interrogation techniques in increasing intensity and in rapid succession was to dislodge Zubaydah's expectation that no physical harm would be done to him. The OLC unambiguously found that the ultimate use of the waterboard would accomplish this goal by creating a threat of imminent death—a predicate act under Section 2340A.¹⁵ The OLC concluded, nevertheless, that “using the . . . [specified] procedures and culminating in the waterboard” would not violate Section 2340A because “not only must the course of conduct be a predicate act [i.e. torture], but also those who use the procedure must actually cause prolonged mental harm.”¹⁶

The waterboarding of Zubaydah is known to have commenced in August 2002.¹⁷ According to, among others, former Director of the CIA Michael Hayden and former Vice President Richard Cheney, information crucial to the defense of the United States was acquired as a result of the use of enhanced interrogation techniques on Zubaydah.¹⁸ Despite reported success, the practice of waterboarding

American courts and other tribunals [have] consistently branded waterboarding “torture.” The United States prosecuted members of the Japanese armed forces after World War II, in part because they used waterboarding as a form of torture. Moreover, . . . courts have called waterboarding torture when used by domestic law enforcement. The United States . . . court-martialed at least one of its own military officers for employing waterboarding during the occupation of the Philippines at the beginning of the twentieth century.

Id. at 8. See also Walter Pincus, *Waterboarding Historically Controversial: In 1947, the U.S. Called It a War Crime; in 1968, It Reportedly Caused an Investigation*, WASH. POST, Oct. 5, 2006, at A17; Eric Weiner, *Waterboarding: A Tortured History*, NAT'L PUB. RADIO, Nov. 3, 2007, <http://www.npr.org/templates/story/story.php?storyId=15886834>; Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007) (discussing the history of water torture in U.S. case law including *United States v. Sawada*); THE UNITED NATIONS WAR CRIMES COMMISSION, 5 L. REP. TRIALS OF WAR CRIMINALS 1 (1948) (regarding the 1942 Doolittle raid on Tokyo, some of the Doolittle raiders were captured and questioned using water torture, that torture was included in charges against the Japanese officers); *United States v. Lee*, 744 F.2d 1124, 1127 (5th Cir. 1984) (involving a Texas sheriff convicted on federal charges after being accused of using water torture to secure a confession); Scott Shane, *Distinctions: Torture Versus War*, N.Y. TIMES, Apr. 19, 2009, at WK1 (noting that “[w]aterboarding, [is a] near-drowning method with a pedigree stretching back to the Spanish Inquisition”).

15. The predicate acts under Section 2340A include: “(1) the intentional or threatened infliction of severe physical pain or suffering; . . . (3) the threat of imminent death . . .” 18 U.S.C. § 2340(2)(A)-(D) (2006). The Bybee-Rizzo Memorandum forthrightly conceded that: “We find that the use of the waterboard constitutes a threat of imminent death. . . . Accordingly, it . . . fulfills the predicate act requirement under the statute.” Bybee-Rizzo Memorandum, *supra* note 5, at 15.

16. *Id.* at 16.

17. Zubaydah was subjected to waterboarding “at least 83 times in August 2002” while Khalid Shaikh Mohammed, another prisoner identified as a senior member of Al Qaeda and one of the planners of the 9/11 attacks, was subjected to waterboarding 183 times in March 2003 (his first month in custody). Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 30, 2005) at 37, *available at* <http://www.usdoj.gov/olc/docs/memo-bradbury2005.pdf>. Two months after the Bybee Memoranda were issued, a Defense Department lawyer, Lieutenant Colonel Diane Beaver, also approved enhanced interrogation techniques, including “[t]he use of a wet towel to induce the misperception of suffocation, provided that there [was] a legitimate national security objective.” David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1454-55 (2005).

18. On April 19, 2009, General Hayden had the following exchange with Chris Wallace on the television program *Fox News Sunday*:

was discontinued by the CIA in the spring of 2003 for reasons stated by former CIA Director Hayden to be unrelated to the legality of this enhanced interrogation technique.¹⁹

If not excused or legally justified, orders to waterboard persons held in the custody of the United States violated various provisions of domestic and international law that proscribe torture.²⁰ The Bybee Memoranda are now

HAYDEN: . . . [I]n September 2006, President Bush gave a speech on the Abu Zubaydah case. He pointed out that he — Zubaydah gave us nominal information, probably more valuable than he thought. He clammed up. The decision was made to use techniques. After that decision was made and the techniques were used, he gave up more valuable information, including the information that led to the arrest of Ramzi Binalshibh. . . . [W]e stand by our story. The critical information we got from Abu Zubaydah came after we began the EITs.

WALLACE: The EIT?

HAYDEN: The enhanced interrogation techniques.

Fox News Sunday with Chris Wallace (Fox television broadcast Apr. 19, 2009), available at <http://www.foxnews.com/story/0,2933,517158,00.html>. On May 10, 2009, former Vice President Cheney appeared on *Face the Nation*, where he said the following:

[T]he process we had in place produced from certain key individuals, such as Khalid Shaikh Mohammed and Abu Zubaydah, two of the three who were waterboarded, and Khalid Shaikh Mohammed is the man who killed 3,000 Americans on 9/11, blew up the World Trade Center, attacked the Pentagon, tried to blow up the White House or the Capitol building. . . . He did not cooperate fully in terms of interrogations until after waterboarding. Once we went through that process, he produced vast quantities of invaluable information about Al Qaeda.

Face the Nation (CBS television broadcast May 10, 2009), available at <http://www.cqpolitics.com/wmspage.cfm?docID=news-000003114272>.

19. According to Michael Hayden, former Director of the CIA, the CIA, on his orders, ceased all waterboarding in the spring of 2003, as evidenced from the following exchange:

HAYDEN: But keep in mind, waterboarding had not been using [sic] since the spring of 2003. Waterboarding was one of the techniques that I took off the table formally and officially when I became director and reshaped the program.

WALLACE: Because you thought it was torture?

HAYDEN: No. I reshaped the program because the legal landscape had changed, the operational landscape had changed, and we knew more about Al Qaeda, all right, and the sense of threat under which we were operating had changed.”

Fox News Sunday, *supra* note 18.

20. Establishing the illegality of waterboarding, and other conceded actions that inflicted agony on persons for the purpose of coercing the disclosure of information, is not the principal focus of this paper. The amorphous and myriad provisions of domestic and international law that proscribe torture will not be analyzed in depth. Those provisions are necessarily considered here only for their relevance to the issues at hand. For purposes of this article, the illegality of waterboarding as torture is presupposed based, in part, on the opinion of the present Attorney General of the United States. At his confirmation hearing, Attorney General Eric Holder testified as follows:

LEAHY: Thank you, Mr. Holder. . . . Water boarding has been recognized to be torture since the time of Spanish Inquisition. . . . [T]he two most recent nominees to serve as attorney general of the United States hedged on the question of water boarding. They would not say that if an American were water boarded by some other government or terrorist anywhere in the world, whether it would be torture and illegal. They maintained it would depend upon the circumstances. Do you agree with me that water boarding is torture and illegal?

HOLDER: . . . I agree with you, Mr. Chairman, water boarding is torture.

infamous and have been disavowed by the OLC, in certain (but certainly not all) important particulars.²¹

In response to challenges concerning the legality of waterboarding and other techniques to coerce cooperation by persons captured and detained in conduct of the “War on Al Qaeda,” former President George W. Bush and other former members of his administration have publicly stated that orders to conduct enhanced interrogations were issued only upon and in keeping with advice by the OLC that such techniques were lawful.²²

LEAHY: Do you believe that other world leaders would have the authority to authorize the torture of United States citizens if they deemed it necessary for their national security?

HOLDER: No, they would not. It would violate the international obligations that, I think, all civilized nations have agreed to at the Geneva Conventions.

LEAHY: Do you believe that the president of the United States has authority to exercise a commander-in-chief override and immunize acts of torture? I ask that because we did not get a satisfactory answer from Former Attorney General Gonzales on that.

HOLDER: Mr. Chairman, no one is above the law. The president has a constitutional obligation to faithfully execute the laws of the United States. There are obligations that we have as a result of treaties that we have signed—obligations, obviously, in the Constitution. Where Congress has passed a law, it is the obligation of the president, or the commander-in-chief, to follow those laws. . . .

If one looks at the various statutes that have been passed, it is my belief that the president does not have the power that you’ve indicated.

LEAHY: . . . I’m glad to see we now have a nominee for attorney general who is unequivocal on this.

Transcript: Senate Confirmation Hearings: Eric Holder, Day One, N.Y. TIMES, Jan. 16, 2009, at 11-12, available at http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?pagewanted=11&_r=1.

21. See, e.g., Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, (Dec. 30, 2004) (regarding legal standards applicable under 18 U.S.C. §§ 2340-2340A), available at http://www.humanrightsfirst.org/us_law/etn/pdf/levin-memo-123004.pdf.

22. On January 7, 2009, President Bush had the following exchange with Brit Hume, on the television program *Fox News Sunday*:

HUME: Now, the enhanced interrogation techniques, as some call them—torture, as others call them—are being argued over to this hour. . . . Your view of that.

G.W. BUSH: My view is that the techniques were necessary and are necessary to be used on a rare occasion to get information necessary to protect the American people. One such person who gave us information was Khalid Sheikh Mohammed. He was the mastermind of the September the 11th, 2001 attacks that killed nearly 3,000 people on our soil. And I’m in the Oval Office and I am told that we have captured Khalid Sheikh Mohammed and the professionals believe he has information necessary to secure the country. So I ask what tools are available for us to find information from him, and they gave me a list of tools. And I said, are these tools deemed to be legal? And so we got legal opinions before any decision was made. And I think when people study the history of this particular episode they’ll find out we gained good information from Khalid Sheikh Mohammed in order to protect our country.

HUME: Well, how good and how important? And what’s the—

G.W. BUSH: We believe that the information we gained helped save lives on American soil.

HUME: Can you be more specific than that?

G.W. BUSH: Well, I have said in speeches—as a matter of fact, when this program was leaked to the press I actually gave a speech that said to the American people, yes, we’re

On April 16, 2009, the current President of the United States, Barack Obama, expressly promised to forbear prosecution by the United States of those who “carried out their duties” to torture Zubaydah and others, so long as they “rel[ie]d in good faith upon legal advice from the Department of Justice.”²³ President

doing this. But I also emphasized we were doing it within the law. . . . Everything this administration did—had a legal basis to it, otherwise we would not have done it.

Interview of the President and Former President Bush by Brit Hume, *Fox News*, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2009/01/20090111-1.html>. In a separate interview, this time with Matt Lauer of NBC, President Bush asserted that “whatever we have done is legal. That’s what I’m saying. It’s in the law. We had lawyers look at it and say, ‘Mr. President, this is lawful.’ That’s all I can tell you.” CQ.com, Newsmaker Transcripts, Sep. 11, 2006, President Bush Interviewed on NBC’s “Today Show,” Part 2, available at http://public.cq.com/public/20060911_topten_2368124.html. On May 10, 2009, former Vice President Cheney likewise clearly asserted that the permissible scope of the enhanced interrogation techniques employed with respect to Zubaydah and others was determined by the OLC. Specifically, former Vice President Cheney said:

We had captured these people. We had pursued interrogation in a normal way. We decided that we needed some enhanced techniques. So we went to the Justice Department. And the controversy has arisen over the opinions written by the Justice Department. The reason we went to the Justice Department wasn’t because we felt we were going to take some kind of free hand assault on these people or that we were in the torture business. We weren’t. And specifically, what we got from the Office of Legal Counsel were legal memos that laid out what is appropriate and what’s not appropriate, in light of our international commitments.

Face the Nation (CBS television broadcast May 10, 2009), available at http://www.cbsnews.com/htdocs/pdf/FTN_051009.pdf. See also Clarke, *supra* note 14. As Professor Clark notes, other members of the Bush administration have claimed reliance on the advice of counsel, in terms nearly identical to those used by the former president and vice president:

Secretary of State Condoleezza Rice has refused to characterize waterboarding as torture, insisting that “the determination of whether interrogation techniques are consistent with our international obligations and American law are made by the Justice Department.” . . . Former Secretary of Defense Donald Rumsfeld also [claims to have] deferred to legal interpretations while contending that the United States has not tortured.

Id. at 2-3.

23. Specifically, President Obama said:

In releasing these memos, it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution. The men and women of our intelligence community serve courageously on the front lines of a dangerous world.

Press Release, White House, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), available at http://www.whitehouse.gov/the_press_office/statement-of-president-barack-obama-on-release-of-olc-memos/. To some extent, President Obama was merely declaring existing law:

In any . . . criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government . . . arising out of . . . engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.

42 U.S.C. § 2000dd-1 (Supp. 2008).

Obama's formal statement scrupulously avoided clarifying a potential ambiguity created by limiting his promise of immunity to those who "relied" on legal advice.

On April 19, 2009, President Obama's Chief of Staff, Rahm Emanuel, suggested that President Obama's promise to forbear prosecution would extend to those who "devised" the plan of torture, presumably including policymakers and those attorneys who advised and assisted them.²⁴ But, on April 21, 2009, President Obama refused to rule out taking action against those who "formulated legal decisions" to employ enhanced interrogation techniques, leaving the matter to Attorney General Eric Holder.²⁵

24. During an appearance on ABC's "This Week," White House Chief of Staff Emanuel had the following exchange with George Stephanopoulos:

Stephanopoulos: The president has ruled out prosecution for CIA officials who believed they were following the law. Does he believe that the officials who devised the policies should be immune from prosecution?

Emanuel: He believes that, look, as you saw in that statement he wrote, let's just take a step back. He came up with this and worked on this for about four weeks. Wrote that statement Wednesday night after he had made his decision and dictated what he wanted to see. And Thursday morning I saw him in the office, he was still editing it. He believes that people in good faith were operating with the guidance they were provided.

Stephanopoulos: What about those who devised the policy?

Emanuel: Yeah, but those who devised the policy, he believes that they were, should not be prosecuted either.

This Week with George Stephanopoulos (ABC television broadcast Apr. 19, 2009), available at <http://abcnews.go.com/video/playerIndex?id=7373892>.

25. See Sheryl Gay Stolberg, *Obama Won't Bar Inquiry, or Penalty, on Interrogations*, N.Y. TIMES, Apr. 22, 2009, at A17. See also The Gaggles, <http://blog.newsweek.com/thegaggle/default.aspx> (Apr. 21, 2009, 12:16 EST). The author of the *Newsweek* blog observed that when:

[a]sked directly about those who gave the legal go-ahead for those tactics, Obama said that decision was up to Attorney General Eric Holder and he wouldn't "prejudge." In other words, that's not a firm no. "With respect to those who formulated those legal decisions, I would say that that is going to be more of a decision for the attorney general within the perimeters of various laws," Obama said. "I don't want to prejudge that. I think that there are a host of very complicated issues involved there."

Id. Despite a potential ambiguity created by President Obama's remarks, it is widely believed that the prosecution of attorneys who served in the OLC during the Bush administration is unlikely, owing in part, ironically, to the appointment of Dawn Johnsen to be the new head of the OLC. See Jeffrey Rosen, *Yoo Complete Me*, THE NEW REPUBLIC, Mar. 4, 2009, available at <http://www.tnr.com/article/yoo-complete-me-0>. Professor Rosen noted:

No former Bush administration official has been more vilified as a torturing monster than John Yoo. And, for years, one of Yoo's most severe critics has been former Clinton Justice official Dawn Johnsen. Last April, Johnsen called Yoo a "rogue legal adviser," declaring that the "shockingly flawed content" of one of his notorious memos justifying torture—along with the "horrific acts it encouraged . . . all demand our outrage." Her attacks were so fervent, in fact, that *Mother Jones* branded her the "anti-Yoo." Now, in a novelistic turn, the anti-Yoo will be responsible for defending her bete noir. [One of Johnson's] main responsibilities will be to decide . . . whether to prosecute or investigate Yoo's OLC for issuing the torture memos The issue hinges on whether giving . . . erroneous legal advice should be a criminal offense. . . . Johnsen and the Justice Department have made clear that Yoo . . . should not be prosecuted. . . . Yoo should be relieved, rather than apprehensive, that the OLC will soon be headed by the woman who has declared that his "bogus constitutional arguments for outlandishly expansive presidential power" demand nothing less than "outrage." Although she may not be John Yoo's best friend, she could turn out to be his best defender.

John Choon Yoo is widely reported to have been the principal author of the Bybee Memoranda.²⁶ He is now a Professor of Law at the University of California, Berkeley, School of Law (Berkeley Law). Professor Yoo continues to defy the many critics of the opinions he rendered concerning the scope of presidential power while a member of the OLC.²⁷ In the teeth of intense criticism about the torture of detainees carried out with his imprimatur, he has not only defended, but expanded his views about presidential power, in numerous public fora.²⁸

Prompted by calls for the termination of Professor Yoo's employment by Berkeley Law, Dean Christopher Edley released the following statement, first in 2008, and then, as amended, again in 2009:

There are important questions about the content of the Yoo memoranda, about

Id. at 8.

26. See Luban, *supra* note 17, at 1456 (stating that "Professor Yoo [was] the principal author of the Bybee Memo . . ."); Neil A. Lewis, *Official Defends Signing Interrogation Memos*, N.Y. TIMES, Apr. 29, 2009, at A12 (stating that "John Yoo . . . at the Office of Legal Counsel . . . is generally believed to have been the memorandums' principal author, [and] has defended them regularly."); Tim Golden, *Domestic Surveillance: The Advocate; A Junior Aide Had a Big Role In Terror Policy*, N.Y. TIMES, Dec. 23, 2005, at A1. Golden reports:

While a mere deputy assistant attorney general in the legal counsel office, Mr. Yoo was a primary author of a series of legal opinions on the fight against terrorism, including one that said the Geneva Conventions did not apply and at least two others that countenanced the use of highly coercive interrogation techniques on terror suspects.

Id.; *Times Topics, C.I.A. Interrogations*, N.Y. TIMES, Aug. 25, 2009, http://topics.nytimes.com/top/reference/timestopics/organizations/c/central_intelligence_agency/cia_interrogations/index.html?scp=3&sq=secret%20overseas%20Yoo&st=cse. The article summarizes the provenance of one of the key Bybee Memoranda, as follows:

At one point [during the] summer [of 2002], current and former intelligence officials have said, C.I.A. lawyers ordered that the use of [enhanced interrogation] techniques by C.I.A. personnel be suspended until the Justice Department formally authorized them. That authorization came in a secret memo dated Aug. 1, 2002, written by John Yoo, a legal advisor in the Justice Department's Office of Legal Counsel, and signed by Jay S. Bybee, head of the office.

Id.

27. Professor Yoo wrote, following the recent release of OLC Memoranda by President Obama: In releasing these memos, the Obama administration may be attempting to appease its antiwar base — which won't bother to read the memos in full — or trying to look good for the chattering classes. . . . But if the administration chooses to seriously pursue those officials who were charged with preparing for the unthinkable, today's intelligence and military officials will no doubt hesitate to fully prepare for those contingencies in the future. President Obama has said he wants to "look forward" rather than "backwards." If so, he should not restore risk aversion as the guiding principle of our counterterrorism strategy.

John Yoo, *Yes, We did Plan for Mumbai-Style Attacks in the U.S.*, WALL ST. J., Mar. 7, 2009, at A11.

28. In a 2005 debate, Professor Yoo responded as follows when asked the following questions by Doug Cassel, a Professor of Law at Notre Dame:

Doug Cassel: If the president deems that he's got to torture somebody, including by crushing the testicles of the person's child, there is no law that can stop him?

John Yoo: No treaty.

Doug Cassel: Also no law by Congress—that is what you wrote in the August 2002 memo [while Yoo was a Justice Department attorney].

John Yoo: I think it depends on why the president thinks he needs to do that.

<http://rwor.org/audio/yoo%20excerpt.mp3> (last visited Sept. 21, 2009).

tortured definitions of “torture,” about how he and his colleagues conceived their role as lawyers, and about whether and when the Commander in Chief is subject to domestic statutes and international law. As a legal matter, the test here is [whether Deputy Assistant Attorney General Yoo] commi[tted] . . . a criminal act which has led to conviction in a court of law and which clearly demonstrates unfitness to continue as a member of the faculty. . . . Did the writing of the memoranda, and his related conduct, violate a criminal or comparable statute?

Absent very substantial evidence on these questions, no university worthy of distinction should even contemplate dismissing a faculty member. That standard has not been met.²⁹

Beyond calls for Professor Yoo’s dismissal from his current employment, indictment of Professor Yoo for crimes arising out of the advice that led to the torture of persons in the custody of the United States has been considered by a court in Spain.³⁰ He yet may be sanctioned by the Justice Department’s Office of Professional Responsibility (“OPR”), but it is unlikely.³¹ The OPR might suggest

29. Press Release, Christopher Edley, Jr., The Honorable William H. Orrick, Jr. Distinguished Chair and Dean, UC Berkeley School of Law, *The Torture Memos and Academic Freedom* (Apr. 10, 2008), available at <http://www.law.berkeley.edu/news/2008/edley041008.html>. See also *infra* note 123.

30. Paul Haven, *Spanish Court Considers Trying Former U.S. Officials*, ABC NEWS, March 29, 2009, <http://abcnews.go.com/print?id=7198396>. ABC News reported:

A Spanish court has agreed to consider opening a criminal case against six former Bush administration officials, including former Attorney General Alberto Gonzales, over allegations they gave legal cover for torture at Guantanamo Bay, a lawyer in the case said Saturday. Human rights lawyers brought the case before leading anti-terror judge Baltasar Garzon, who agreed to send it on to prosecutors to decide whether it had merit, Gonzalo Boye, one of the lawyers who brought the charges, told The Associated Press. The ex-Bush officials are Gonzales; former undersecretary of defense for policy Douglas Feith; former Vice President Dick Cheney’s chief of staff David Addington; Justice Department officials John Yoo and Jay S. Bybee; and Pentagon lawyer William Haynes.

Id.

31. See Michael Isikoff, *A Torture Report Could Spell Big Trouble for Bush Lawyers*, NEWSWEEK, Feb. 14, 2009, available at <http://www.newsweek.com/id/184801>. *Newsweek* reported:

An internal Justice Department report on the conduct of senior lawyers who approved waterboarding and other harsh interrogation tactics is causing anxiety among former Bush administration officials. H. Marshall Jarrett, chief of the [Justice Department’s] ethics watchdog unit, the Office of Professional Responsibility (OPR), confirmed last year he was investigating whether the legal advice in crucial interrogation memos “was consistent with the professional standards that apply to Department of Justice attorneys.”

Id. at 9. However, the *Wall Street Journal* more recently reported that “[t]he final [OPR] report is expected to preserve the core findings of earlier drafts, people familiar with the matter said. Those drafts . . . recommended against criminal prosecution, these people said.” Evan Perez, *Justice Likely to Urge No Prosecutions*, WALL ST. J., May 6, 2009, at A4. At present, the final report by the OPR has not been released. In an August 2009 statement, Attorney General Holder suggested that, contrary to prior reports in the press, prosecutions may be recommended. Specifically, he said:

The Office of Professional Responsibility has now submitted to me its report regarding the Office of Legal Counsel memoranda related to so-called enhanced interrogation techniques. . . . Among other findings, the report recommends that the Department reexamine previous decisions to decline prosecution in several cases related to the interrogation of certain detainees.

Statement of Attorney General Eric Holder Regarding Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009), available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech->

that he be disciplined by other professional organizations, such as the Pennsylvania Bar Association, but this too seems unlikely.³²

Professor Yoo stands out as the most vocal and unmoved representative of the Bush administration's OLC and the most responsible individual for its stance on enhanced interrogation techniques.³³ Furthermore, he stands out as well owing to an impression of vindication arising out of the total absence of an accounting of his influence on the conduct of the CIA interrogators and others by any court, quasi-judicial agency, state university, professional association, or private institution.

III. THE CULPABILITY OF THE FORMER PRESIDENT

Implausible as it may appear on first impression, it is plain that the reliance on the advice of counsel would be the basis for the planned defense against any prosecution of former President Bush for illegal torture carried out upon his command authority.³⁴ Former President Bush has expressly and repeatedly

0908241.html. However, the Attorney General promised that any probes in preparation for prosecutions will not target those who in "good faith" committed torture prescribed by the attorneys of the OLC:

The men and women in our intelligence community perform an incredibly important service to our nation, and they often do so under difficult and dangerous circumstances. They deserve our respect and gratitude for the work they do. Further, they need to be protected from legal jeopardy when they act in good faith and within the scope of legal guidance. That is why I have made it clear in the past that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals.

Id.

32. The final report by the OPR is expected to call on state bar associations to carry out sanctions, including disbarment of the OLC lawyers. *See* Perez, *supra* note 31. *See generally* Marissa Lopez, *Professional Responsibility: Tortured Independence in The Office of Legal Counsel*, 57 FLA. L. REV. 685 (2005) (considering possible violations of ethical standards by OLC attorneys). As pointed out on the *Wall Street Journal's Law Blog*, however, this recommendation may be an idle gesture: "Judge Bybee is a member of the Washington, D.C., bar. If disbarred, Bybee could remain on the bench unless impeached by Congress. Federal judges do not have to be members of the bar to be nominated to the federal bench, at any level, including on the Supreme Court." Law Blog, <http://blogs.wsj.com/law/> (May 7, 2009, 09:42 EST). And, it appears that Professor Yoo's status as a member of the bar is unlikely to be affected by any OPR recommendation, because "the five-year statute of limitations for allegations of attorney misconduct in Pennsylvania, where Yoo is licensed to practice law, has expired. That makes it unlikely the state bar will take up an ethics inquiry into his work at the Justice Department, which he left in 2003." Carrie Johnson, *Amid Scrutiny, Yoo Pushes Back: Quietly but Forcefully, Author of Detainee Memos Rebuts Critics*, WASH. POST, Jul. 27, 2009, at A3.

33. "In many ways, Yoo . . . has become the face of what critics see as the Bush era's legal overreaching — all tied to memos written from 2001 to 2003 spelling out his expansive views of interrogation, electronic surveillance and the deployment of soldiers on U.S. soil . . ." *Id.*

34. For the purpose of this inquiry, the derivative command responsibility of executive officers and other members of the Bush administration for acts of subordinates that constituted illegal torture during their terms in office is presupposed. As president, George W. Bush had a nondelegable duty to faithfully execute the laws of the United States. *See, e.g.,* Clinton v. Jones, 520 U.S. 681 (1997). In a concurring opinion, Justice Breyer wrote:

Article II makes a single President responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch, or the entire Judiciary for those of the Judicial Branch. . . . The Founders created this equivalence . . . in order to focus, rather than to spread, Executive

asserted that “enhanced interrogation techniques” employed to coerce information from persons in the custody of the United States were sparingly conducted, and conducted only upon and in keeping with advice obtained from duly appointed legal counsel to the President of the United States.³⁵

On first impression, a personal belief by the former president in the legality of proscribed conduct, based on the opinion of learned counsel, would seem irrelevant to any prosecution for violation of criminal law.³⁶ It is said: “Ignorance of the law is no excuse.”³⁷ The maxim is so time-honored that even children repeat and

responsibility thereby facilitating accountability. . . . [A] President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it.

Id. at 712-13. In addition to constructive responsibility, actual authorization of the use of enhanced interrogation techniques by former President Bush, after obtaining legal advice from the Justice Department, has been established. *See, e.g., Face the Nation, supra* note 22. This is apparent based on the following exchange between former Vice President Richard Cheney and Bob Schieffer of *CBS News*:

CHENEY: If we had been about torture, we wouldn’t have wasted our time going to the Justice Department.

SCHIEFFER: How much did President Bush know specifically about the methods that were being used? We know that you—and you have said—that you approved this

CHENEY: Right.

SCHIEFFER: . . . [S]omewhere down the line. Did President Bush know everything you knew?

CHENEY: I certainly, yes, have every reason to believe he knew—he knew a great deal about the program. He basically authorized it. I mean, this was a presidential-level decision. And the decision went to the president. He signed off on it.

Id. at 4-5.

35. The defense of “advice of counsel” is distinguishable from reasonable reliance upon the assurance of government officials that one’s conduct will be lawful. *See, e.g.,* Marty Lederman, posting to Balkinization, <http://balkin.blogspot.com/> (Feb. 8, 2008, 03:33 EST). *See also* *State v. Jacobson*, 681 N.W.2d 398, 405 (Minn. Ct. App. 2004) (“Many jurisdictions, including Minnesota, have recognized the defense of good-faith reliance on an official interpretation of the law, including official actions or pronouncements regarding a criminal charge.”). The president, however, uniquely stands in relation to the attorney general as a superior officer, and, despite claims to independence, it is clear that “[t]he assistant attorney general of OLC is a political appointee and thus necessarily ‘philosophically attuned’ to the administration’s policies.” Note, *The Immunity-Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2088 (2008). Thus, notwithstanding whether inferior officers may estop government prosecution based on assurances of prospective legality, the better-reasoned view is that the president cannot estop the Justice Department or an independent prosecutor based on a claim of reasonable reliance on opinions that were shaped by the president’s own policy imperatives. Similarly, the defense of advice of counsel must be distinguished from the so-called “Nuremberg defense”—or the claim to have been justified by reason of following orders. Clearly, this defense would not be available to the former President of the United States. Ironically, the official policy of the current President of the United States, by absolving those who relied in good faith on the opinions of the OLC, supplants the Nuremberg defense with the defense of claimed reliance on the advice of counsel, placing the views of the OLC above those of the president in immunity-conferring force and effect.

36. *Id.* at 2087 (stating too broadly that, “[i]n the private lawyer context, a defendant who acts illegally cannot invoke an advice-of-counsel defense”).

37. *Id.* at 2092 (stating that “ignorance of the law or a mistake as to the law’s requirements is generally not a defense to criminal conduct.”). There is a clear difference between the intent to do an act and cognizance that that act is in violation of the law. The “ignorance” maxim is typically applied to reject a claim of exculpation in the latter instance. For example, in *United States v. Liparota*, 471 U.S. 419, 426 (1985), the Supreme Court held that a defendant could not be convicted of violating a statute

understand it. This maxim suggests the untenable nature of any defense by former President Bush based on OLC advice that contemplated action on his orders would comply with law.

The law, however, is nearly never as simplistic as a childish maxim might suggest. To be sure, the “ignorance” maxim might spring from the mouths of judges. But like so many other time-honored principles of law, the “ignorance” maxim is not as inflexible as it may seem on first impression. When ignorance of the law compels one to seek the advice of someone who is not—an attorney—reliance in good faith upon the advice of that counsel, perhaps surprisingly, is sometimes relevant to criminal responsibility.³⁸

A reason for recognizing this excuse finds some support in the words of Justice Robert H. Jackson, writing for majority of the United States Supreme Court in *Morissette v. United States*³⁹:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.⁴⁰

It is with respect to this somewhat idealistic notion of criminal responsibility—

prohibiting the purchase of food stamps at less than face value because he did not know that his conduct was prohibited by law. In dissent, Justice White wrote that “the [majority] ignores the . . . well founded assumption that ignorance of the law is no excuse.” *Id.* at 441. Justice White further noted that “knowingly to do something that is unauthorized by law is not the same as doing something knowing that it is unauthorized by law.” *Id.* at 436.

38. Significantly, the Bybee-Gonzales Memorandum relied in part on *Ratzlaf v. United States*, 510 U.S. 135 (1994). In *Ratzlaf*, the United States Supreme Court required proof of knowledge of illegality in a prosecution for illegally structuring a currency transaction. The Court noted that the element of intent to cause a particular unlawful result “might be negated by . . . proof that [the] defendant relied in good faith on advice of counsel.” *Id.* at 142 n.10. The Fifth Circuit generally finds that the reliance of the advice of counsel is relevant to the element of wilfulness:

As a defense reliance on counsel is . . . relevant to establishing whether a person knows his or her actions are illegal. Presumably, if a lawyer instructs a client that a specific course of action is legal, evidence of such instruction is relevant when determining whether the client willfully violated the law.

United States v. Adeyinka, 205 Fed.Appx. 238, 241 (5th Cir. 2006). Reliance on counsel is usually viewed, however, as an affirmative defense. *See United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002). As such, it is “an assertion more positive and specific than a general denial of criminal intent.” *United States v. White*, 887 F.2d 267, 270 (D.C. Cir. 1989).

39. 342 U.S. 246 (1952).

40. *Id.* at 250. The “choice between good and evil” to which Justice Jackson alluded corresponds with the Latin maxim *actus non facit reum nisi mens sit rea*—translated “an act does not make one guilty unless his mind is guilty.” Comment, *United States v. Nofziger and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, 813 n.51 (1990). In the United States, *mens rea* is a bedrock principle of law and “[a]bsent evidence of a contrary legislative intent, courts should presume *mens rea* is required” before imposing criminal sanctions. *Id.* at 808 (quoting *United States v. Nofziger*, 878 F.2d 442, 452 (D.C. Cir. 1989)). *See also* *Dennis v. United States*, 341 U.S. 494, 500 (1951) (“The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”). Despite this importance, however, “[t]he unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element.” *Morissette*, 342 U.S. at 252.

a responsibility that turns on a necessary choice “between [doing] good [or] evil”—that reliance upon a trained expert in the law becomes salient.⁴¹ It is not ignorance of the law, according to a better reasoned view, but a mistake of law on matters upon which reasonable minds may differ that brings to the fore reliance on the advice of counsel.⁴² These two concepts are analytically antithetical. The former presupposes unknowing violation of the law. The latter presupposes reasonable reliance upon a mistaken belief in the legitimacy of one’s actions, despite a patent putative proscription of those actions by positive law.

If good reason grounds criminal responsibility on immorally mistaken choices, for reasons that are perhaps eminently understandable, reliance on the advice of counsel as a defense to criminal charges has been recognized by United States courts infrequently, inconsistently, and on only an ad hoc basis.⁴³ Traditionally, crimes at common law proscribed inherently inexcusable conduct obviously contrary to community norms.⁴⁴ Thus, cognizance of criminality was not a core element of crime, and the advice of counsel could play no role in the determination

41. See, e.g., Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392 (1986), equating freedom with the proscription only of culpable choices:

To justify punishment, the criminal law traditionally has required that an individual both make a wrong choice and commit a wrongful act. . . . The defense of mistake serves to insure that the requirement of a wrong choice is met. The existence of the mistake demonstrates that there was no choice to act in a prohibited way even if the action itself was wrongful. In the absence of a wrong choice, the moral justification for refusing to respect a person’s liberty vanishes. It is partially through this system of mistake defenses that criminal law protects individual liberty.

Id. at 1393-94.

42. One may not commit an act that is patently harmful and contrary to community norms, and yet still claim the “advice of counsel” in defense. See *Powers v. Goodwin*, 324 S.E.2d 701, 705 n.8 (W.Va. 1984) (“[S]ome courts have held that the advice must not be so patently erroneous as to be unacceptable to a reasonably prudent person.”) (collecting cases).

43. There is uncertainty about the defense of reliance on advice of counsel because “[r]eliance on advice of counsel as a defense is a subject that does not appear to have been extensively discussed by the courts.” *Powers*, 324 S.E.2d at 705. Despite the seeming refusal by some courts to recognize the defense at all, the general contours of the defense have been established. Generally, the “defense may not succeed absent a showing that the accused acted in good faith in seeking advice on the lawfulness of the possible future conduct, relied on that advice in good faith, and made a full disclosure of all relevant facts to the advisor.” 22 C.J.S. *Criminal Law* § 118 (2008). In *United States v. Van Allen*, 524 F.3d 814 (7th Cir. 2008), the Seventh Circuit held:

In order for this theory to be supported by the evidence, a defendant must establish the following elements: (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

Id. at 823. It is clear that the Bush administration, and the OLC advising it, took great care to ensure that each of these elements was satisfied.

44. See, e.g., *Screws v. United States*, 325 U.S. 91, 102 (1945) (“[W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law.”). See also *United States v. Wenger*, 427 F.3d 840 (10th Cir. 2005) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 660-61 (1994)) (“‘Willful’ criminal conduct is at the very least conduct that no ‘ordinary person would engage in innocently.’”)

of guilt.⁴⁵ The common law of crimes presumed knowledge of wrongfulness, and the failure to acquire that knowledge was considered blameworthy, *per se*.⁴⁶

As the body of law proscribing acts punishable as crimes increased, however, the defense of reliance on the advice of counsel developed. The equities start to appear quite different from the common law perspective when examining whether a person may be properly punished for a mistaken choice to act in a manner that violates a complex or vague law proscribing an unobvious wrong, especially if the accused relied in good faith on an attorney's advice.⁴⁷

Unfortunately, the case law does not dependably support a theory that the defense of reliance on the advice of counsel may be asserted in prosecutions for unapparent wrongs.⁴⁸ And, the defense may be asserted in some cases that involve

45. See Note, *supra* note 41, noting:

Mistakes of criminal law concern the existence or interpretation of a law that prohibits certain kinds of behavior. While mistakes of fact and of noncriminal law have traditionally been defenses in a criminal trial, mistakes of criminal law have not on the theory that the knowledge that conduct is prohibited is not itself an element of the crime.

Id. at 1394-95.

46. See *id.*, observing that the rationale for imposing punishment in instances of unwitting violation of the common law had more saliency because persons were subject to criminal sanctions for fewer offenses:

In the past, this presumption may have been true for the simple reason that the common law of crimes closely tracked a relatively homogeneous community's moral sensibility. It was a useful presumption for two reasons: first, without it a strong incentive not to know the law might be created; and second, proof of abstract, conceptual legal knowledge can be relatively difficult and, additionally, may be unnecessary where there is little likelihood that the defendant did not, in fact, know the law. . . . However, in modern times, this presumption is largely fictional.

Id. at 1395-96.

47. See *e.g.*, *United States v. Impastato*, 543 F. Supp. 2d 569, 578 (E.D. La. 2008). In *Impastato*, the court suggested that the defense of reliance on the advice of counsel may negate the element of criminal "willfulness" only in connection with the enforcement of a statute proscribing a "complex" offense:

[T]he lowest level of willfulness requires simply "committing an act, and having knowledge of that act," and under this definition "the defendant need not have known of the specific terms of the statute or even the existence of the statute;" instead "[t]he defendant's knowledge that he committed the act is sufficient." . . . The second or "intermediate" level of willfulness "requires the defendant to have known that his actions were in some way unlawful," i.e., that "he was doing a 'bad' act under the general rules of law," but it does not require that he knew the specific statute that he violated. . . . Finally, "[t]he strictest level of interpretation of criminal willfulness requires that the defendant knew the terms of the statute and that he was violating the statute." . . . The Fifth Circuit [has] indicated that this strict level is reserved for "complex" statutes.

Id. at 578 (internal citations omitted).

48. There is a "public welfare" exception to the *mens rea* requirement that permits punishment for a class of offenses without proof of a "guilty mind." Generally included in this class of "public welfare" offenses are violations of general police regulations passed for the safety, health, or well-being of the community. See Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62, 73 (1933). See also Comment, *Reliance on Advice of Counsel*, 70 YALE L.J. 978, 978 n.5 (1961). Such "police regulations" often do not proscribe immediately apparent harms.

wrongs that are easily recognized.⁴⁹ Where the line is drawn between the culpability of the ignorant and the excuse of the mistaken is therefore ambiguous.⁵⁰ Perhaps all that can be said categorically is that the defense of reliance on the advice of counsel is seen in cases where courts excuse criminality based on doctrinal precepts that are largely uncategorizable.

Courts and scholars therefore can be excused for failing to discover an underlying principle that harmonizes decisions allowing the defense of reliance on the advice of counsel. Attempts to identify broad theories to explain, and thus delimit, the exculpation of criminal conduct based on the grounds of subjective belief in legality are entirely unsatisfactory. Such theories usually rely, to a greater or lesser extent, on the murky and relatively modern rationale that the advice of counsel negates the *mens rea* necessary to impose criminal punishment, i.e., the culpable “choice” to do wrong that justifies punishment to which Justice Jackson alluded in *Morissette*.⁵¹

To be sure, it can be observed that offenses that have in common the notion that a misapprehension of the law based on legal advice is relevant to criminal responsibility appear to share some aspect of perceived moral ambiguity. Courts often resort to unsupportable conclusions about the blameworthiness of the defendant’s conduct when deciding whether to allow the defense.⁵²

49. See *United States v. Roti*, 484 F.3d 934, 935 (7th Cir. 2007) (“[A] lawyer’s fully informed opinion that certain conduct is lawful (followed by conduct strictly in compliance with that opinion) can negate the mental state required for some crimes, including fraud.”). See also *United States v. Conforte*, 624 F.2d 869, 877 (9th Cir. 1980) (willful tax evasion); *King Instrument Corp. v. Otari Corp.*, 767 F.2d 853, 867 (Fed. Cir. 1985) (willful patent infringement); *E.E.O.C. v. Rekrem, Inc.*, No. 00 Civ. 7239 (CBM), 2002 WL 27776 (S.D.N.Y. Jan. 10, 2002) (unlawful retaliation under Title VI).

50. See Note, *supra* note 41, noting:

Since the defense is not required for every crime, the problem is one of determining when it is required. This entails identifying laws that threaten the due process values underlying the principle of wrong choice. This decision, by its very nature, must involve balancing and line-drawing that may appear arbitrary. This is true of many other judicial tasks, including that of deciding whether a law is vague or not.

Id. at 1413.

51. See *Morissette*, 342 U.S. at 252.

52. See *United States v. Ragsdale*, 426 F.3d 765, 778 (5th Cir. 2005). Ragsdale entered into an internet pornography business with the understanding (based on his partner’s report) that a former federal prosecutor had assured his partner that the material offered on the website was highly unlikely to be found obscene by a court and would be protected by the First Amendment. *Id.* at 777. The Court of Appeals rejected the defense, stating “[this crime] does not require that the defendant have knowledge of the legal status of the materials, defendant need only know the character and nature of the materials.” *Id.* at 778. The discussion by the Court about whether the materials had an “obscene” character and nature, however, went on for about three pages and was hardly a model of legal clarity. Moreover, the Court in *Ragsdale* relied heavily on *Penthouse Intern., Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), another instance of seemingly ambiguous “characterization” of obscene materials. In the *Penthouse* case, the Fifth Circuit independently found that certain *Penthouse* and *Oui* magazines contained patently offensive sexual content. *Id.* at 1366. See also *Simms v. State*, 675 S.W.2d 643 (Ark. Ct. App. 1984). Defendant Simms was charged and convicted of “interference with custody [of a minor]” pursuant to a statute that required for conviction that she must have acted “knowing that [s]he ha[d] no lawful right to do so.” *Id.* at 644. Defendant consulted with her attorney before acting, and she testified that she followed her lawyer’s advice. *Id.* She urged on appeal that she lacked the requisite mental state because she had sought and relied upon the advice of counsel and believed that her actions were lawful. *Id.* The court found that the trial court, acting as the trier of fact and law, dealt with defendant Simms quite

Courts are equally apt to allow the defense, however, when the criminality of the defendant's conduct turns on legislative fiat, owing to simple disagreement about whether the statute is clear, or, because of doubt about whether the reach of the statute is fair and warranted under the circumstances.⁵³ The defense appears to be successfully deployed in those cases as an equitable means by which judges can qualify or limit criminal responsibility arising under strictly drawn legislation proscribing offenses that are unassailable on constitutional or other grounds that would otherwise rationalize refusing to give a penal statute its intended effect.⁵⁴

Against this backdrop, the Bybee Memoranda were tailor-made to support the defense of reliance on the advice of counsel, such as it is. By reference to analogous precedent, the Bybee-Gonzales Memorandum persuasively argued that necessity and the defense of self (and others) might justify otherwise criminal conduct by a public official in times of grave peril to the nation.⁵⁵ The Bybee

“humanely” by suspending her sentence on conviction of a Class D felony (noting that Simms neglected to raise the defense at an earlier stage in the proceeding). *Id.*

53. *See, e.g.,* State v. Jacobson, 681 N.W.2d 398 (Minn. Ct. App. 2004). In that case, it was alleged that the defendant engaged various persons to complete and file voter-registration cards that falsely listed defendant's place of business as the voter's place of residence. *Id.* at 401. Defendant moved to dismiss the complaint, arguing that “the statutes prohibiting forgery and unlawful voting are unconstitutionally vague as applied to defendant when considered in light of other voting statutes.” *Id.* Defendant also submitted an affidavit in which he stated that his attorney showed him a copy of a letter from a County Attorney to the Assistant Clerk and Director of Elections, concerning an investigation into alleged voter registration and election law violations by local police officers. *Id.* at 402. The letter contained the County Attorney's legal opinion that there was no evidence that the officers had violated election laws by registering to vote based on their work address rather than their home address. *Id.* Defendant asserted that “[w]ith [his attorney's] counsel and advice, and relying on a review of Minnesota's election laws and the letter by [the County Attorney],” he and several of his employees “devised a plan to get people to register to vote using [defendant's place of business] as a residence.” *Id.* The Court found that the trial court erred in refusing to permit the defendant to assert as defenses both the advice of counsel and reliance on an official interpretation of the law. *Id.* at 410.

54. *See* Note, *supra* note 41, noting:

As criminal law began to be used as a tool of the regulatory state, and thus became divorced from its common law roots, the question whether proof of *mens rea* was required by either the Constitution or the particular statute in question frequently arose. . . . [D]eference to the legislature . . . permits a person to be treated as an object, as a means to a social end, without that person first having given up his right to be treated as an autonomous subject by making a prohibited choice.

Id. at 1396. Some scholars contend, however, that properly viewed, “culpability” is negated by a mistake of law, and distinguish that concept from a defense that relates to the mental element of an offense. Thus;

[t]he mental element relates to the actor's awareness of the factual elements constituting the *actus reus* of the offense. That mental state may be negated by a mistake of fact. By contrast, the term “culpability” in our context focuses upon the manner in which a mistake of the criminal law comes about.

Miriam Gur-Arye, *Reliance on a Lawyer's Mistaken Advice—Should it be an Excuse from Criminal Liability?*, 29 AM. J. CRIM. L. 455, 464-65 (2002) (arguing that the defense should not be recognized).

55. Leaving aside the fact that there is no record of the criminal prosecution of a President of the United States for war crimes, there is ample evidence of unchallenged conduct in times of war that would amount to criminal conduct if not otherwise justified or excused. The proposed mistreatment of prisoners with the intent to obtain military intelligence necessary to avoid harm to the populace was certainly not a novel or absurd notion following the attacks of September 11, 2001. The concept of violent action as self-defense to avert immediate danger was defended contemporaneously by diverse

Memoranda also created a patina of plausibility about the scope of presidential authority in times of crisis that might have been honestly, and thus expulporily believed by a president who was legitimately fearful of further devastating attacks against the United States. Perhaps most importantly, the OLC analyses were not so obviously implausible as to suggest cognizance of malfeasance on the part of the president and those following his orders—and recognition of this fact essentially has been codified by Congress.⁵⁶

Measured by the relevant standards, it is almost inconceivable that the defense of reliance on the advice of counsel would not work quite well for former President Bush and his subordinate executive officers in these circumstances. Ironically, the OLC anticipated precisely the argument that would most successfully appeal to the sensibilities of a former professor of law assuming the office of the presidency. For if it is the case that “mature systems of law” will find only a choice to do “evil” punishable as crime, then punishing conduct blessed by a suite of attorneys in the prosaic legalisms of the OLC would not seem to fit the bill.

Moreover, attempting to base the alleged criminality of the former president’s commands to torture on a “choice” to do “evil” would truly fail to fully comprehend the “lesser evil” of behavior that, albeit proscribed by law, plausibly was sincerely intended to accomplish a greater good and undertaken upon finely crafted legal advice.

As presently known, former President Bush ordered the torture of Zubaydah and others after obtaining scholarly and supposedly authoritative legal advice supporting his choices, through the proper channels of the government. At least publicly, the former Commander-in-Chief and other members of his administration have claimed the “advice of counsel” defense in anticipation of any possible charge of illegal torture of enemy combatants in the custody of the United States.⁵⁷ It is likely that this anticipatory defense will successfully preclude the trial of the former president and his delegates on any such charges, just as it has excused the CIA operatives who conducted the subject torture.

IV. THE CULPABILITY OF ATTORNEYS WHO SERVED IN THE OLC DURING THE BUSH ADMINISTRATION

As shown above, reliance by former President Bush upon the advice of the OLC very well might provide the basis for a forceful defense against any

legal scholars, and has been defended ever since. See, e.g., Steve Inskeep, *Rules Should Govern Torture*, *Dershowitz Says*, NAT’L PUB. RADIO, June 27, 2006, <http://www.npr.org/templates/story/story.php?storyId=5512634&from=mobile>. Professor Alan Dershowitz of the Harvard Law School has argued:

If the [P]resident of the United States thinks it’s absolutely essential to defend the lives of thousands of people, he ought to be on the line. He ought to have to sign a torture warrant in which he says, “I’m taking responsibility for breaking the law, for violating treaties, for doing an extraordinary act of necessity.” That’s a responsibility only the president should be able to take, and only in the most extraordinary situation.

Id. For contrary views, see, e.g., *infra* notes 76 and 78; Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. OF NAT’L SECURITY L. & POL’Y 455 (2005) (examining whether the defenses were plausibly asserted).

56. See *supra* note 23.

57. See *supra* note 22.

prosecution for illegal torture of enemy combatants during his administration. Exculpation without trial of the attorneys who counseled the Executive Branch about the limits of legally permissible conduct will eliminate entirely judicial scrutiny of the arguably illegal conduct that gained advantage from their imprimatur.

Under the laws of the United States, there are several theories upon which an indictment of the attorneys who served in the OLC during the Bush administration might be based. Each would test the limits of ascribing criminality to the advisor, rather than to the advised. The most tenable of such theories involves accomplice liability, or “aiding and abetting” the crime of torture.⁵⁸

Although the attorney-advisors to the Bush administration did not conduct or directly participate in the putatively illegal torture of Zubaydah and others,⁵⁹ the absence of their physical participation in the subject waterboarding and other enhanced interrogation techniques is completely irrelevant to assessing their

58. The United States Code holds liable as a principal one who acts to help a criminal venture succeed. For example, section two of title eighteen provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (2006). Some scholars have noted an anomaly in that the two sub-clauses of section two have not both expressly referenced the state of mind required for conviction. *See, e.g.,* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer under Federal Law*, 70 *FORDHAM L. REV.* 1341 (2002), positing:

Presumably, by including the word “willfully” in the causing subsection, and by not including it in the aiding and abetting subsection, Congress’s intent was to require “willfulness” for the causer, but not for the aider and abettor. But, both subsections provide that the accomplice—whether an aider and abettor or a causer—is to be treated as a principal. If an aider and abettor is to be treated as a principal, and a causer is also to be treated as a principal, then, by the transitive principle, an aider and abettor and a causer would have to be treated as equivalent. That is a somewhat perplexing result, if one need act willfully and the other not.

Id. at 1361. *See also* 18 U.S.C. § 373 (2006), which provides, in pertinent part:

Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct . . . [may be] punish[ed].

Id.

59. This point was highlighted by Berkeley Law Dean Christopher Edley, explaining the means by which he distinguishes the “morality” of Deputy Assistant Attorney General Yoo’s conduct from the actions of those who strictly followed his express prescriptions circumscribing the “permissible” torture of Zubaydah and others:

As critical as I am of [Deputy Assistant Attorney General Yoo’s] analyses, no argument about what he did or didn’t facilitate, or about his special obligations as an attorney, makes his conduct morally equivalent to that of his nominal clients, Secretary Rumsfeld, et al., or comparable to the conduct of interrogators distant in time, rank and place. Yes, it does matter that Yoo was an adviser, but President Bush and his national security appointees were the deciders.

Edley, *supra* note 29.

potential criminal responsibility therefor.⁶⁰ Attorneys who counsel another to commit a crime can be and are held liable as accomplices to criminal acts, without regard to any actual participation in the *actus reus*.⁶¹ An attorney is not immune from prosecution because the conduct of the attorney linked to the commission of a crime was limited to providing advice.

For example, in *United States v. Cintolo*,⁶² Attorney Cintolo was charged with

60. See generally CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL LAW § 29 (15th ed. 1993), Part I. General Principles, Chapter 4. Parties, § 29. In general (database updated September 2008). As that treatise explains:

[T]he terms "aid" and "abet" are frequently used interchangeably, ... although they are not synonymous. ... To "aid" is to assist or help another. ... To "abet" means, literally, to bait or excite, as in the case of an animal. . . . In its legal sense, it means to encourage, advise, or instigate the commission of a crime.

Id. Thus, an actor does not need to be present at the time of commission of a criminal offense to "aid" or "abet" it, and "distance" in place and place is mainly irrelevant. See, e.g., *United States v. Greer*, 467 F.2d 1064, 1069 (7th Cir. 1972) (defendant's participation in theft was limited to providing thieves with information about the location of goods to be stolen, and later, a phone call to claim a share of the proceeds; because the Government did not claim the defendant was physically present at the crime, the court found the defendant's participation amounted to that of an accessory).

61. Attorneys may often elude criminal responsibility for advice that leads to the commission of a proscribed offense for a variety of reasons, including prosecutorial discretion and the shield of the attorney-client privilege. This has led some to believe in error that potential criminal responsibility for merely giving legal advice is enshrined more in principle than in practice. In fact, however, aiding and abetting crime is of real concern among practicing attorneys. See, e.g., Faye M. Bracey, *Twenty-Five Years Later—For Better or Worse?*, 25 ST MARY'S L.J. 315, 324 (1993) ("Because federal and state criminal statutes apply to lawyers as well as nonlawyers, practicing attorneys must ascertain constantly whether they or their clients are violating criminal laws. . . . For example, *advising* a client involved in an ongoing criminal enterprise may constitute aiding and abetting.") (emphasis added); David F. Axelrod, W. Evan Price II & Justin A. Thornton, *Crime Doesn't Pay—But Counsel, What Every Practitioner Needs to Know About Criminal Exposure in the Everyday Practice of Law*, CRIM. JUST. Fall 1993, at 27, stating:

The combination of pervasive regulation and expansive criminal statutes covering aiding and abetting, conspiracy, false statements, and concealment of felonies can ensnare the unwary—and sometimes even the wary-practitioner. While most prosecutors refrain from pursuing attorneys who appear to have acted in good faith, the number of reversals of convictions of attorneys suggests that prosecutorial discretion is no safe haven in a close case. . . . [Federal law] defines as a "principal" anyone who "aids, abets, counsels, commands, induces or procures" the commission of a crime. The [relevant] statute covers more than just obvious conduct, such as direct assistance in the commission of a crime; *it reaches so far as to impose criminal liability for merely advising a course of action that is later determined to be criminal.*

Id. at 27 (emphasis added). The sanctity of the attorney-client privilege—another threshold barrier that often precludes acquiring evidence sufficient to prove the culpability of an attorney-advisor—yields entirely in cases that are successfully maintained against attorneys based on "mere advice" rendered to a client. For example, in *Clark v. State*, 261 S.W.2d 339 (Tex. Crim. App. 1953), the court unequivocally held that although:

[t]he purpose of the privilege is to encourage such disclosure of . . . facts [to one's attorney] . . . the interests of public justice further require that no shield such as the protection afforded to communications between attorney and client shall be interposed to protect a person who takes counsel on how he can safely commit a crime. . . . The fact that the aider may be a member of the bar and the attorney for the offender will not prevent his becoming an accessory.

Id. at 347.

62. 818 F.2d 980 (1st Cir. 1987).

rendering advice that led to an illegal refusal to testify by a grand jury witness.⁶³ In his defense, Attorney Cintolo argued that the act of providing legal advice was lawful, and that inquiry into the motives for his opinions and advice would chill the attorney-client relationship and the work of defense attorneys in general.⁶⁴ The court held to the contrary. According to the court, even an act innocuous when considered in isolation may be criminal when considered in context:

Purchasing a chisel at a hardware store is, usually, a lawful act, commonplace in the extreme. Yet, if an individual were to purchase the same chisel at the same hardware store with the avowed (evil) purpose that it be used as part of a planned break-in by persons in league with him, the iniquitous motive alone would transmogrify the innocent transaction into an overt act carrying undeniable criminal consequences. . . . [I]t is lawful—again, commonplace—to offer an acquaintance a lift to the airport. Nevertheless, if a person were to provide such transportation at precisely the same time and in precisely the same way, but with the corrupt purpose that the prospective passenger be spirited away so as to thwart his scheduled appearance before a grand jury, the impure motive alone would convert the otherwise-lawful gesture into an outright obstruction of [justice].

That sort of alchemy—the conversion of innocent acts to guilty ones by the addition of improper intent—is what this case is all about. In the most fundamental sense, the “advice” given by Cintolo in the manipulation of his own client was a commodity no different than the chisel or the free ride. It was legal to traffic in the wares, but illegal corruptly to put them to felonious use.⁶⁵

In this instance, the opinions that Deputy Assistant Attorney General Yoo and his colleagues provided to the Bush administration were commodities put to an arguably felonious use. The OLC opinions unequivocally assured the president and his delegates that the power of the presidency would shield them from criminal responsibility.⁶⁶ A properly instructed finder of fact rightfully could find that the OLC gave those assurances for the very real purpose of promoting and facilitating the contemplated torture enterprise.⁶⁷

63. *Id.* at 983. The client was held in contempt in federal district court and was sentenced to an eighteen month term of incarceration. *Id.* at 989. Attorney Cintolo also offered “to use his position as an attorney to shield members of illegal gambling and loansharking enterprises from their just deserts as tax evaders.” *Id.* at 988 n.4.

64. *Id.* at 990.

65. *Id.* at 993.

66. *See supra* note 10. With respect to the anticipation that the opinions by the OLC would act as a talisman to ward off prosecution, the attorneys who wrote them and the actors who used them were entirely correct. President Obama has acted according to plan. *See also infra* Part IV.

67. The Model Penal Code provides, in pertinent part: “(3) A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he . . . (ii) aids or agrees or attempts to aid such other person in planning or committing it.” MODEL PENAL CODE § 2.06 (2001). As the authors noted in *United States v. Nofziger and the Revision of 18 U.S.C. § 207*, the view that an accomplice acts with the “purpose” to facilitate the crime is derived in no small measure from Judge Learned Hand’s oft-cited opinion that traditional definitions of accomplice liability have nothing whatever to do with the probability that the forbidden result would follow upon the accessory’s conduct; “. . . they all demand that he in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed. All of the words used—even the most colorless, ‘abet’—carry an implication of purposive attitude towards it.”

The OLC certainly acted with the knowledge that tendering exculpatory legal opinions to the Bush administration would result in it carrying out stated policy imperatives to torture Zubaydah and others, and proceeded with the purpose that those imperatives be carried out and succeed. The OLC attorneys carefully constructed legal opinions patently planned to thwart prospective prosecutions for the illegal torture of Zubaydah and others, enabling the Bush administration to act with the assurance that their opinions would serve that very purpose.

Knowledge that one's conduct will enable the commission of a crime is a sufficient predicate to liability as an accomplice.⁶⁸ Academic debate, provoked by a possible distinction between acting with the purpose to help a crime succeed, and knowledge that one has provided an instrumentality necessary to carry it out, has no constructive role to play in this analysis. The conduct of the attorneys of the OLC might satisfy either standard.

On trial for the crime of torture, therefore, the attorneys of the OLC likely would be tempted to base their defense not on the absence of knowledge of or the purpose to enable the prospective torture of Zubaydah and others, but rather on the honesty of their judgment about the matters asserted. After all, it is said, an attorney renders only the best judgment she can about the law, and she cannot be responsible for the consequences of that judgment once put in the hands of a client.⁶⁹ Ironically, however, the fact that cognizance of illegality is not an element of the crime of torture might trouble the former attorneys of the OLC far more than it would trouble former President Bush.⁷⁰

Note, *supra* note 41, at 825 n.100 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). See also *United States v. Kelly*, 888 F.2d 732, 742 (11th Cir. 1989) (“To prove aiding and abetting, the Government must prove beyond a reasonable doubt that the defendant (1) associated himself with the crime, (2) intended to bring it about, and (3) sought by his actions to make it succeed.”).

68. See, e.g., *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940). In *Backun*, the court noted that:

Guilt as an accessory depends, not on “having a stake” in the outcome of crime . . . but on aiding and assisting the perpetrators. . . . One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he had received full price for the gun.

Id. at 637. See also *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985) (holding that “aiding and abetting murder is established by proof beyond a reasonable doubt that the supplier of the murder weapon knew the purpose for which it would be used.”).

69. See, e.g., *In re Watts*, 190 U.S. 1, 29 (1903) (holding that “In the ordinary case of advice to clients, if an attorney acts in good faith and in honest belief that his advice is well-founded and in the just interests of his client, he cannot be held liable for error in judgment.”).

70. The conviction of the OLC attorneys would turn initially on whether acts actually criminal were committed upon their advice. See *Kelly*, 888 F.2d at 742 n.17. That is not to say, however, that it would be in any way relevant to the liability of the attorney-advisors whether President Bush and his delegates are charged with any offense. See, e.g., *United States v. Hodge*, 211 F.3d 74 (3d Cir. 2000). The court in *Hodge* noted that:

[I]t is beyond dispute that a person charged with aiding and abetting a crime can be convicted regardless of the fate of the principal. [18 U.S.C. § 2] clearly states that: “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” . . . We have also held . . . that: “18 U.S.C. § 2, the majority of cases, and the Model Penal Code, all take the view that an aider and abettor should be treated like any other principal, and be required to ‘stand on his own two feet.’”

The old maxim, “ignorance of the law is no excuse” might apply with particular force to evaluate potential charges against the attorneys of the OLC, for a defense based on a mistake of law would be no defense at all.⁷¹ Any claimed subjective belief by the attorneys of the OLC that the torture of Zubaydah would not be a crime would be as completely irrelevant to their defense as the claimed belief by Cintolo that witness tampering was privileged and thus beyond the reach of the law.

The OLC opinions were tendered to facilitate the infliction of waterboarding on Zubaydah and others. The OLC tendered those opinions with the full knowledge that waterboarding would ensue as a result, and that it might not ensue otherwise. The OLC planned the torture of Zubaydah and others, and prescribed the particulars of that torture in minute detail. The OLC instructed the CIA in the minutia of the techniques of torture to be applied. Unlike those who relied on their advice, a mistake of law in these circumstances would be no excuse for the attorneys who made it.

The fact that Deputy Assistant Attorney General Yoo, in particular, countenanced, planned, enabled, and prescribed the means of torture because it was desired by the Executive that he do so is perhaps explicable, but irrelevant. He likely was plucked from academia to work for the OLC owing to his broad views

Id. at 77. *See also Ex parte Thompson*, 179 S.W.3d 549, 553 n.9 (Tex. Crim. App. 2005) (citing *State v. Kaplan*, 469 A.2d 1354, 1355 (N.H. 1983) (conviction of wife who pleaded guilty to accomplice role in murder of husband would not be reversed even though principal, an alleged contract killer, was acquitted, and noting that “conviction of an accomplice is thus premised upon proof of the commission of the criminal act, rather than on the guilt of the principal”) (citation omitted); *Jeter v. State*, 274 A.2d 337, 338-39 (Md. 1971) (collecting cases and concluding that virtually all American jurisdictions hold that the subsequent acquittal of a principal does not affect the trial or conviction of an accomplice)).

Id. In *Ex parte Thompson*, the court noted the long-standing and current understanding that liability as an aider and abettor attaches in the absence of conviction of a principal, as follows:

The North Carolina Supreme Court has traced this principle back three hundred years to *Wallis’ Case*, 1 Salk. 334. *See State v. Whitt*, 18 S.E. 715, 716 (N.C. 1993). The Model Penal Code also adopts this position. *See MODEL PENAL CODE* § 2.06(7) (2001) (accomplice can be convicted “though the person claimed to have committed the offense . . . has been acquitted.”).

Id.

71. Most torture statutes require an intent to cause pain and suffering for some defined purpose, such as the coerced disclosure of information. The prosecution of such offenses in such instances thus requires an intent to act, with an intent to cause a specified harm, for a specified reason. The OLC’s opinions notwithstanding, here all of those elements could be easily satisfied on the basis of the Bybee Memoranda, read together with later OLC memoranda that establish the CIA took action in accordance with the OLC’s prescriptions (*see, e.g., supra*, note 17). *See, e.g., United States v. Tarr*, 589 F.2d 55, 60 (1st Cir. 1978) (“[I]n order to convict the aider or abettor [must have] kn[own] that the principal was committing the acts which constituted the elements of the crime. That does not mean, of course, that either the principal or aider and abettor must [have] know[n] . . . that those acts were illegal.”) The exculpatory hypothesis in the Bybee-Gonzales Memorandum that the CIA interrogators would not “specifically intend” to cause “severe” harm to the detainees upon the sustained application of waterboarding was patently specious: the acts undertaken neatly fit the nearly universal definition of torture. The “specific intent” of the relevant actors to cause “severe” harm as a result of waterboarding and other enhanced interrogation techniques carried out according to the prescriptions of the OLC can be inferred on the basis of the evidence already in the public record, notwithstanding OLC word processing that suggested such intent could be plausibly denied. Bybee-Gonzales Memorandum, *supra* note 10, at 8.

about presidential authority.⁷² Deputy Assistant Attorney General Yoo understandably may have believed that his work at the OLC was akin to his other work, such as writing theoretical essays about executive power. His conduct was not therefore excusable.

If prosecuted, the criminal culpability of the attorneys of the OLC as accessories to the torture enterprise undertaken by the United States after the attacks of September 11, 2001 will depend solely on the nature of the acts they helped to happen, not any good faith belief those acts were correctly and permissibly done. As stated colorfully by the court in *Cintolo*:

Having called the tune, *Cintolo* cannot be excused from paying the piper on the basis of his vocation. . . . [W]e emphatically reject the notion that a law degree, like some sorcerer's amulet, can ward off the rigors of the criminal law. No spells of this sort are cast by the acceptance of a defendant's retainer.⁷³

IV. THE CRIME OF CONVICTION OF JOHN CHOON YOO

President Obama has ordered the launch of Hellfire missiles into the homes of persons who are not members of any recognized army, located within the boundaries of nations with which the United States is not at war, killing persons not known to have committed any crime.⁷⁴ He has ordered the execution on the high

72. "John Yoo, in particular, expressed his extreme views about unitary executive power before joining the government." Rosen, *supra* note 25. See also Carrie Johnson, *Amid Scrutiny, Yoo Pushes Back*, WASH. POST, July 27, 2009, at A3. *The Washington Post* reported:

Professor Yoo's notions of Presidential authority [were] born early in his legal career, before stints as a law clerk to Supreme Court Justice Clarence Thomas and Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit. Those positions, which even friends call extreme, endeared him to a Bush White House seeking to adopt a centralized approach to power.

Id.

73. *Cintolo*, 818 F.2d at 995-96.

74. Since taking office, Barack Obama has authorized the repeated use of unmanned drones in Central Asia, causing numerous deaths and injuries. See Bernd Debusmann, *Killer Robots and a Revolution in Warfare*, REUTERS, Apr. 22, 2009, available at <http://www.reuters.com/articlePrint?articleId=USLM674603>; Greg Miller, *Drones based in Pakistan; Feinstein's Disclosure Makes Things Awkward For Islamabad, Which Has Protested the U.S. Campaign of Airstrikes from the Planes*, L.A. TIMES, Feb. 13, 2009, at A3. *The L.A. Times* reported:

A senior U.S. lawmaker said Thursday that unmanned CIA Predator aircraft operating in Pakistan are flown from an air base inside that country, a revelation likely to embarrass the Pakistani government and complicate its counter-terrorism collaboration with the United States. The attacks are extremely unpopular in Pakistan, in part because of the high number of civilian casualties inflicted in dozens of strikes. The use of Predators armed with Hellfire antitank missiles has emerged as perhaps the most important tool of the U.S. in its effort to attack Al Qaeda in its sanctuaries along the Pakistani-Afghan border.

Id. See also Peter Bergen & Katherine Tiedemann, *The Drone War: Are Predators Our Best Weapon or Worst Enemy?* NEW REPUBLIC, June 3, 2009, available at <http://www.tnr.com/article/the-drone-war>. *The New Republic* reported that the drone program escalated dramatically under the incoming administration of President Barack Obama, killing hundreds of persons, including civilians:

The drone war against Al Qaeda's leaders—and, increasingly, their Pakistani-based Taliban allies—has been waged with little public discussion or congressional investigation of its legality or efficacy, even though the offensive is essentially a

seas of persons engaged in piracy.⁷⁵ The President of the United States has no inherent authority to order the execution of anyone. Absent justification, using the forces of the United States to end the lives of persons abroad is unlawful.⁷⁶

The crime of torture of persons detained without trial by the United States is analogous. Reasonable minds can differ about the ultimate criminal responsibility of those who designed, ordered, encouraged, or engaged in the otherwise illegal torture of Al Qaeda detainees after the events of September 11, 2001, because the defenses of self-defense, defense of others, and necessity might apply. Those affirmative defenses concede the *prima facie* elements of a crime, but assert in response an exculpatory justification.⁷⁷ It can be stated reliably that the OLC

program of assassination that kills not only militant leaders, but also civilians in a country that is, at least nominally, a close ally of the United States. . . . President Obama has not only continued the drone program, he has ratcheted it up further. In 2007, there were three drone strikes in Pakistan; in 2008, there were 34 . . . Just three days into his presidency, Obama authorized a near-simultaneous pair of drone strikes against targets in North and South Waziristan. Since he took office, there have been a total of 16 airstrikes, or roughly one per week. Our analysis shows that these attacks have killed some 170 people, but only one has killed an important Al Qaeda or Taliban leader, presumably because many of them have decamped from the tribal areas.

Id.

75. See Mark Hosenball & Michael Isikoff, *Blood in the Water: Will Deadly Force Deter Somali Pirates—Or Just Make Them More Violent?*, *Newsweek*, Apr. 15, 2009, available at <http://www.newsweek.com/id/194167?tid=relatedcl>:

While it has been almost universally praised stateside, President Obama's directive authorizing snipers to kill Somali pirates is getting criticized from one quarter: the international shipping and insurance industries, which fear the commando action will only spur pirates to greater violence and put merchant ships at greater risk. . . . Obama . . . authorized a team of Navy SEAL commandos to shoot three Somali pirates who had been holding Richard Phillips, captain of . . . [a] cargo ship, hostage for five days.

Id.

76. Paul Richter, *White House Justifies Option of Lethal Force*, *L.A. Times*, Oct. 29, 1998, at 1. The *L.A. Times* reported:

The Clinton administration believes that it has a legal right to use deadly force against terrorist leaders such as Islamic extremist Osama bin Laden, despite a 23-year-old presidential ban on assassinations, officials say. In public, administration officials remain studiously ambiguous on this sensitive issue. . . . [T]he administration appears to have fairly wide latitude to strike back at terrorists. Specifically, it can authorize military commandos or undercover agents to use deadly force against the leadership of an organization that has hurt or threatened Americans, U.S. officials say. That prerogative arises from a fundamental right of national self-defense, they say. As supporting evidence, they cite language in the United Nations charter endorsing every nation's right to defend itself from attack. "At all times, we may act in self-defense," one senior U.S. official said. "That's what we did in August." "Lawful use of force in self-defense," another official said, "is not assassination."

Id.

77. There are fine and fluctuating historic distinctions between legal excuse and justification. A comprehensive work on the subject finds overarching societal aims most often associated with the latter and personal circumstances with the former, though this distinction does not hold up consistently in case law. See Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 ST. JOHN'S L. REV. 725 (2004). The Bybee-Gonzales Memorandum used the term "justification" in connection with the considered defenses of necessity and self-defense, as follows: "We conclude that, under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A." *Id.* at 2.

plausibly described possible justifications for the torture of detained enemy combatants in the very difficult circumstances following the attacks of September 11, 2001.⁷⁸

To conclude that a competent attorney could have omitted such advice under the same or similar circumstances therefore would appear unwarranted. The opinions by the OLC that torture someday might be found justified by a court or jury were no more or less than guidance to the president and his delegates that they took a chance—a chance that prosecutions might ensue and culminate in criminal convictions should they carry out the contemplated torture enterprise. Opining that the result in any such prosecution might be acquittal cannot be deemed a criminal act.

Had the OLC limited its opinions to the possibility that defenses of justification might apply, however, then the torture enterprise might not have proceeded. It can be readily demonstrated that CIA interrogators would have been unsatisfied with the cold comfort that one day their decisions to engage in enhanced interrogation techniques known to implicate the laws proscribing torture might be vindicated in a trial by a judicial authority.⁷⁹ The same might be said of former President Bush's decision to green light their activities. Those actors needed something more.

And the OLC obliged. By advising that the president had absolute authority to issue orders to conduct enhanced interrogations, and by cloaking those who carried out that torture with the confidence afforded by a blanket authorization to so act without fear of punishment, the OLC created the climate of pretext that accompanies the ultimate in anticipatory exculpation — the claim to sovereign immunity. The claim that “*rex non potest peccare*” is the ultimate *carte blanche*.⁸⁰

78. The viability of these defenses is beyond the scope of this article, but would necessarily entail a thorough examination of possibly less onerous alternatives. See, e.g., Whitney Kaufman, *Torture and The “Distributive Justice” Theory of Self-Defense: An Assessment*, 22 ETHICS & INT’L AFFAIRS 93 (2008) (providing a contrary view concerning the availability of self-defense or others in instances of torture). Specifically, Professor Kaufman invites readers to:

[c]onsider, for instance, the moral philosopher Thomas Nagel’s classic discussion of the man whose friends are badly injured in a car wreck and who gets himself to a nearby isolated house. Once there he is tempted to twist a child’s arm to cause sufficient pain (that is, torture the child) to get the mother to give him her car keys to help his friends. Nagel concludes that this would not be permissible, for it is an example of violating the child’s right not to be used as a means, however morally significant the goal (saving innocent lives). That torture is not defensive but instrumental force can also be seen in that it is in practice irrelevant who one tortures so long as one achieves one’s goal; for example, one could try to get the terrorist to reveal the information by torturing his wife or child in front of him.

Id. at 110.

79. On May 10, 2009, former Vice President Cheney predicted that prosecution of former agents of the United States involved in the use of “enhanced interrogation techniques” would chill such use in the future owing to low “risk tolerance” associated with potential criminal or civil liability. *Face the Nation*, *supra* note 18; see also *supra* note 27.

80. “The King can do no wrong” is the ultimate “blank check.” The doctrine was rejected at the founding of the United States. See, e.g., *Clinton*, 520 U.S. 681, wherein the Court noted:

[The president’s] argument does not place any reliance on the English ancestry that informs our common-law jurisprudence; he does not claim the prerogatives of the monarchs who asserted that “[t]he King can do no wrong.” See 1 W. Blackstone,

By so opining, the OLC rendered other aspects of its Torture Memoranda superfluous.

Uncannily, the OLC accomplished exactly what it intended. It is precisely reliance upon advice by the OLC that has been identified as a determinative excuse to preclude prosecution of the actors who engaged in otherwise illegal torture.⁸¹ The policy makers needed a talisman to ward off the need to prove justification, and, they got just what they wanted in the OLC's opinions. To date, the opinions of the OLC have worked just like the charm they were intended to be.

If one proceeds from the premise that President Obama's decision not to prosecute those relying on the OLC's advice is not obviously incorrect as a matter of law (if not public policy), then it is all the more important that the merits of the OLC's advice be tested in court. The OLC opined not that the president would act outside the law, but that the president could so act without regard to the law. The merits of the exculpatory claim that the war powers afforded by the Constitution preclude prosecution of the president and his delegates for acts defined as criminal by Congress deserve to be the subject of as definitive an adjudication as possible in the crucible of a criminal trial.

To obtain that adjudication necessarily will require prosecution of those who attempted to provide exculpation for actions they abetted. The OLC manifestly intended to cloak executive action with an immunity from prosecution, and by so doing, gave the Bush administration assurances that coordination with the other branches of the federal government was unnecessary to the putative exercise by the president of war powers. In this, the OLC assumed the role of principal with respect to taking action upon its prescriptions.

Any person who carries into practice a belief that the supreme power of the president is a defense to prosecution for the crime of torture deserves his day(s) in court. There, untested academic theories about the power of the president of the United States in times of war to act with impunity can be fully and finally vindicated, or determinatively discredited.

The true crime of conviction of Professor Yoo—and there is no doubt he is so convinced—is the use to which he put his theoretical views about the illegitimacy of any legislative or judicial check on presidential war powers (save the power of the purse). Even while he served as Deputy Assistant Attorney General of the

Commentaries . . . Although we have adopted the related doctrine of sovereign immunity, the common-law fiction that “[t]he king . . . is not only incapable of doing wrong, but even of thinking wrong,” *ibid.*, was rejected at the birth of the Republic.

Id. at 697 n.24.

81. See *supra* notes 23 and 31. By declining prosecution of those who followed his advice, President Obama and Attorney General Holder, *ex post*, have afforded Deputy Assistant Attorney General Yoo's opinions the full force of the legislative, executive, and judicial departments of the United States. Many believe Deputy Assistant Attorney General Yoo basically rewrote the U.S. Code on torture, redefining both its scope and intent, and then instructed actors to commit torture in particular ways asserted by him to be consistent with his version of the law. By limiting prosecution of patently proscribed acts to only those which “exceeded” Deputy Assistant Attorney General Yoo's specifications and instructions, the Obama administration today thereby validates that strategy. If left unchallenged, Deputy Assistant Attorney General Yoo will have been able not only to redefine an offense proscribed by Congress, but also prospectively thwart judicial review by seemingly deliberate manipulation of prosecutorial abstention.

OLC, John Choon Yoo published scholarship that established him as a key proponent of a broad theory of presidential power under the Constitution of the United States to unilaterally initiate and conduct war, with all of the powers necessary and ancillary thereto.⁸² During his tenure at the OLC, Deputy Assistant Attorney General Yoo's opinion that statutes proscribing torture could not be constitutionally applied to the president while exercising war powers was a mere extension of those views—extreme views that demonstrably infected the OLC.⁸³

82. See John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002). Professor Yoo:

In light of Article II's text, I have argued that the Constitution constructs a loose framework within which the President as commander-in-chief enjoys substantial discretion and initiative in conducting military hostilities. . . . The centralization of authority in the President is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch. . . . This point applies perhaps most directly in war than in any other context. . . . There is no doubt that the Constitution provides Congress with a powerful check on warmaking, but it comes through the authority to grant or deny funds to wage war.

Id. at 1676-77, 1681.

83. Cataloguing the volume of persuasive authority that has found Professor Yoo's notions of presidential war powers outside of the mainstream is beyond the scope of this article. See generally Jordan J. Paust, *Above the Law: Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 382-85, nn.97-99 (collecting authority). As Professor Owen Fiss of Yale University recently explained, the Bush administration OLC reproduced in its zeal precisely what went wrong during the administration of President Richard M. Nixon, who was impeached by the House of Representatives and thereafter resigned the presidency owing to abuses of power:

Not only did the [OLC] seek to narrow the scope of the rule against torture by manipulating the definition of the practices covered, it also denied that the President is bound, as a matter of law, by the prohibition against torture, and in doing so harked back to a conception of presidential power long identified with the Nixon White House. In the late 1970s, President Richard Nixon, in an effort to defend the action that led to his impeachment and eventual resignation, publicly maintained that the President is entitled to disobey the law whenever he determines it is for the good of the nation. If the President does an act, he said, it is not illegal. History judged this view harshly, but it was taken as an article of faith in certain circles, which included Vice President Dick Cheney, and it became an organizing theme of the Bush presidency, most remarkably, even in the debates over torture.

Owen Fiss, *The Example of America*, 119 YALE L.J. POCKET PART 1, 6 (2009), available at <http://www.yalelawjournal.org/content/view/764/14/>. Indeed, the Supreme Court of the United States seemed, in principle at least, to undermine Deputy Assistant Attorney General and Professor Yoo's views of unaccountable presidential war power in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In that case, Justice O'Connor, announced the judgment of the court, and joined by the Chief Justice, Justice Kennedy, and Justice Breyer, stated: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 536. Although writing in dissent from the judgment, Justice Clarence Thomas seemingly agreed that "[even] in the declared exercise of his powers as Commander-in-Chief of the Army in time of war and of grave public danger[, action by the president can] be set aside by the courts [if] in conflict with the Constitution or laws of Congress constitutionally enacted." *Id.* at 584 (internal citations omitted; emphasis added). The issue framed by Justice Thomas, for whom Professor Yoo served, may be more precisely stated in this instance to be the proper role of the Supreme Court to determine not only whether laws proscribing torture were constitutionally enacted, but also whether those laws may be constitutionally applied over a claim by the President of the United States (or his delegates) to the free

In this context, Professor Yoo's theories about the war making powers of the President of the United States are held out as a *sui generis* construction of the grant of executive authority to a president by Article II of the United States Constitution.⁸⁴ In fact, in this context, the theory that the war powers acquired by the President of the United States under the Constitution are nearly absolute (subject only to often necessarily *ex post* check by means of the appropriation powers of Congress) mirrors in eerily and nearly verbatim terms an old and long-ago discredited theory of governance: the Fuehrer principle.⁸⁵

A modern court might find little precedent to help it to discover the merits of a wartime Fuehrer principle advocated by the advisors to a present-day President of the United States. But the court would not be without compelling guidance in American jurisprudence.

Following the surrender of the German forces in 1945, in the third of twelve cases brought by the United States before the Nuremberg Military Tribunal, charges were heard against sixteen former German attorneys and jurists for war crimes and crimes against humanity alleged to have been committed during World War II.⁸⁶ Declarations by tribunals condemning them condemned the Fuehrer

exercise of war powers. Deputy Assistant Attorney General Yoo posited no such role for the courts. However, as Justice Stevens explained the rudimentary elements of the governance of the United States in *Clinton v. Jones*:

[W]e have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. . . . [This] principle [was] established in *Marbury v. Madison* [where we stated] that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”

Id. at 703 (internal citations omitted).

84. U.S. CONST. art. II, § 1 (providing that “[t]he executive Power shall be vested in a President of the United States”).

85. In about 1920, the National Socialist German Workers’ (“National Socialist”) Party formed in Munich, Germany. Within months, Adolf Hitler became its Führer. (The term “Fuehrer” is roughly translated as “Leader”). The National Socialists adopted a theory of governance known as the “Führerprinzip” or “Leader principle.” In 1933, Hitler became chancellor of Germany. On August 2, 1934, he was designated “Führer und Reichskanzler” or “Leader and Chancellor of the (Third) Reich.” See generally WILLIAM J. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* (1960) (In a conflict known as “World War II,” Germany and its allies fought against and were ultimately defeated by a coalition of armed forces, including those of the United States, Great Britain, and the Union of Soviet Socialist Republics).

86. See TRIALS OF WAR CRIMINALS BEFORE THE NUERNBURG MILITARY TRIBUNALS, available at <http://www.mazal.org/NMT-Home.htm>. The Mazal Library describes those military tribunals generally as follows:

The Trials of War Criminals before the Nuremberg Military Tribunals (NMT) differ[ed] from the [more well-known] Trial of the Major War Criminals before the International Military Tribunal (IMT) in a number of different ways. The IMT process held between November 14, 1945 and October 1, 1946 was held under the aegis of an international court with judges and prosecutors from the United States, Great Britain, the Provisional Government of France and the Union of Soviet Socialist Republics. . . . [T]he IMT prosecuted those major war criminals who were the leaders of the [defeated government of wartime Germany.] . . . The NMT process held from October 1946 through May of 1949 focused on many of the actual perpetrators of the war crimes. The judges and prosecutors of these war criminals were exclusively American.

Id. One of the cases brought before the NMT was *United States v. Altstoetter*, which is commonly known as the “Justice Case.” 3 *Trials of War Criminals Before the Nuernberg Military Tribunal* (1951) [hereinafter Altstoetter]. In that case, “[o]f the sixteen defendants indicted, nine were officials in the

principle in no uncertain terms.

In this passage from the judgment by the Nuremberg Military Tribunal pronouncing the guilt of several former members of the wartime German Ministry of Justice, the relevance of the Fuehrer principle to their guilt was explained:

We pass now . . . to a consideration of the law in action, and of the influence of the “Fuehrer principle” as it affected the officials of the Ministry of Justice Two basic principles controlled conduct within the Ministry of Justice. The first concerned the absolute power of Hitler in person or by delegated authority to enact, enforce, and adjudicate law. . . . Concerning this first principle, [it was] said:

“[O]ne will have to say that restrictions under German law did not exist for Hitler. He was *legibus solutus* in the same meaning in which Louis XIV claimed that for himself in France”⁸⁷

The Fuehrer principle was more than just another academic theory to be bandied about by persons without responsibility for the real-world consequences of the opinions they expressed. The Fuehrer principle was advanced to support a very specific agenda—to foster and promote the legal authority of the executive in Germany to achieve “victory” during a time of war.

All powers to do as the Fuehrer saw fit to achieve that “victory” were deemed to be implied by role his as “Commander-in-Chief”:

[T]he Fuehrer must have all the rights postulated by him which serve to further or achieve victory. Therefore—without being bound by existing legal regulations—in his capacity as leader of the nation [and] Supreme Commander of the Armed Forces . . . the Fuehrer must be in a position to [use] force with all means at his disposal . . . to fulfill his duties.⁸⁸

In comparison, consider this passage from the Bybee-Gonzales Memorandum:

The President’s constitutional power to protect the security of the United States and the lives and safety of its people must be understood . . . [to] imply the ancillary powers necessary to their successful exercise. . . . In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy.

Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. . . . Congress can no[t] . . . interfere with the President’s conduct of the interrogation of enemy combatants. . . . [L]aws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States [are unconstitutional].⁸⁹

In other words, just as National Socialists assigned to their commander-in-chief broad and unchecked war powers, the OLC assigned to the President of the United States unchecked powers to achieve victory against the amorphous forces with which the United States was “at war.” The OLC expressly disclaimed the

[wartime Germany] Ministry of Justice. [Among those,] . . . defendants Schlegelberger . . . and Klemm [discussed *infra*] each had held the position of Under Secretary “Staatssekretaer”, (also translated as State Secretary) in the . . . Ministry of Justice. *Id.*

87. *Id.* at 1010-1011.

88. *Id.* at 1012.

89. See Bybee-Gonzales Memorandum, *supra* note 10, at 36-39.

power of mere “laws” to “prevent” the president from doing anything he “believe[d] necessary” to “gain intelligence.” There is no distinction that makes a difference here.

The OLC went even further, along precisely the same line of logical reasoning employed by the National Socialists. Respected National Socialist German legal authorities opined that not only the Fuehrer, but all those who acted on his authority, were shielded from legal accountability by reason of the express and implied powers inherent in his role as the Supreme Commander of the Armed Forces:

The conclusion to be drawn from the evidence, presented by the defendants themselves is clear: In German legal theory, Hitler’s law was a shield to those who acted under it.⁹⁰

Now, consider this passage from the Bybee-Gonzales Memorandum:

[B]oth courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to . . . the President’s constitutional powers [as commander-in-chief].⁹¹

In other words, just as accepted German legal theory postulated that Hitler’s orders shielded all those who obeyed them, so too the OLC concluded that the Constitution of the United States forbids prosecution not only of the president, but also any person acting under his “shield” in a time of war—even if acting in direct violation of the laws of the United States prohibiting torture.

There may be some who will support the notion that the president may exercise unchecked power, as a Caesar or Fuehrer, with respect to the conduct of war, until Congress disbands or defunds the armed forces of the United States to halt it (after the damage is done and without consequence for those who violated positive law). In an age of war without end, however, others will insist that this creed must be condemned, just as it was condemned in post-war Germany—not only because it is morally wrong, but because it threatens the very foundation of the constitutional republic of the United States. Until and unless rebuked by a judicial authority, criminal acts taken upon a perceived principle of unchecked presidential power may remain the subject of intense criticism, but such criticism will dissolve into meaningless, idle chatter in the teeth of another crisis.

Again, historical precedent cannot be ignored. In wartime Germany, similar subversions of the German Republic by the forces of the National Socialist jurists and attorneys were allowed to flourish. Respected German legal scholars advocated the Fuehrer principle, and then assumed senior positions in the government. Perhaps none of them is more representative, at the highest levels of the Reich’s Ministry of Justice, than Louis Rudolph Franz Schlegelberger. His is a cautionary tale.

Schlegelberger received his law degree from the University of Leipzig in 1899 and passed the state law examination in 1901. He was the author of several law books. In 1927, Schlegelberger was appointed Ministerial Director in the Reich Ministry of Justice. He quickly rose through the ranks in the Ministry. In 1941,

90. Altstoetter, *supra* note 86, at 1011.

91. Bybee-Gonzales Memorandum, *supra* note 10, at 36.

Schlegelberger was put in charge of the Reich Ministry of Justice as Administrative Secretary of State. He resigned from the Ministry of Justice in 1942.⁹²

Schlegelberger was the highest ranking defendant in the Justice Cases. He was charged with war crimes and crimes against humanity.⁹³ The Fuehrer principle played a prominent role in the actions that led to Schlegelberger's conviction. The Tribunal found that he "supported the pretension of Hitler in his assumption of power to deal with life and death in disregard of even the pretense of judicial process. By his exhortations and directives, Schlegelberger contributed to the destruction of judicial independence."⁹⁴ In addition, the Tribunal condemned "[the acquiescent] attitude toward atrocities committed by the police [that could] be inferred from his conduct."⁹⁵

Schlegelberger presented an interesting defense, which was also claimed by most of the other defendants in the Justice Cases. He claimed that the administration of justice in wartime Germany was under persistent assault by advocates of a German police state, and that, absent his efforts, matters would have been even worse. The evidence showed instead that Schlegelberger and the other defendants who joined in his claim of justification facilitated the dirty work that the leaders of the German State demanded, in order to maintain the Ministry of Justice

92. Alstoetter, *supra* note 86, at 1081-82.

93. Control Council Law No. 10 ("CC 10") dealt with war crimes and crimes against humanity. The first penal provision of CC 10, at Article II, defined war crimes as follows:

Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, . . . murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Id. at XIX. CC 10, Article II defined crimes against humanity, as follows: "inhumane acts committed against any civilian population, before or during the war." *Id.* CC 10 defined as criminal acts "atrocities and offenses, including but not limited to . . . imprisonment, torture, rape, or other acts committed against any civilian population . . . whether or not in violation of the domestic laws of the country where perpetrated." *Id.*

94. Alstoetter, *supra* note 86, at 1083.

95. *Id.* at 1085. The subject of enhanced interrogations was at issue also in the trial by the NMT of another attorney, Herbert Klemm. The evidence showed that as a Chief Prosecutor in the Ministry of Justice, Klemm was responsible for the review of "criminal procedures concerning more severe interrogations." *Id.* at 1088. The Tribunal noted that, at least upon first impression, "severe interrogations" of persons were of interest to the Ministry of Justice: "The practice of more severe interrogations . . . caused much worry to those concerned with the administration of justice. [T]he term 'more severe interrogations' . . . meant [the] 'third degree' methods which Hitler authorized the police to use in cases considered important for the safety of the State." *Id.* at 1088. After these interrogations were transferred to the Gestapo, however, and put "beyond the jurisdiction of law" the interest of the Ministry waned. As explained by the NMT, in its judgment convicting Klemm:

Certainly it can hardly be assumed that the defendant Klemm was unaware of the practice of the Gestapo with regard to obtaining confessions. He had dealt with this matter during his early period with the department of justice. It is hardly credible that he believed that the police methods which at an earlier time were subject to some scrutiny by the Ministry of Justice, had become less harsh because the Gestapo, in October of 1940, was placed beyond the jurisdiction of law. He must have been aware that a prolific source of clear cases based on confessions and, therefore, legally incontestable, came to him from the obscurity of the torture chamber.

Id. at 1093.

in the good graces of Hitler. They employed the Ministry of Justice as a means to accomplish Hitler's wrongful ends, under the guise of law.

Pronouncing Schlegelberger guilty as charged and sentencing him to life imprisonment, the American authority discredited the Fuehrer principle in a manner only possible by persons who came from a country that would never permit it to flourish.⁹⁶ The Tribunal stated that "[t]he prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes."⁹⁷

Professor Yoo's views may be likewise condemned on moral grounds by those who believe that the Constitution of the United States does not contemplate a chamber of horror used to torture perceived enemies who threaten the homeland, operated by the White House in violation of the United States Code. But, should advice that so closely mirrored the Fuehrer principle, no matter how repugnant, be the basis for criminal responsibility for acts undertaken in reliance upon that advice?

Having postulated Deputy Assistant Attorney General Yoo's true crime of conviction, we must return to the issue of the accountability of the attorneys of the OLC. The question remains whether an attorney in modern-day America may, with impunity, put into practice an abhorrent theory of dictatorial power to justify the wanton violation of criminal laws by the President of the United States and his delegates.

The answers are yes and no. Again, on trial as an accessory to the crime of torture, the former attorneys of the OLC might be able to mount a decent defense that their advice concerning available affirmative defenses was a valid exercise of professional judgment—which left the choice to the executive whether to proceed with the contemplated torture enterprise. But their advice that former President Bush had unilateral authority in times of war to violate the laws of the United States with impunity merits trial of the entire matter.⁹⁸ If the opinions by the OLC

96. Indeed, Justice Robert H. Jackson of the United States Supreme Court, who presided over the Trial of the Major War Criminals before the International Military Tribunal (*see supra* note 86) later, and many believe brilliantly, summed up the scope of the constitutional check on the powers of the President of the United States in his oft-cited concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), as follows:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637-38.

97. Alstoeffer, *supra* note 86, at 1086.

98. In addition to opining that the Fuehrer principle permitted the President of the United States to violate the laws of the United States with impunity, "John Yoo [also] argued that constitutional provisions ensuring free speech and barring warrantless searches could be disregarded by the president in wartime." R. Jeffrey Smith & Dan Eggen, *Post-9/11 Memos Show More Bush-Era Legal Errors*, WASH. POST, Mar. 3, 2009, at A5. If the former attorneys of the OLC are heard to say rightly that the Congress cannot constitutionally bar a torture enterprise undertaken by the president against perceived enemies of the Republic, then their defense will be successful and the law found wanting. Acquittal

in this latter respect are found to have been the *sine qua non*—that without which the Bush administration’s torture enterprise would not have ensued—then the issue will be properly framed.

The former attorneys of the OLC could not be heard to credibly say in their defense that they had no control over the actions of the executive branch, or no expectation that their opinions would lead to torture. Once again, any such claim would echo the futile pleas of those members of the National Socialists’ Ministry of Justice, who, when faced with trial for their actions, claimed that they did not know what would happen to persons as a result of their legal opinions condoning, facilitating, and planning the brutality done by others. The Ministers’ plea of ignorance was summarily rejected by the Tribunal as follows:

The defendants contend that they were unaware of the atrocities committed by the Gestapo and in concentration camps. This contention is subject to serious question. Dr. Behl testified that he considered it impossible that anyone, particularly in Berlin, should have been ignorant of the brutalities of the SS and the Gestapo. He said: “In Berlin it would have been hardly possible for anybody not to know about it, and certainly not for anybody who was a lawyer and who dealt with the administration of justice.” He testified specifically that he could not imagine that any person in the Ministry of Justice . . . or as a practicing attorney . . . could be in ignorance of the facts of common knowledge concerning the treatment of prisoners in concentration camps. . . . In short, the claim that . . . they were ignorant [is not credible].⁹⁹

Without any doubt, the OLC knew the use to which its advice would be put. The OLC prescribed the terms of torture, in precise and detailed terms. Its detailed instructions to the CIA interrogators included the specific admonitions to be furnished to Zubaydah while tormenting him.¹⁰⁰

therefore would establish an awesome power of the President not only to capture and torture persons seized overseas—charged with no offense, but believed by the president alone of possessing information that might help thwart an attack on the United States—but also might strongly suggest the validity of their ancillary conclusions that the President of the United States holds inherent, unitary, and discretionary war power to violate of the First and Fourth Amendments to the United States Constitution with impunity.

99. Altstoetter, *supra* note 86, at 1079.

100. With the exception of a lofty academic treatment of issues marginally requiring an exegesis of United States constitutional law, the Bybee Memoranda were appallingly amateurish — the author’s lack of objectivity, proficiency, and actual experience in the practice of law glaringly evident. In truly one of the more bizarre passages of Bybee-Rizzo Memorandum, the OLC explained how to “legally” torment Zubaydah with a caterpillar:

In addition to using the confinement boxes alone, you also would like to introduce an insect into one of the boxes with Zubaydah. As we understand it, you plan to inform Zubaydah that you are going to place a stinging insect into the box, but you will actually place a harmless insect in the box, such as a caterpillar. If you do so, to ensure that you are outside the predicate act requirement, you must inform him that the insects will not have a sting that would produce death or severe pain. If, however, you were to place the insect in the box without informing him that you are doing so, then, in order to not commit a predicate act, you should not affirmatively lead him to believe that any insect is present which has a sting that could produce severe pain or suffering or even cause his death.

Bybee-Rizzo Memorandum, *supra* note 5, at 14. This inept attempt to legislate the criminality of torment, by the words spoken or not spoken while conducting it, appears to reflect not only a complete

The OLC conceived a legal framework that would exculpate those directly responsible for the torture of enemy combatants detained by the United States. It blessed the entire enterprise in an overt attempt to provide immunity from prosecution to the participants. A finder of fact could conclude reasonably that had the OLC said no torture is legal, the result would have been no illegal torture.

The activities by the attorneys in the OLC in connection with the torture enterprise described above, and particularly the actions of John Choon Yoo, simply cannot be permitted to stand unchallenged and unadjudicated forever. As stated by United States Supreme Court Justice Robert Jackson, presiding over the first of the Nuremberg Tribunals: “The danger, so far as the moral judgment of the world is concerned, which will beset these trials is that they come to be regarded as merely political trials in which the victor wreaks vengeance upon the vanquished.”¹⁰¹

As a nation of laws, and as the nation that claimed the moral authority to put on trial and punish Schlegelberger and the rest, the United States must not accept the disgrace that Justice Jackson rightly predicted would befall it should his warning to avoid double standards go unheeded.¹⁰²

lack of common sense, but also an ignorance of literature. Their surreal approach to the matter of the caterpillar clearly evokes a scene all too familiar to those who once feared that one day, this day would come. As George Orwell presciently envisioned the scene, long ago:

It was bigger than most of the cells he had been in. He was strapped upright in a chair, so tightly that he could move nothing, not even his head. A sort of pad gripped his head from behind, forcing him to look straight in front of him. For a moment he was alone, then the door opened and O'Brien came in. "You asked me once", said O'Brien, "what was in Room 101. I told you that you knew the answer already. Everyone knows it. The thing that is in Room 101 is the worst thing in the world." The door opened again. A guard came in, carrying something made of wire, a box or basket of some kind. He set it down on the further table. Winston could not see what the thing was. "The worst thing in the world", said O'Brien, "varies from individual to individual. It may be burial alive, or death by fire, or by drowning, or by impalement, or fifty other deaths. There are cases where it is some quite trivial thing, not even fatal." He had moved a little to one side, so that Winston had a better view of the thing on the table. It was an oblong wire cage. Fixed to the front of it was something that looked like a fencing mask, with the concave side outwards. Although it was three or four metres away from him, he could see that the cage was divided lengthways into two compartments, and that there was some kind of creature in each. They were rats. "In your case", said O'Brien, "the worst thing in the world happens to be rats."

GEORGE ORWELL, NINETEEN EIGHTY-FOUR 286 (1949).

101. Justice Robert H. Jackson, Statement on War Trials Agreement (Aug. 12, 1945), *available at* http://avalon.law.yale.edu/imt/imt_jack02.asp.

102. Any claim that the volume of injustice perpetrated against only a few detainees in America is not comparable to the Holocaust would be a particularly inappropriate argument. As the NMT stated with respect to a similar argument by Schlegelberger (who resigned from the Reich Ministry in protest long before the Nazi killing machine reached its full potential):

The cruelties of the system which he had helped to develop were too much for him, but he resigned too late. The damage was done. If the judiciary could slay their thousands, why couldn't the police slay their tens of thousands? The consequences which Schlegelberger feared were realized. The police . . . prevailed. Schlegelberger had failed. His hesitant injustices no longer satisfied the urgent demands of the hour.

Altstoetter, *supra* note 86, at 1086-87.

V. ADVOCACY OF THE LEADERSHIP PRINCIPLE CONTINUES

Although conclusions to be drawn from such comparisons are somewhat obvious, there is an understandable reluctance among scholars to label a colleague an adherent of National Socialism (i.e., a “Nazi”). Any such reference is so overused an epithet that it has lost saliency as a tool to connote affinity with a well-developed legal and political philosophy. To be sure, the epithet is often misapplied, especially in the popular media. Study of such comparisons suffers as a result.

No one could credibly claim that Professor Yoo is a Nazi. He is not. Nor can it be said that the Fuehrer principle belonged first or only to that odious regime. In fact, it did not.

What can be said, and what should be said is that the Fuehrer principle is a discernible theory of governance that inexorably bends toward atrocity.¹⁰³ Advocacy and adoption of the Fuehrer principle as a governing strategy in times of conflict, by whatever name and in whatever era, is wrong because it is fundamentally at odds with predictable justice. The founders of the United States did not intend to create an office of the presidency with unchecked power to seize and torture persons in violation of the law. It is a perversion of history and American jurisprudence to contend otherwise. When one person is given ultimate authority to do “whatever is necessary” under the guise of unlimited “war powers” the result has been and may be always the same.¹⁰⁴

To better understand to what ultimate end Professor Yoo’s theories of presidential war powers would lead, it is only necessary to examine to what end those theories have led. Owing to a complete absence of accountability for what was done while he was with the OLC, Professor Yoo is able still to peddle a pernicious postulate of sovereign immunity in times of war, thanks in no small measure to the “academic freedom” afforded by the shelter of the academy.¹⁰⁵ Professor Yoo’s theories have evolved into a full-throated defense of extremism in the name of executive war power, even when that extremism results in horrifying

103. With apologies to Dr. Martin Luther King, Jr., who said: “Let us realize the arc of the moral universe is long but it bends toward justice,” available at <http://www.indiana.edu/~ivieweb/mlkwhere.html>.

104. As John Emerich Edward Dalberg Acton, first Baron Acton (known simply as Lord Acton) stated, in a letter to Bishop Mandell Creighton in 1887: “Power tends to corrupt, and absolute power corrupts absolutely.” LORD ACTON, *ESSAYS ON FREEDOM AND POWER* 335 (Gertrude Himmelfarb ed. 1964). William Pitt, British Prime Minister from 1766 to 1778, similarly opined, in a speech to the House of Lords of the United Kingdom in 1770: “Unlimited power is apt to corrupt the minds of those who possess it.” William Pitt, *Case of Wilkes Speech*, Jan. 9, 1770.

105. Berkeley Law Dean Edley has asked whether holding Professor Yoo accountable for putatively criminal acts by Deputy Assistant Attorney General Yoo, absent formal conviction, would chill academic freedom:

Does what *Professor Yoo* wrote while not at the University somehow place him beyond the pale of academic freedom today? . . . My sense is that the vast majority of legal academics with a view of the matter disagree with substantial portions of *Professor Yoo’s* analyses, including a great many of his colleagues at Berkeley. If, however, this strong consensus were enough to fire or sanction someone, then academic freedom would be meaningless.

Edley, *supra* note 29 (emphasis added).

acts.

If there is any doubt that Professor Yoo is a staunch, if undeclared, advocate of the Fuehrer principle no matter what it may have wrought, his work since leaving the OLC dispels it. Professor's Yoo recent scholarship continues to demonstrate an unmistakable magnetism to National Socialist principles. In a recent article about President Andrew Jackson, Professor Yoo endorses the most dangerous aspects of the Fuehrer principle, in prose nearly identical to the accolades that German legal scholars paid to it.¹⁰⁶

Surely, Professor Yoo's observation that "scholars continue to regard Jackson as one of the ten greatest presidents" is correct.¹⁰⁷ However, Professor Yoo focuses not on those positive aspects of Jackson's record that others might, but rather on certain aspects of Jackson's terms in office that reflect brutal and blunt exercises of his executive power. The best example of this is Professor Yoo's analysis of Jackson on the "Indian question."

Andrew Jackson's presidency is particularly associated, as Professor Yoo's scholarship establishes, with "Indian removal"—an indelible stain on the fabric of the history of the United States. This program was rooted in racism and was essentially a policy of ethnic cleansing. Professor Yoo describes it as a "pillar" of Jackson's presidency.¹⁰⁸ Although the infamous "Trail of Tears" "occurred after Jackson left office," Professor Yoo forthrightly acknowledges that Jackson "surely bears great responsibility for the tragedy [because he] used the power of the Presidency to bring it about."¹⁰⁹

According to Professor Yoo, Jackson's racist policies produced Indian Removal "at a significant cost in lives."¹¹⁰ That statement is truth enough. After clinically describing the horror of those genocidal campaigns, however, Professor Yoo appears to be too ready to laud the putative benefits of Jackson's racist policies.

Professor Yoo is uninhibited in these claims. He repeatedly justifies brutal ethnic cleansing by the ends it supposedly achieved. He writes:

In order to fulfill the promise of the West, settlers needed land. . . . Federal policy recognized the Indian tribes were self-governing sovereigns, they should remain on their lands. . . . Jackson held a very different view. He saw removal of the Indians as advancing America's economic development and enhancing its strategic position in the Southwest. Removing the Indians would open up fertile lands in the West to white settlement, and it would eliminate an anomaly from America's sovereignty.¹¹¹

He achieved what he had wanted—the removal of a perceived obstacle to the growth of the American republic. Jackson opened up 100 million acres to white settlers in exchange for 30 million acres in Oklahoma and Kansas and seventy million dollars. . . . He . . . wanted to open the best farmland to white settlers and

106. John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521 (2008).

107. *Id.* at 574.

108. *Id.* at 531.

109. *Id.* at 536.

110. *Id.*

111. *Id.* at 531-32.

to impose state law so as to drive the Indians out.¹¹²

Despite . . . negative aspects to his time in office, scholars continue to regard Jackson as one of the ten greatest presidents. His foreign policy expanded the frontiers of the nation and opened land to economic development. . . . He could not have achieved [this] without a reinvigorated understanding of the constitutional powers of the [Presidency].¹¹³

Professor Yoo thus lists among President Jackson's achievements the elimination of an "anomaly" from America's sovereignty, the opening up of fertile lands for white settlers, and the supposedly consequent economic development that ethnic cleansing facilitated.

Hitler described the reasons for and right to territorial expansion in nearly identical terms:

[I]t is critical for a nation that its territory correspond to its population. . . . "The nation needs space." . . . The question confronts us today as insistently as ever: No government, of whatever kind, can long escape dealing with it. . . . Increasing competition . . . naturally force[s] . . . states to use ever sharper weapons until one day the sharpest economic weapons will give way to the sharpness of the sword; that is, when a healthy nation faces the last either-or, and despite the greatest diligence cannot withstand the competition, it will reach for the sword because the question of life is always the problem about which life turns. It is a question of power. The first way to satisfy this need, the adjustment of territory to population, is the most natural, healthy and long-lasting. . . . The . . . foundation is power, always power. . . . We can see that today.¹¹⁴

There is nothing new or novel about comparing the notion of the "manifest destiny" of the United States (a "policy" draped with racism) with the theory of *lebensraum* championed by the National Socialists in Germany.¹¹⁵ Yet, Professor

112. Yoo, *supra* note 106, at 536.

113. *Id.* at 574-75.

114. Adolf Hitler, Speech Delivered at the 1927 Nuremberg Rally, *available at* <http://www.calvin.edu/academic/cas/gpa/rpt27c.htm>.

115. *See, e.g.*, ADOLF HITLER, MEIN KAMPF 403, 591 (John Chamberlain et al. eds., 1939). *See* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 708 (2003) (arguing that the "policy of Lebensraum was premised on the claim that Germany was overcrowded and that the Germans, by virtue of the superiority of their race, had a right to the land owned by Slavs; the American policy of manifest destiny was based on the presumed superiority of American civilization"); Lilian Friedberg, *Dare to Compare: Americanizing the Holocaust*, 24 AM. INDIAN Q. 353, 360-61 (2000) (comparing the U.S. government's doctrine of Manifest Destiny with the German Lebensraumpolitik and arguing that the American genocide campaign against the Indians was a predecessor to the Nazi Holocaust, relying on, among other sources, DAVID E. STANNARD, AMERICAN HOLOCAUST 153 (1992) (Hitler biographer John Toland recorded that the Führer was known to have "expressed admiration for the 'efficiency' of the American genocide campaign against the Indians, viewing it as a forerunner for his own plans and programs"); A Conversation with R. David Edmunds (Anne and Chester Watson Chair in History in the University of Texas Dallas School of Arts and Humanities) Concerning Native American Displacement Amid U.S. Expansion (Apr. 27, 2009), *available at* <http://www.utdallas.edu/news/2009/06/25-002.php>. During the interview, Professor Edmunds noted:

There is an interesting symbolic portrayal of Manifest Destiny that shows "Columbia," the great American angel or woman, floating over the plains. Ahead of her, in the West, is a great darkness populated by wild animals. There are bears and wolves and Indian people, who are fleeing her light. In her wake come farms, villages and homesteads and

Yoo seems to be unaware of this. He speaks of Jackson's policy of "Indian Removal" in terms of the greater good he finds it accomplished. For Professor Yoo, the ends seem always to justify the means, and, this appears to be so, even if a vast group of human beings might have died in the process.

The greater good, in Professor Yoo's instantly recognizable view, is the establishment of the supreme authority of the executive. What is first and foremost in Professor Yoo's scholarship is the Fuehrer principle. It appears that no matter what the wrong done, Professor Yoo returns to the putatively positive accomplishments that unchecked executive authority can achieve while waging "war"—foreign or domestic. Professor Yoo heaps praise on an ethnic cleanser because Jackson helped to lay the foundation for the Yoo vision of a dictatorial wartime Presidency.

Making the comparison all the more precise, Professor Yoo even cites with approval the racist rationale for Jackson's Indian Removal policy. Professor Yoo uncritically highlights Jackson's patently racist and immoral excuse that ethnic cleansing worked for the "good" of the "Indians," with no accompanying debunking of Jackson's claim—a claim that speciously presupposed the futility of acting decently under the circumstances:

Jackson . . . believed that whites and Indians could not live together and that the best solution was to keep the races apart. . . .

Jackson may have honestly believed that the lot of the Indians would be improved by distance from whites. His actions may have even prevented their wholesale destruction, which could have occurred had they attempted to remain in Georgia and other western states. . . . [H]e believed himself to be protecting the Indians by keeping them apart from whites.¹¹⁶

Compare Hitler's rationale for ethnic cleansing:

And thus it happens that for the first time it is now possible for men to use their God-given faculties of perception and insight in the understanding of those problems which are of more momentous importance for the preservation of human existence than all the victories that may be won on the battlefield or the successes that may be obtained through economic efforts. . . . It is not for men to discuss the question of why Providence created different races, but rather to recognize the fact that it punishes those who disregard its work of creation. . . . [T]his will not lead to an estrangement between the nations; but, on the contrary, it will bring about for the first time a real understanding of one another.¹¹⁷

In the scholarly view of Professor Yoo, President Jackson (like Hitler) "honestly" observed that ethnic cleansing benefits the cleansed as much as the cleansers. Professor Yoo teaches us that a bigoted and fundamentally unnecessary genocide

in the back are cities and railroads. As the figure progresses across the land, the light of civilization dispels the darkness of ignorance and barbarity. In this painting, Native American people are portrayed along with the animals and the darkness. They have to be removed before Columbia can bring the prosperity promised to the United States.

Id.

116. Yoo, *supra* note 106, at 532, 536.

117. Adolf Hitler, Speech on National Socialism and World Relations, delivered at the German Reichstag (Jan. 30, 1937), available at <http://www.calvin.edu/academic/cas/gpa/hitler1.htm>.

by forced expulsion legitimately could have been “honest believed” by Jackson to have been the alternative to simply exterminating or harassing into extinction the irrationally despised group *in situ*.¹¹⁸

Aside from the supposed benefits of ethnic cleansing, Professor Yoo’s defense of Jackson’s policies stands on another independent ground. Professor Yoo’s admiration for the “good” accomplished by Jackson’s genocidal policies against the “Indians” also turns on the claim that “popular will” supported it. Once again, Professor Yoo appears to accept, with implied approval, another of Jackson’s “honest” beliefs—that the racist underpinnings of his “Indian removal” policies were in keeping with a unitary “popular will.” Professor Yoo writes that “[u]nder the standards of his time, Jackson’s views can be said to represent the views of the voting public.”¹¹⁹

Are “*the* views” of that voting public something to be condemned? To the contrary, according to Professor Yoo. In stark terms, Professor Yoo praises Jackson’s exercise of unilateral and anti-Constitutional executive authority, based on Jackson’s supposedly superior power to discern *the* putative “popular will”.¹²⁰

To Jackson, democracy meant that the will of the majority should prevail, *regardless of existing governmental and social arrangements*. . . . The Framers designed a government to check and balance majority rule with the Senate, the Electoral College, and an independent judiciary. *Jackson followed a different star*.¹²¹

Professor Yoo conspicuously does not forthrightly and vigorously renounce that star as Caesar’s light.

Undoubtedly, Professor Yoo would acknowledge that a majority of the German people also supported Hitler’s racist policies. Be that as it may be, as recognized a Constitutional scholar as he cannot completely fail to understand that the Constitution of the United States is riddled with anti-democratic provisions—and was designed precisely to avoid the tyranny of a real or imagined majority manifested in the racist policies of a rogue president.¹²² There is something

118. See, e.g., Edmunds, *supra* note 116. Professor Edmunds explained the hypocritical nature of this particularly crass rationalization for Indian Removal:

How do you rationalize the taking of land and the usurpation of property? The argument that was used was, “This had to be done to save these poor Indian people. They don’t fit in the East, so we have to move them out beyond the frontier This is the only possible way to save them.” The hypocrisy of this is obvious because many of the people, though not all of them, who were removed were very sophisticated and relatively “civilized” people. For example, the literacy rate of the Cherokee nation is higher than that of the white South up through the Civil War, yet the tribe was moved westward as an uncivilized people, so that their land could be open for American expansion.

Id.

119. Yoo, *supra* note 106, at 536.

120. Despite praising Jackson as a supposed man of the people, Professor Yoo acknowledges that the revulsion arising out of Jackson’s dictatorial policies was so great that a new political party formed in the United States to oppose them. Professor Yoo writes: “He would also spark resistance so strong that it would coalesce into a new political party, the Whig party, devoted to opposing concentrated executive power.” *Id.* at 526.

121. *Id.*

122. Justice Robert H. Jackson stated:

intellectually awry here.

Professor Yoo's tribute to the Fuehrer principle reaches its apogee in his analysis of the work of President Polk:

Jackson's restoration of the constitutional powers of the Presidency reached its apogee under his protégé, James K. Polk. . . . Only by fully exercising the powers of the Presidency, as laid down by Andrew Jackson, could Polk's determination to reach the Pacific have been realized. As Commander-in-Chief, Polk manipulated events to produce a war, maneuvered Congress into funding it, and held sole control over its goals and strategies. . . . Polk "probably did as much as anyone to expand the powers of the Presidency—certainly at least as much as Jackson, who is more remembered for doing it." . . . Overcoming the errors of Madison's ways, the vigor and energy of [Polk's] leadership set the model for other Presidents in wartime. Polk's success was inextricably intertwined with the Jacksonian understanding of a constitutionally energetic executive, and it worked to the nation's incalculable benefit.¹²³

In this incredibly telling passage—the conclusion of his piece on Jackson—Professor Yoo teaches that President Polk's "*manipulation of events*" to form a pretext to "*produce*" war, and subsequent exercise of "*sole control*" over the goals and strategies of that war, are precedents of "*incalculable benefit*" to the governance of the United States. This passage engages with approval not only the Fuehrer principle, but also the other primary basis for war crime charges against the former members of the Third Reich: aggressive war.

To borrow a phrase: the glove fits. The Fuehrer principle has crept insidiously into American scholarship under the guise of advocacy of it by Professor Yoo (and some others), and, owing to his work at the OLC, has already undermined the governance of the United States. The time for mere recognition that something went very wrong at the OLC during the Bush administration has passed; the time has come to permit Professor Yoo to test his theories about unaccountable presidential war powers in a court of law.¹²⁴

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. Bd. of Ed. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

123. Yoo, *supra* note 106, at 575, 583.

124. In an August 20, 2009, addendum to his original statement, Dean Edley plainly states:

My belief then, and now, is that only in a court of law can we have definitive findings of fact and conclusions of law. We need both. My friend Eric Holder, Attorney General of the United States, should either pursue the matter, or tell us that he believes there was no criminality. We need to know what happened, and not just from journalists. We need to know where the boundaries of lawful conduct are in combating national security threats. We need to know when legal advice and advocacy become criminal.

Christopher Edley, Jr., *The Torture Memos, Professor Yoo, and Academic Freedom*, BERKELEY L. NEWS ARCHIVE, Aug. 20, 2009, available at <http://www.law.berkeley.edu/5961.htm>. Dean Edley has spoken rightly, and the Berkeley Law community now is better for it.

VI. CONCLUSION

At present, prosecution of former members of the Executive Branch is highly unlikely. So too is any prosecution of Professor Yoo and his cohorts, despite a growing clamor to at least consider it in quarters where none was previously heard so clearly. As the Justice Department declines criminal prosecution of Yoo and Bybee, among others, it may yet suggest their disbarments—a futile gesture at this late date.

Despite all of this, some action seems minimally necessary to determinately test those theories of governance, so prominently propounded by John Choon Yoo, that may threaten the rule of law in the United States.

Sadly, in complete absence of any such action, a precedent will have been established for the future. The absolution afforded by the OLC's opinions may convince future attorneys that they too have the power to excuse almost any conduct by the executive *ex ante*. And future presidents will be able to easily construct a wall of impenetrable and unaccountable power because of the current President's decision to allow all done with the OLC's imprimatur to be excused without trial.

Professor Yoo succeeds, thusly. Despite accomplishing what he set out to do, however, Professor Yoo will remain a man who must bear the burden of what he has done. As stated by the Tribunal in pronouncing guilt on Defendant Schlegelberger:

We are under no misapprehension. Schlegelberger is a tragic character. He loved the life of intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship . . . for a mess of political pottage and for the vain hope of personal security.¹²⁵

Professor Yoo and his colleagues at the OLC traded much of their considerable prestige for that same bowl of bitter political pottage. While they might still recant their views about presidential authority, and as a result perhaps regain some of that prestige, they will stand unaccountable in the sense that accountability was envisioned by Justice Jackson—in another world, long ago.

125. Altstoetter, *supra* note 86, at 1087.