

Transcript of May 26, 2010 House Judiciary Committee Interview of Former Assistant Attorney General Jay Bybee

The remainder of this document consists of the transcript of the May 26, 2010 House Judiciary Committee interview of Former Assistant Attorney General for the Office of Legal Counsel Jay Bybee, along with a July 1, 2010 letter from Bybee's counsel providing additional information about his testimony concerning John Yoo and enclosing a proposed errata sheet. Under Rule III(e) of the Judiciary Committee rules, transcripts of Committee proceedings are "published in verbatim form," with additional proposed changes to a transcript "other than errors in the transcription" to be appended to the record. Accordingly, each proposed change beyond transcription errors is denoted in the transcript as a "Bybee proposed change", and both the original version and the proposed change can be reviewed by the reader. In addition, at the request of the Department of Justice, the name of an Office of Legal Counsel attorney who worked on the interrogation memoranda has been redacted. The documents utilized as exhibits at the Bybee interview are separately available on the Committee Web site.

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Committee on the Judiciary

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COMMITTEE ON THE JUDICIARY,
U.S. HOUSE OF REPRESENTATIVES,
WASHINGTON, D.C.

INTERVIEW OF: JUDGE JAY S. BYBEE

Wednesday, May 26, 2010

Washington, D.C.

The interview in the above matter was held at 2148
Library, Rayburn House Office Building, commencing at 9:34
a.m.

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4 REPRESENTATIVE SHEILA JACKSON LEE
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1 Mr. Nadler. All right. Good morning, everybody.

2 We're here this morning for a transcribed interview of
3 Judge Jay Bybee, former Assistant Attorney General for the
4 Office of Legal Counsel, pursuant to the May 4th, 2010,
5 letter from Chairman Conyers, agreed to by Judge Bybee on
6 May 5th, 2010.

7 Judge Bybee, would you please state your full name and
8 address for the record?

9 Judge Bybee. Yes. My name is Jay Scott Bybee. My
10 address is -- I'm sorry, would you like my mailing address or
11 my home address?

12 Mr. Johnson. If it is public, Judge, why don't you just
13 give your court address?

14 Judge Bybee. I prefer to use my court address, which is
15 also my mailing address --

16 Mr. Nadler. Fine, fine, fine.

17 Judge Bybee. -- which is 333 Las Vegas Boulevard South,
18 Suite 7080, Las Vegas, Nevada, 89101.

19 Mr. Nadler. Thank you.

20 My name is Jerrold Nadler, for the record. I'm a member
21 of the committee and the chairman of the Subcommittee on the
22 Constitution, Civil Rights, and Civil Liberties.

23 I will be questioning you today, along with several
24 other Democratic committee members and the committee's chief
25 oversight counsel, Elliot Minberg, sitting to my right,

1 after which Representative Goodlatte, for committee
2 Republicans, will have the opportunity to ask questions a
3 little later.

4 EXAMINATION

5 BY MR. NADLER:

6 Q Now, I would like to ask you to open the notebook
7 that is in front of you. I hope there is a notebook --

8 Mr. Mincberg. Let's go off the record for a minute.

9 [Discussion off the record.]

10 [Bybee Exhibit No. 1

11 was marked for identification.]

12 BY MR. NADLER:

13 Q Take a look at the notebook in front of you, which
14 has been marked as Exhibit 1, and turn to Document 1 in the
15 Exhibit 1 notebook -- start at the beginning -- a May 4th,
16 2010, letter from Chairman John Conyers of the Judiciary
17 Committee to Maureen Mahoney of the law firm of Latham and
18 Watkins. And Document 2 in the Exhibit 1 notebook, a May
19 5th, 2010, letter from Ms. Mahoney to Chairman Conyers.

20 Am I correct that you or your counsel have seen these
21 letters and that you have agreed to an interview as set forth
22 in the May 4th letter?

23 A Yes.

24 Q For the record, today's interview will be conducted
25 in accord with the terms of the May 4th letter.

1 Three preliminary matters, before we begin. First, if I
2 or anyone questioning you today asks you any questions that
3 you don't understand, please let us know.

4 A Okay.

5 Q Otherwise, we'll assume that you do understand our
6 questions, okay?

7 A All right.

8 Q Second, if you'd like to take a short break for any
9 reason, just let whoever is questioning you know, and we will
10 try to get to the end of that line of questioning, and we
11 would be happy to accommodate you.

12 A Thank you.

13 Q Finally, this interview is taking place as part of
14 an authorized investigation under the jurisdiction of the
15 Judiciary Committee of the U.S. House of Representatives. Do
16 you understand that any knowing and willful misstatement that
17 you provide in answering questions today, including any
18 omission of material information that renders any statement
19 misleading, would be a violation of Section 1001 of Title 18
20 of the United States Code, which would be a felony and could
21 be prosecuted in Federal court?

22 A I do.

23 Q Good.

24 Please take a look at Document 3, going in order, in the
25 Exhibit 1 notebook, entitled, "Memorandum Regarding Standards

1 of Conduct for Interrogation under 18 USC 2340-2340A," dated
2 August 1st, 2002, signed by you as head of OLC and addressed
3 to White House Counsel Alberto Gonzales.

4 For the record, this is a declassified and redacted copy
5 of this memorandum, released by DOJ, which we will also refer
6 to as "Bybee Memo 1."

7 Did you sign the original of this memo and have it sent
8 to the White House on August 1st, 2002?

9 A Yes, I did.

10 Q Thank you.

11 Please take a look at Document 4.

12 Mr. Johnson. Just before you ask the question --

13 Mr. Nadler. Sure.

14 Mr. Johnson. -- this is a problem that we have had
15 consistently because the word "you," Y-O-U, and the word
16 "Y-O-O" can sometimes be confusing.

17 Mr. Nadler. Okay.

18 Mr. Johnson. So we'll understand when you say "you"
19 that you mean Judge Bybee unless you say "John Yoo" or
20 otherwise indicate.

21 Mr. Nadler. Okay. That's fair enough. And if, by the
22 context of something that I say, I obviously mean John Yoo
23 and haven't indicated it, please --

24 Mr. Johnson. We'll let you know.

25 Mr. Nadler. -- clarify the matter.

1 Mr. Johnson. We struggle with that every day.

2 Mr. Nadler. Okay.

3 BY MR. NADLER:

4 Q Please take a look at Document 4 in the Exhibit 1
5 notebook, entitled, "Memorandum Regarding Interrogation of al
6 Qaeda Operative," also dated August 1st, 2002, and signed by
7 you as head of OLC and addressed to acting CIA general
8 counsel John Rizzo.

9 For the record, this is the declassified and redacted
10 copy of this memorandum, released by DOJ, which we will refer
11 to as "Bybee Memo 2."

12 Did you sign the original of this memo and have it sent
13 to the CIA on August 1st, 2002?

14 A Yes.

15 Q Thank you.

16 When and how did you learn about the request that led to
17 the writing of Bybee Memos 1 and 2?

18 A I cannot be confident in the timeline. This has
19 now been 8 years. But sometime in 2002 -- I cannot pinpoint
20 a time --

21 Q Uh-huh.

22 A -- I had a conversation with John Yoo.

23 Q Could you give us a season? Was it spring, fall?

24 A I can't, because it actually -- according to the
25 OPR timeline, it actually straddled the spring and summer.

1 Q Okay.

2 A So I cannot be confident of this. I had a
3 conversation with John Yoo. I may have been in my office, or
4 he may have caught me in the hall, and told me that they had
5 received -- that he had entered a -- opened a new matter and
6 that we would be issuing an opinion --

7 Q Now, this occurred first in a conversation with Mr.
8 John Yoo?

9 A That's correct.

10 Q And it's correct that Mr. Yoo was a Deputy
11 Assistant Attorney General who was already at OLC when you
12 got there?

13 A John was one of my deputies at the Office of Legal
14 Counsel, and John had arrived several months before I arrived
15 at OLC.

16 Q Can you describe what was said by whom at this
17 meeting, as best as you can recall?

18 A There is very little that I can recall from that,
19 other than that John told me that we had been asked for an
20 opinion dealing with the torture statute.

21 Q When you say you had been asked for an opinion, you
22 mean a legal analysis?

23 A Some kind of an analysis, yes.

24 Q And do you remember why -- did he say that you were
25 asked for legal analysis because of something pending?

1 A I don't recall.

2 Q A pending CIA interrogation of high-value
3 detainees, for example?

4 A Mr. Nadler, I'm sorry, I don't recall.

5 Q Okay. Now, was it decided at that meeting that he
6 would work on it with [REDACTED] and Patrick Philbin
7 would be the deputy who would review the work?

8 A I don't recall the conversation. If you'd like, I
9 would be happy to give you background as to how we generally
10 handled those matters at OLC.

11 Q Yeah, quickly.

12 A Okay. Well, I had five deputies at the Office of
13 Legal Counsel. And if either I or any one of my deputies
14 received a request from a client or a client agency --

15 Q And the client or client agency would be?

16 A Oh, it could include the White House. It could
17 include any agency of the executive branch.

18 Q Uh-huh.

19 A If I or one of my deputies received a request for
20 an opinion, whether it was an informal or a more formal
21 opinion, then they would open the matter -- that was filling
22 out a form, entering it in some books that were maintained by
23 staff. And the deputies had full authority to open those
24 matters.

25 Ordinarily -- I'm talking about the typical case -- the

*]Name redacted at DOJ request

1 deputy who received the matter logically, because they had
2 received the matter, would be the deputy assigned to the
3 matter. The Office of Legal Counsel, by tradition, has a
4 two-deputy rule, which means --

5 Q I thought you had five deputies.

6 A I have five deputies. We have a two-deputy rule.
7 The two-deputy rule is that, whenever we have a principal
8 deputy who is responsible for supervising the preparation of
9 an opinion, there is a second deputy who is assigned to
10 conduct a second reading.

11 Q Okay. I see.

12 A Staffing to the attorney advisors was conducted in
13 a very informal way. So, for example, we had attorneys who
14 would develop an expertise in a particular area. And if a
15 deputy knew that an attorney advisor had some expertise in an
16 area and the attorney advisor was available to accept another
17 assignment, then it would simply be assigned in that way. So
18 it wasn't always done in a formal way in which I needed to be
19 involved in the decision.

20 Mr. Johnson. Congressman, without interrupting your
21 question -- Elliot, in the OPR report, [REDACTED]'s
22 name was redacted throughout. Do you intend to redact it
23 from this transcript?

24 Mr. Mincberg. I thought that was something that we
25 could confer with the Justice Department about, if they feel

*] Name redacted at DOJ request

1 strongly about it. I don't think we have a strong interest
2 in having her name in the public record, but, frankly, her
3 name has gotten into the public record --

4 Mr. Johnson. Right.

5 Mr. Mincberg. -- such that it wouldn't really make much
6 difference.

7 Mr. Johnson. And, of course, we don't care. I was just
8 asking if you wanted the judge to use, for example, "attorney
9 advisor" instead of "[REDACTED]" he could do that --

10 Mr. Mincberg. Yeah, I think for purposes of this, it
11 would be easier if he uses her name, and then we can
12 determine later if it makes sense to redact it.

13 Mr. Johnson. Understood. Thank you.

14 BY MR. NADLER:

15 Q Now, going back, did Mr. Yoo indicate whom he had
16 received the request or assignment from?

17 A If he did, I don't recall.

18 Q And you don't recall if anything was provided in
19 writing on that?

20 A I don't know.

21 Q Okay. And you don't recall the date. You said
22 that --

23 A No, I can't pinpoint the date.

24 Q Please take a look at Document 5 in the notebook, a
25 Department of Justice Office of Professional Responsibility

*] Name redacted at DOJ request

1 report dated July 29th, 2009, which would be in that time
2 period that you mentioned.

3 For the record, this is --

4 A Well, I'm sorry, I'm a little confused. This is
5 July 29th, 2009.

6 Q Oh, I'm sorry. I'm sorry. Strike that last thing.
7 It would not be in the time period in which he mentioned
8 there. I'm in the right date, the wrong year.

9 For the record, this is the declassified and redacted
10 version of this report, relating to the OLC interrogation
11 memos, that was made available to the committee.

12 If you turn to the bottom of page 39 and the top of page
13 40, you will see it states that, "E-mail records indicate
14 that the matter was recorded on an OLC log sheet on
15 April 11th, 2002, with 'someone' and Yoo" -- that is, Mr. Yoo
16 -- "designated as the assigned attorneys. The log sheet
17 designated 'John Rizzo Central Intelligence Agency' as the
18 client."

19 I take it you have no reason to dispute these details?

20 A I don't have any recollection, so I have no reason
21 to dispute them.

22 Q So you should say "yes."

23 A Yes.

24 Q Okay. Would your conversation with Mr. Yoo have
25 been on or shortly before that April 11th? Well, let me

1 rephrase that. In light of this, does it make sense that
2 that conversation with Mr. Yoo might have been on or shortly
3 before the issue date of this memo, April 11th?

4 A I can't answer that, Mr. Nadler, and it would not
5 be unusual -- I can only speak to what the usual, the typical
6 practice is at OLC -- it would not have been unusual for a
7 deputy to open a matter and then advise me of it later, at a
8 later time.

9 Q Which would indicate that it is quite possible that
10 that conversation would have predated this memo.

11 A Well, you asked me if it could predate it. I'm
12 telling you that it is also possible that it postdated
13 that --

14 Q Then I didn't understand you. I thought you
15 meant -- I thought you said he talked to you and then ~~you~~^{Yoo} had
16 opened the document.

17 A No. It would not be unusual for a deputy to open a
18 matter by entering it on the OLC log sheet --

19 Q I see. Okay.

20 A -- and then advising me that a matter had been
21 opened.

22 Q Okay. So it could have been before or after?

23 A It could have been before or after.

24 Q But it would have been within a reasonable
25 proximity of time?

1 A Well, I --

2 Q Two weeks, a couple months?

3 A Well, I -- I think, certainly, we can assume within
4 a couple of months, because the memos were signed the 1st of
5 August. But --

6 Mr. Johnson. Let me say this before our reporter does.
7 You need to let Mr. Nadler finish his questions before you
8 answer.

9 Judge Bybee. Sorry.

10 Mr. Johnson. And if you speak more slowly, she will be
11 happier.

12 Judge Bybee. Okay.

13 Mr. Nadler. That's probably true.

14 BY MR. NADLER:

15 Q Did you, yourself, ever communicate, either orally
16 or in writing, with Mr. Gonzales, Mr. Rizzo, or anyone else
17 at the White House or the CIA about the content or subject of
18 Bybee Memos 1 or 2?

19 A Not that I recall.

20 Q With any of them.

21 A I don't recall a communication.

22 Q Okay. So were oral communications relating to this
23 request handled by Mr. Yoo?

24 Mr. Johnson. Or written communications?

25 Mr. Mincberg. Or oral.

1 Mr. Nadler. Or oral. Either way.

2 Mr. Johnson. Okay.

3 Judge Bybee. I can't answer that because I think it is
4 also possible that there may have been some communications
5 between [REDACTED] and some attorneys, perhaps, at the
6 CIA.

7 BY MR. NADLER:

8 Q So it could have been by Mr. Yoo or by [REDACTED]?

9 A I don't know whether Pat Philbin would have had
10 occasion to do that. It strikes me, as I sit here now, that
11 that might have been a little unusual, that a second deputy
12 would ^{have been} ~~be that~~ ^{into} ~~with~~ the project.

13 Q So it could have been by Mr. Yoo, by [REDACTED],
14 or, unlikely but perhaps, by Mr. Philbin?

15 A That's my best answer.

16 Q Okay. Now, since you were the confirmed Assistant
17 Attorney General and Mr. Yoo was just one of your deputies
18 and this is clearly a very important project, why would you
19 -- why did you not participate in any of these
20 communications?

21 Mr. Johnson. I think he said he didn't recall whether
22 he did.

23 But you can answer.

24 BY MR. NADLER:

25 Q Well, why might not you have participated -- let me

*] Name redacted at DOJ request

1 rephrase. Since you were the confirmed AAG and Mr. Yoo was
2 just one of your deputies and this was obviously a very
3 important project, why might you not have been involved in
4 any of these conversations?

5 A Mr. Nadler, I had five deputies. They were all
6 highly experienced, highly qualified deputies. And they were
7 authorized to open matters. By the traditions of the Office
8 of Legal Counsel, they were authorized to sign opinions on
9 behalf of the office. It was not unusual for a deputy to be
10 the contact point with any of our client agencies.

11 Q And it was not unusual for a matter -- would you
12 characterize this as one of the most important matters you
13 handled?

14 A It certainly was a very important matter.

15 Q So in something of this grave importance, it would
16 not have been unusual for you not to have any communication
17 with the White House or with other agencies, to leave it all
18 to the deputies?

19 A It would depend on the nature of the question, the
20 issues before us, and so on. In this case, John Yoo had the
21 national security portfolio within the office. And John had
22 regular communication with various agencies or offices that
23 had an interest in national security, such as the White
24 House, the National Security Council, the CIA.

25 Mr. Johnson. And, Mr. Nadler, can I ask -- I just want

1 to make sure that we didn't inadvertently misunderstand your
2 question. Did your prior question include conversations with
3 the Attorney General, or were you referring to non-Justice
4 agencies?

5 Mr. Nadler. Non-Justice, as well.

6 Mr. Johnson. And you understood that?

7 Judge Bybee. Uh-huh.

8 Mr. Johnson. Thanks.

9 BY MR. NADLER:

10 Q Okay, now -- so you don't recall having any
11 specific conversations?

[Proposed by Bybee: outside
the Department of Justice]

12 A I don't recall having any specific conversations.[^]

13 Q Okay. Now, can you describe everything you can
14 recall about the communications on this project with the
15 White House and the CIA as communicated to you by Mr. Yoo or
16 anyone else at OLC? In other words, you didn't have the
17 conversations, but I presume you must have been briefed on
18 them at some point.

19 A Let me think about how far back we -- after John
20 advised me that we had opened the matter, I recall John
21 telling me from time to time that the memo was in preparation
22 and that they would be getting to it me, you know, at some
23 point.

24 Q But nothing about the contents of the memo?

25 A Well, I don't recall what John was telling me about

1 the -- what John briefed me on of the contents of the memo.
2 At some point, I was provided with a draft of the standards
3 memo. I do not recall --

4 Q Is that Bybee 1 or 2?

5 A I'm sorry, that would be Bybee 1. I sometimes
6 refer to them as the "standards memo" and the "techniques
7 memo." I'll try and refer to them as Bybee 1 and 2.

8 Q We'll clarify as we go along.

9 A Okay.

10 I was provided with a draft of Bybee 1, the standards
11 memo. I don't recall whether I saw the techniques memo
12 contemporaneous with that memo or whether I saw them in
13 sequence.

14 Q And do you recall any comments that you made to Mr.
15 Yoo or anyone else about those contents before it was
16 finalized?

17 A Well, it was my practice to take any draft
18 memoranda or draft opinions for the office and to edit them
19 with a red pen. I would have written comments in the
20 margins. I might have written comments on the back. I might
21 have asked questions.

22 I do recall, with respect to these memoranda, that I had
23 several opportunities to edit drafts of the memos and that I
24 had several meetings in my office with Pat and John and/or

25 [REDACTED] *

*] Name redacted at DOJ request

1 Q So there is nothing you can tell us at this point
2 -- well, not firsthand, because you don't recall such
3 conversations on your own part, but secondhand, as
4 communicated by Mr. Yoo or anyone else -- there is nothing
5 you can tell us at this point about communications with the
6 White House on these matters?

7 A Not as I sit here today. It's been 8 years.

8 Q Now, let me ask you about --

9 A Now, if there's something more specific --

10 Q Well, we're going to get into that.

11 A -- was a very general question.

12 Q My next line is, let me ask you about a few
13 specific matters.

14 A Okay. All right.

15 Q As we have seen, the OLC log listed Mr. Rizzo as
16 the client. But as we've also seen, there were two August
17 1st OLC memos, one to Mr. Rizzo and one to Mr. Gonzales.

18 How did it come about that the project was divided into
19 these two memos, one of which was addressed to the White
20 House? Why were there two memos?

21 A Yeah. My best recollection is that, at some point
22 fairly late in the drafting process, that we had received
23 enough information from the CIA that we believed that we
24 would have to do a second memo.

25 Q You mean because you had already done the first

1 memo and there was more information that wasn't included in
2 it, so you had to do a supplement? Is that what you're
3 saying?

4 A Well, we thought that there was enough -- my
5 recollection of this is very, very hazy.

6 Q Uh-huh.

7 A But my recollection is that we decided to do two
8 memos because there was one that would be specific advice to
9 the CIA. And there was some question, some discussion among
10 us and also between us and the White House about to whom the
11 memo should be addressed.

12 Q I want to clarify. I'm not clear here.

13 A Uh-huh.

14 Q You decided there should be a second memo because
15 one memo had to give instructions to the CIA. That is what
16 you just said, correct?

17 A The second memo -- the standards memo was the one
18 that was begun first.

19 Q That was Bybee --

20 A That was the Bybee 1, yes.

21 Q Okay.

22 A Bybee 2 was the memo that we decided needed to be
23 written, as well, and put in writing at a later date.

24 Q And needed to be put in -- you decided this at a
25 later date because you had more information than you had when

1 you finished Bybee 1?

2 A Well, we had -- we thought it would be useful to
3 put it into writing.

4 Q But you didn't include it in Bybee 1 because you
5 didn't have the information at that time?

6 Mr. Johnson. I'm confused. You should focus on his --
7 he's asking you about time frames. Did you finish Bybee 1
8 before you started Bybee 2? And I don't think you said that,
9 but that's a fair question.

10 Mr. Nadler. And why didn't you include the material in
11 Bybee 2 in Bybee 1? In other words, why there two memos?
12 That's what I'm trying to figure out.

13 Mr. Johnson. Yeah. And, Congressman, you know that one
14 was classified and one was not.

15 Mr. Nadler. Okay, but you could have classified part of
16 the memo and unclassified part of it.

17 Mr. Johnson. Sure. Yeah.

18 BY MR. NADLER:

19 Q So it still remains, why were there two memos?

20 A Yeah, I don't recall all of the discussion. I do
21 remember that we did have some discussion as to whether it
22 ought to be one memo or whether it ought to be two. We had
23 some discussion, but I don't remember the details very well.

24 Q Okay. Now, one of them, Bybee -- I forget which
25 one was addressed to the White House.

1 A Bybee 1.

2 Q Bybee 1. Why was one addressed to the White House
3 and one not?

4 A I don't recall at this point.

5 Q Now, the second -- Bybee 2 was addressed to the
6 CIA.

7 A Yes.

8 Q CIA did not see Bybee 1?

9 A No, the CIA did see Bybee 1. If I can -- I may be
10 able to shed some light on this. I'm sorry, I have my own
11 copies of Bybee 1 and 2. I think I can shed a little bit of
12 light on this. There is actually a mistake. Let's see if I
13 can find that.

14 Yeah, if you turn to page 9 of Bybee 2 --

15 Q Bybee 2 is Exhibit --

16 A Exhibit No. -- I believe that was Exhibit --

17 Mr. Johnson. Four.

18 Judge Bybee. Oh, your Exhibit 4.

19 BY MR. NADLER:

20 Q Page -- what did you say?

21 A Page 9. And if you'll look at the large paragraph
22 right there in the middle, you'll see that we refer to what
23 is by content obviously Bybee 1. It's the wrong title.

24 Q Uh-huh.

25 A It says it's a memorandum for John Rizzo.

1 Q Yes.

2 A And that's not how the memo actually came out. It
3 was a memorandum for Alberto Gonzales. So we've cited the
4 wrong title here.

5 Q So, in the memo here, there is a mistake?

6 A It is a mistake. That's correct. It was the wrong
7 reference.

8 Q Uh-huh.

9 A It was, at some point, I believe -- and I just
10 don't have a clear recollection as to what went into that
11 decision --

12 Q So it should've said memo for --

13 A For Alberto Gonzales.

14 Q -- Alberto Gonzales. Okay.

15 A So there was -- I recall that we had some
16 discussion to whom the memos would be addressed. I don't
17 recall how or why that was resolved in the way that we did
18 it.

19 Q Okay. Now, would it be true, to your recollection,
20 that Mr. Yoo -- not you, Mr. Yoo -- consulted with the White
21 House and decided anything about whether there should be one
22 or two memos and to whom they should be addressed?

23 A All I can say, Mr. Nadler, is that it wouldn't be
24 inconsistent with anything that I recall.

25 Q Okay. Now, former Attorney General Ashcroft

1 testified before this committee that others in the Justice
2 Department had expressed concern to him about how close Mr.
3 Yoo was to people in the White House, particularly for an
4 office that is supposed to provide independent advice, an
5 office such as OLC.

6 The OPR report states -- and I can give you the page
7 number if you want. Actually, it's page 110, note 83, but
8 you don't have to look that up right now. The OPR report
9 states at page 110, note 83, that, according to
10 Mr. Goldsmith, Mr. Ashcroft objected to Mr. Yoo being
11 appointed to head OLC for that reason.

12 Were you aware of this, and did you share that view?

13 A I'm sorry. Can I -- the question was, am I aware
14 that Attorney General Ashcroft objected to John Yoo?

15 Q Yes.

16 A I don't have any direct evidence -- direct
17 information about that. I had heard some rumors through the
18 Justice Department that Mr. Ashcroft didn't want John as --

19 Q Okay. And were you aware of the rumored reason for
20 his rumored objection?

21 A No.

22 Q Okay. Well, if you had been aware of the reason,
23 that he, according to this report, felt that he was too close
24 to the White House to head an office that was supposed to be
25 independent, would you have shared that view?

1 Mr. Johnson. My brain just went blank. I apologize.

2 Mr. Nadler. Let me rephrase that.

3 Mr. Johnson. Okay.

4 BY MR. NADLER:

5 Q If in an objection were made, as according to the
6 OPR report an objection was made, but whether it was or not,
7 if an objection were made that Mr. Yoo should not be
8 appointed to head OLC because Mr. Yoo was allegedly too close
9 to the White House to head what was supposed to be an
10 independent office, would you have shared that view? Would
11 you agree with that?

12 Mr. Johnson. At that point in time?

13 Mr. Nadler. At that time, yes.

14 Mr. Johnson. Okay. Bearing in mind that --

15 Mr. Nadler. No, at that point in time, not today.

16 Mr. Johnson. And I apologize, Mr. Chairman, but I'm
17 still confused. You're asking the judge whether, at the time
18 that he was leaving, if he had become aware -- Mr. Yoo was
19 trying to become his successor, so if, as he was leaving, he
20 had become aware that there was an objection, whether he
21 would have shared that view.

22 Mr. Nadler. Yes.

23 Mr. Johnson. Do you understand that?

24 Judge Bybee. Yeah, I do. I do.

25 Mr. Johnson. Okay. I apologize.

1 Judge Bybee. I don't know that I would have shared
2 precisely that view. I think I can shed just a little more
3 light on that whole question.

4 I came into this position sort of by accident. There
5 had been -- and this was my understanding after I got to the
6 Office of Legal Counsel, that there had been some
7 back-and-forth between the Attorney General and the White
8 House over who should have the office and that each of them
9 had a candidate.

10 BY MR. NADLER:

11 Q Between who -- the White House?

12 A Between the Attorney General and the White House.

13 Q Okay.

14 A In early 2001.

15 Q Okay.

16 A So this was before I was ever contacted or
17 interviewed --

18 Q Sure.

19 A -- that there was a lot of back-and-forth. Some of
20 this was even in the papers. I had seen it at the time, just
21 because I was curious. And they had some disagreements. The
22 Attorney General had his candidate; the White House had his
23 candidate. Neither one would agree to the other's candidate.
24 They chose a compromise candidate --

25 Q We've never seen such a situation before. Unheard

1 of.

2 A They chose a compromise candidate. And the White
3 House actually announced somebody for the Office of Legal
4 Counsel, announced an intent to nominate.

5 Q The compromise.

6 A The compromise. And, within a couple of weeks, the
7 candidate withdrew.

8 Q Uh-huh.

9 A And when the White House indicated to me that the
10 President was willing to send my name forward for nomination
11 to the Ninth Circuit, the announcement and all of the
12 paperwork was actually held up -- this is what I was told --
13 because there was more back-and-forth between the White House
14 and the Attorney General over who should be my successor.

15 So it is not surprising to me --

16 Q Wait, let me just clarify that. When you were
17 being nominated for the Ninth Circuit --

18 A This would've been --

19 Q -- as an incumbent at OLC, that was held up while
20 they were worried about who should be your successor at OLC?

21 A I can give you just a little bit more of a precise
22 timeline on this one. I was contacted somewhere around the
23 end of January or the 1st of February of 2002 about a vacancy
24 that had come up very quickly in the State of Nevada.

25 Q In the State. A vacancy for what?

1 A The Ninth Circuit position.

2 Q Oh, okay.

3 A And the White House, someplace at the end of
4 January, first part of February of 2002, indicated that the
5 White House, the Senators were agreed that my name would go
6 forward. And, at that point, there was some discussion as to
7 whether they would push my name quickly in hopes that I could
8 be confirmed. I had bipartisan support for my nomination,
9 and there was some thought that they might be able to push me
10 through the summer recess in the Senate.

11 The announcement was actually held up for a number of
12 weeks. And I wasn't sure why, until later I heard -- so I
13 can't verify this from firsthand knowledge -- I heard that it
14 was held up over the question of who would succeed me.

15 And so, there had been this history of back-and-forth
16 between the White House and the Attorney General. So that,
17 in March of 2003, which would've been a year later after all
18 of this discussion about nominations and so forth, it doesn't
19 surprise me that if the White House favored John Yoo, that
20 there might be pushback from the Attorney General.

21 Q That's all very interesting for political history,
22 but the question is not why there might have been
23 disagreement for other reasons -- the White House wanted
24 someone from Nevada, the Attorney General wanted someone from
25 California, whatever reason. The question is, if it were

1 true or if it had been told to you that someone was
2 objecting, the Attorney General or anyone else for that
3 matter, were objecting to Mr. Yoo's being appointed to
4 succeed you at OLC because he was too close to the White
5 House and this is an independent office, would you have
6 agreed with that view?

7 A I didn't -- I'm not sure that I would have shared
8 the view that John was disqualified from serving as Assistant
9 Attorney General because he was too close to the White House.

10 Q Not from Assistant Attorney General, from heading
11 the specific OLC?

12 A But that would have been the Assistant Attorney
13 General.

14 Q Okay. Okay, fine.

15 Now, OPR reported that, according to Mr. Yoo, he
16 attended several meetings with White House Counsel Gonzales
17 and others at the White House relating to the interrogation
18 legal analysis that OLC was preparing and that he shared a
19 draft with the White House.

20 Were you aware that this was happening at that time?

21 A I don't have any recollection today as to what I
22 knew at that point about meetings at the White House.

23 Q Now, if you look at Document 5, the bottom
24 paragraph of page 46 and top paragraph of page 50 of
25 Document 5, the ~~OLC~~^{OPR} report --

1 Mr. Johnson. Page 46 did you say?

2 Mr. Nadler. Yes.

3 BY MR. NADLER:

4 Q Bottom of page 46, bottom paragraph of page 46 and
5 top paragraph of page 50 -- am I looking at the right one?

6 Does this have any effect on your answer to the prior
7 question?

8 Mr. Johnson. Let us just take a moment and read.

9 Mr. Nadler. Sure, sure, sure.

10 Mr. Johnson. Now, for purpose of the question, do you
11 want us to read the intervening pages?

12 Mr. Nadler. No, no, no, no.

13 Mr. Mincberg. No. Yeah, off the record.

14 [Discussion off the record.]

15 BY MR. NADLER:

16 Q Now, these two paragraphs refer to two separate
17 meetings, one on July 12th and one on July 16th. Now, do
18 these affect your answers to the prior question?

19 A Well, I don't recall -- I don't recall, as I sit
20 here now, whether at that time I knew about those meetings.

21 Q Okay. When did you -- well, do you recall when you
22 found out about these meetings or about the subjects of these
23 meetings?

24 A I don't have a recollection of that.

25 Q Well, when you found out about them, can you tell

1 us what you were told or learned about what happened at these
2 meetings?

3 Mr. Johnson. Do you want to exclude -- he may have
4 found out about them in the course of the OPR investigation.
5 Would you want to exclude that from your answer?

6 Mr. Nadler. Yes.

7 Judge Bybee. I really can't -- I'm sorry. I'd like to
8 be helpful. I really can't -- don't remember anything about
9 what I knew or didn't know about those meetings.

10 BY MR. NADLER:

11 Q Well, let me ask you a couple of specifics to see
12 if it will jog your memory. Maybe you can answer them.

13 Did you find out anything about any changes or input
14 that Mr. Gonzales or others at the White House suggested
15 concerning OLC's analysis?

16 A Not that I recall.

17 Q Would it have been any concern to you if the White
18 House itself had made substantive suggestions on the content
19 of advice that was going to the White House itself?

20 A I don't have a recollection about this memo and
21 about anything that I may or may not have known about input
22 that the White House had. If it will be helpful, I will be
23 happy to tell you about OLC's general practice on that.

24 Mr. Johnson. You should do so without reference to any
25 other memos, because we don't know about privilege issues, so

1 if you can do it generically.

2 Mr. Nadler. Well, yeah, but before you do that, or
3 maybe this is a better way of asking -- a different way of
4 asking the same question.

5 BY MR. NADLER:

6 Q Not the general practice, but if you knew -- and
7 I'm not saying you did -- but, as a general question, if you
8 knew that the White House were making substantive suggestions
9 on the content of advice that it was soliciting from OLC --
10 in other words, they are asking you the question, "Can we do
11 this? Might we do that? Should we do the other thing?" --
12 and they are suggesting part of the answer, would that be of
13 concern to you?

14 A The answer is, it depends. And maybe I should give
15 you just the general background on our practice because I
16 think it may be helpful.

17 Q Uh-huh.

18 A When matters comes into OLC, it was not unusual for
19 the Office of Legal Counsel to share a draft with our agency
20 clients. That serves a number of purposes. First of all, it
21 makes clear that we are answering the questions they have put
22 to us. It gives them an opportunity to tell us whether they
23 know something more about the matter that we may have
24 overlooked, whether there are additional questions that they
25 would like to have us answer.

1 When we get requests from agencies, oftentimes it is
2 because they have already taken a look at the question and
3 regard the question as a difficult one and would like, sort
4 of, a second pair of eyes to take a look at it. Now, we have
5 lots of matters in which agencies had already conducted their
6 own background and research and come to their own conclusions
7 and then wanted some kind of a confirmation from OLC.

8 So my answer is, it is not unusual to share a matter
9 with a client and to get some client input. So my answer is,
10 Congressman, it would depend on the nature of the comments.

11 Q It wouldn't necessarily concern you. It might.

12 A It wouldn't necessarily concern me. It might
13 concern me, yes.

14 Q Thank you.

15 And did you get any report at all from your subordinate,
16 Mr. Yoo, about these meetings with the very recipient of the
17 OLC memo?

18 A I don't recall.

19 Q You don't recall.

20 As you may know, controversy has developed about the
21 sections of Bybee Memo 1 concerning the commander-in-chief
22 power and possible defenses to torture prosecutions. I'm
23 sure you've heard that.

24 A [Nonverbal response.]

25 Mr. Johnson. You need to answer "yes" or "no" so that

1 she can --

2 Judge Bybee. Yes, sir.

3 BY MR. NADLER:

4 Q Without getting into detail on substance at this
5 point, it has been suggested that these sections were added
6 after DOJ's Criminal Division refused to agree to decline to
7 prosecute any CIA agents for conduct connected to
8 interrogations and after the issue was discussed at one of
9 Mr. Yoo's meetings at the White House. Is that suggestion
10 correct?

11 Mr. Johnson. Can I just ask whether you're asking him
12 to comment on a specific suggestion. If so, you could help
13 us by pointing to who suggested that and where. You may be
14 asking more generally whether he's ever heard that; I don't
15 know.

16 Mr. Mincberg. Let me just say for the record, it has
17 been stated in many outside commentators, and I think it
18 probably wouldn't serve us much time to go through the
19 specific examples.

20 Mr. Johnson. And, Elliot, I think you're right about
21 that. The only reason I asked is the question was phrased,
22 "Is that suggestion correct?" And we don't --

23 Mr. Nadler. Are those suggestions -- I'm not referring
24 to a specific one.

25 Mr. Johnson. I hear you.

1 BY MR. NADLER:

2 Q What I said was, it has been suggested, meaning by
3 multiple people, that these sections were added after the DOJ
4 Criminal Division refused to agree to decline to prosecute
5 any CIA agents -- that is to say, refused to agree
6 generically not to prosecute CIA agents -- for conduct
7 connected to interrogations and after the issue was discussed
8 at one of Mr. Yoo's meetings at the White House.

9 Is that suggestion or those suggestions correct?

10 A If --

11 Q Is that what happened, in other words?

12 Mr. Johnson. Yeah, we understand.

13 Do you understand that?

14 Judge Bybee. I think I do.

15 Mr. Johnson. Okay.

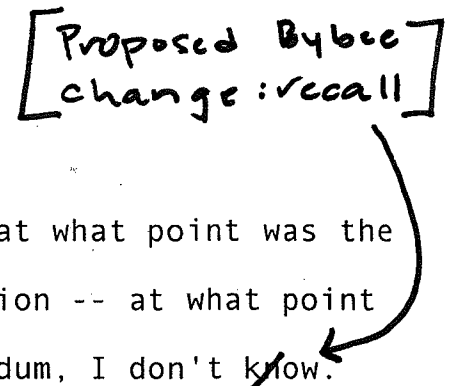
16 Judge Bybee. If you're asking me, at what point was the
17 commander in chief and the defenses section -- at what point
18 were those sections added to the memorandum, I don't know.

19 Q No, I'm asking a more specific question.

20 Regardless of when they were added -- well, regardless of the
21 general -- strike that.

22 Were they added after the Criminal Division said, "We're
23 not going to agree never to prosecute CIA agents," and after
24 the issue was discussed at one of Mr. Yoo's meeting at the
25 White House? Did those two things happen first?

[Proposed Bybee
change: recall]



1 A Well, I don't know the chronology from my own
2 memory. I know what the OPR report suggests, but I don't
3 know from my own memory, as I sit here.

4 Q Okay. Do you have any information as to whether
5 there were earlier drafts before you became involved in the
6 substantive review that did not include those sections?

7 A I don't know. Not that I recall. But I don't
8 know.

9 Q Do you have any other information that might either
10 confirm or contradict the suggestion that these sections were
11 added after the White House meeting and after DOJ refused to
12 decline prosecution?

13 A I don't have any information, again, from my own
14 memory bank, that would shed any more light on that question.

15 Q Okay. Do you have any other reason to dispute the
16 contention that this section was added at the request of the
17 White House?

18 A I don't have any information that would contradict
19 that.

20 Q Okay. In any event, you do know that Mr. Yoo was
21 at the White House on a regular basis; is that correct?

22 A Mr. Yoo was at the White House on a regular basis.

23 Q Okay. Did Mr. Yoo communicate with the White House
24 on the interrogation project in other ways, such as by
25 e-mail?

1 A I don't know that.

2 Q Okay. The OPR report states that OPR was not able
3 to look at most of Mr. Yoo's e-mails, as well as some of
4 Mr. Philbin's e-mails, because they were deleted and not
5 recoverable. Do you have any idea what happened to those
6 e-mails and why?

7 A No, I don't. You'd have to ask the Department of
8 Justice what happened to those.

9 Q Okay. Is it not correct that all OLC attorneys
10 were instructed to, quote, "retain all notes, documents, and
11 e-mails that are important to understanding a decision of the
12 office," closed quote?

13 Mr. Johnson. What are quoting from, Congressman?

14 Mr. Nadler. Where is this quote from?

15 Mr. Mincberg. Off the record.

16 [Discussion off the record.]

17 Mr. Nadler. It is Document 6 in the Exhibit 1 notebook.

18 Mr. Johnson. And the reason I asked the question is
19 your question says "all OLC attorneys," and that's not what
20 Document 6 says.

21 Mr. Nadler. Well, okay, let's take a look at Document 6
22 in the Exhibit 1 notebook, which is a copy, for the record,
23 of the June 2000 OLC manual for attorney advisors.

24 And if you turn to page 18, in the middle of the page,
25 under "Handling and Maintaining Documents and Electronic

1 Mail," the first sentence says, "You" -- and this is not Mr.
2 Yoo; you -- and this is addressed to all OLC attorneys --
3 "You should retain all notes, documents, and e-mails that are
4 important to understanding a decision of the office," closed
5 quote.

6 That is what I had quoted a moment ago when I said,
7 isn't it correct that all OLC attorneys were instructed to
8 retain all notes, documents, and e-mails important to
9 understanding a decision of the office?

10 Let me ask you that question. The answer is obviously
11 yes.

12 Mr. Johnson. And, Congressman, I am really trying to be
13 helpful. Your question says, "all OLC attorneys." And Jay
14 can answer this question; I can't. But the phrase "attorney
15 advisor" describes a category of OLC attorneys, not all OLC
16 attorneys.

17 Mr. Nadler. Well, let me ask Mr. Bybee, then.

18 BY MR. NADLER:

19 Q This is a manual for attorney advisors. It says,
20 "The materials" -- the first line on page 1. I don't know if
21 it is necessary to ask you this question. I will say it for
22 the record. If you disagree with this in any way, please
23 comment.

24 "The materials in this binder are intended to provide
25 each new attorney in the Office of Legal Counsel with basic

1 information," et cetera. The second sentence says --
2 actually, the second sentence is not material.

3 So this is a communication to all attorneys. And so,
4 let me ask the question again, although the answer is
5 obvious, so just for the record. Isn't it correct that all
6 OLC attorneys were instructed to retain all notes, documents,
7 and e-mails that are important to understanding the decisions
8 of the office?

9 A Mr. Nadler, this document was drafted in June of
10 2000, which would have been --

11 Q Yes.

12 A -- you know, a year and a half before I arrived
13 there. It appears to be by its title a manual for attorney
14 advisors. "Attorney advisors" does describe a particular
15 class of attorneys.

16 Q Go ahead.

17 A It does describe a particular class of attorneys.
18 The attorney advisors are sort of a line attorney --

19 Q But it says in this first line, "The materials in
20 this binder are intended to provide each new attorney in
21 OLC."

22 A I can't answer as to whether a copy of this memo
23 was provided to each new attorney in our office, whether it
24 was provided to the deputies, whether it was provided to me.

25 Q Okay. So, although but its terms it seems to say

1 that it was provided to all attorneys, you can't verify that?

2 A I can't verify that.

3 Q Okay.

4 A This would have been handled through some
5 administrative process.

6 Q Are you saying that a lesser standard might have
7 applied to deputies like Mr. Yoo?

8 A I'm not staying that a lesser standard, but I don't
9 know how DOJ handled its e-mail system. And you would have
10 to go to the Department of Justice and ask them. I don't
11 know how they maintained the e-mails.

12 Q Okay. So the next question may have just answered
13 itself, but let me ask it anyway: Did you take any steps to
14 ensure that attorneys like Mr. Yoo complied with this
15 standard instruction?

16 A I don't even recall seeing this memo. I may have
17 seen it. I don't recall that it was ever an issue.

18 Q So the answer would be no?

19 A Not that I recall.

20 Q Well, if you don't know if this was applicable to
21 Mr. Yoo and if you don't know that it applied, you would not
22 have taken steps to see that he adhere to it?

23 A You know, as I sit here, I don't recall ever having
24 an issue with any attorney over e-mail retention policies.

25 Q Okay. From your knowledge of OLC at the time,

1 where would you go or who would you ask to try to find the
2 answer to the question of what happened to any missing
3 e-mails?

4 A Well, if I were still at OLC, probably the first
5 person I would ask would have been my chief of staff, who is
6 an administrative person, not an attorney.

7 Q And who would you expect him to ask, or her?

8 A Probably some kind of an information office or a
9 technology office, the support staff at the Department of
10 Justice.

11 Q Okay. Thank you.

12 Now, Judge Bybee, I would like to ask you a couple of
13 questions about how you came to be the head of OLC and then,
14 after that, a Federal judge. Although, I think you may have
15 already answered some of these questions, but I'm going to
16 press on.

17 Did you actively seek to be appointed head of the Office
18 of Legal Counsel? *[Proposed Bybee change: simple]*

19 A I'll give you a ~~st~~aight answer to that, Mr.
20 Nadler: No.

21 Q Okay. So how did it happen?

22 A Well --

23 Q Well, let me save some time and go on. Let me
24 withdraw that question. I probably can save a little time
25 here.

1 Press reports state that you did not seek out the OLC
2 job, were interested in an appointment to the Federal bench,
3 an appointment you did eventually receive. According to The
4 Washington Post, you were asked to head up OLC until an
5 appropriate Ninth Circuit slot opened up.

6 Is that a fair statement?

7 A That is not correct.

8 Q Please correct it.

9 A Okay. Well, let me give you just a little bit of
10 chronology because I think it will be --

11 Q Okay.

12 A I'm trying to be helpful here.

13 Q By all means. By all means.

14 A Let me give you the background.

15 In June of 2001, I received a phone call at home from
16 somebody from the White House asking for Professor Bybee.
17 And the call came out of blue from somebody I did not know
18 who called and said, "Judge Gonzales would like to talk with
19 you about the Ninth Circuit, about a position on the Ninth
20 Circuit. Would you be available to meet with him next week?"

21 And --

22 Q I'm sorry, who wanted to talk to you?

23 A Somebody from the White House.

24 Q No, no. He said somebody wanted to talk to you.

25 A Oh, Judge Gonzales.

1 Q Judge Gonzales, okay.

2 A Counsel to the President.

3 Q Uh-huh.

4 A About the Ninth Circuit. And, at some point in the
5 conversation, he added the words -- and I only recalled this
6 later because it was sort of strange, and I didn't attribute
7 anything to it at the time -- he added, "or perhaps something
8 at the Department of Justice."

9 I had been in contact with Senator Ensign's staff
10 because of my experience at the White House and at the
11 Department of Justice, in which I had participated in some of
12 the process of judicial selection and had provided some
13 advice --

14 Q In the prior administration, I assume.

15 A During the Bush administration.

16 Q The first Bush administration.

17 A The first Bush administration as Associate White
18 House Counsel. I had been in the Justice Department during
19 both the Reagan and first Bush --

20 Mr. Johnson. Just speak a little more slowly, so she
21 can --

22 Judge Bybee. Okay.

23 And I had cooperated with Senator Ensign's staff,
24 because he was a new Senator, on what the process would be
25 for him recommending people for the U.S. attorney position or

1 a Federal district court or for a court of appeals position.
2 So I just gave him advice from my perspective, having been at
3 the Justice Department and at the White House.

4 I also knew, by virtue of that contact, because Senator
5 Ensign's office had asked me for some briefing materials,
6 that Senator Ensign and Senator Reid intended to cooperate on
7 judgeships and that they were going to request an additional
8 seat for Nevada.

9 Q And you're a resident of Nevada?

10 A I'm a resident of Nevada. I was a professor at the
11 University of Nevada-Las Vegas, at their new law school.

12 Q Uh-huh. Uh-huh.

13 A When I received this call from the White House, I
14 attributed the call to the success of those efforts by
15 Senators Reid and Ensign. I thought, "Oh, my goodness, maybe
16 they got an additional seat for Nevada and I'm under
17 consideration."

18 When I went to Washington to interview with Judge
19 Gonzales in June of 2001 --

20 Q Judge Gonzales then being White House counsel?

21 A White House counsel.

22 Q Uh-huh.

23 A I was ushered into his office. And as Judge
24 Gonzales walked in, he said, "What are we talking to
25 Professor Bybee about?" And an assistant said, "The Ninth

1 Circuit and the Office of Legal Counsel." That was the first
2 time that anybody had said that I was under consideration for
3 anything at the Office of Legal Counsel. I didn't know
4 whether they were looking for an Assistant Attorney General
5 or a Deputy Attorney General or what they were looking for.

6 We spent roughly half the interview talking about the
7 Ninth Circuit, a matter on which I felt prepared because I
8 had done a little bit of research, and then said, "All right,
9 let's talk about the Office of Legal Counsel."

10 Q You said that?

11 A No. Judge Gonzales said, "Now let's turn" and
12 asked my views about the role of the Office of Legal Counsel
13 and so on.

14 Q Uh-huh.

15 A I left that interview and went out to Virginia,
16 where I have family, and received a call that night from the
17 White House saying, "We want to know whether you and your
18 wife would be serious about considering the Office of Legal
19 Counsel position. Because, if so, the Attorney General has
20 an opportunity tomorrow on his schedule and he could
21 interview you before you fly home to Nevada."

22 And I spoke with my wife and returned the following
23 morning to talk with the Attorney General and his staff about
24 the Office of Legal Counsel position. That would have been,
25 I believe, on a Wednesday.

1 I knew that the Attorney General was interviewing other
2 candidates for the Office of Legal Counsel. On Friday, I
3 received another call from the White House offering me the
4 position to be head of the Office of Legal Counsel, which I
5 accepted.

6 Q Okay. So I'm going to quote from The Washington
7 Post. If you want to, it is in front of you. It is
8 Document 10 in the Exhibit 1 notebook. I'm only going to
9 quote two sentences. You can look it up if you want.

10 Mr. Mincberg. Off the record.

11 [Discussion off the record.]

12 BY MR. NADLER:

13 Q It says the following: "Bybee's friends say he
14 never sought the job at the Office of Legal Counsel," which
15 is essentially what you just said. "The reason he went back
16 to Washington" -- "Guynn"? I hope I'm pronouncing that
17 right.

18 A "Guynn."

19 Q "The reason he went back to Washington, Guynn said,
20 was to interview with then White House Counsel Gonzales for a
21 slot that would be opening on the Ninth Circuit when a judge
22 retired. The opening was not there yet, however, so Gonzales
23 asked, 'Would you be willing to take a position at the OLC
24 first?'"

25 Is that accurate? Or let me rephrase my question. It

1 seems to comport with what you just said, with the possible
2 exception of the word "first."

3 Mr. Johnson. And a judge retiring.

4 Mr. Nadler. That's correct. The judge retiring is not
5 material to this inquiry.

6 Judge Bybee. Well, it becomes relevant. Let me add
7 one piece.

8 Mr. Nadler. Okay. Okay.

9 Judge Bybee. When I received the call, the call after
10 my interview with Judge Gonzales, asking if I would be
11 consider the position and would I interview with the Attorney
12 General the following day, I specifically asked, I said --
13 well, for closure, I just had to say, "Well, what about a
14 position on the Ninth Circuit?"

15 BY MR. NADLER:

16 Q Yeah, but -- I'm sorry. When you received the call
17 when you interviewed for which position?

18 A This is in June of 2001. I had come to Washington.
19 I had interviewed with Judge Gonzales.

20 Q And both positions had been mentioned.

21 A And both of these positions had been mentioned.

22 I received a call that night at my sister's home asking
23 me if I would be interested in pursuing the Office of Legal
24 Counsel position and interview with the Attorney General the
25 following morning before I flew home.

1 Q And you then said?

2 A And I said, well, I would have to talk with my
3 wife. But, at some point in that conversation, I said --

4 Q "What's with the Ninth Circuit?"

5 A "What's with the Ninth Circuit?" Exactly. And the
6 response was something to the effect of, "We're not going to
7 pursue that at this time."

8 Q At this time. Okay.

9 A And I'll -- well, would you like me to continue
10 with the chronology?

11 Q No, no. I think that's sufficient for the moment.

12 A Because I believe I can answer this question, but
13 I'll be happy to let you --

14 Q If you wanted to volunteer anything, by all means.

15 Mr. Johnson. Well, just for the record, when you say
16 "this question," she doesn't know what you -- you're
17 referring to Exhibit 1, Tab 10, when you say "this question"
18 and the quote from The Washington Post, right?

19 Judge Bybee. That's correct.

20 Mr. Johnson. Okay.

21 Judge Bybee. That's correct.

22 It was far from clear in June of 2001 that Senators
23 Ensign and Reid had secured a promise from the White House to
24 allocate a seat that had previously belonged, by tradition,
25 to some other State in the Ninth Circuit to Nevada.

1 Mr. Nadler. I see.

2 Judge Bybee. And there were no other nominations from
3 Nevada.

4 Because of the timing of 9/11, my obligations to teach
5 at the University of Nevada-Las Vegas, it was agreed that I
6 would go ahead and teach in the fall 2001 at UNLV on a
7 truncated schedule and if my nomination went through as
8 planned --

9 BY MR. NADLER:

10 Q If your nomination for?

11 A The Office of Legal Counsel as Assistant Attorney
12 General --

13 Q Okay.

14 A -- went through in the fall of 2001, then I would
15 plan on joining the Justice Department sometime in mid to
16 late November.

17 Q Before finals?

18 A Well, UNLV was kind enough to compress the
19 schedule, and I was able to give the finals the first of
20 November.

21 Q Uh-huh.

22 A We were in the process of moving, of packing up our
23 home to come to Washington when I learned that Judge Procter
24 Hug of Reno had somewhat unexpectedly announced that he was
25 taking senior status.

1 Q I see.

2 A That created a vacancy.

3 Q On the Ninth Circuit or district court?

4 A No, that was the Ninth Circuit position. Judge Hug
5 is the former chief judge of the Ninth Circuit.

6 Q Okay. Uh-huh.

7 A That actually created an opportunity in Nevada.
8 That position did not have to go to Nevada, but certainly
9 Nevada was going to argue to the President that they wanted
10 that seat filled by a Nevadan.

11 I came to Washington believing, at that point, that I
12 probably had lost any opportunity to go to the Ninth Circuit.
13 Sometime around late December, first part of January, so it
14 would've been late December of 2001, early January 2002,
15 about a month to 2 months after Judge Hug announced that he
16 was taking senior status. I spoke with a colleague of mine
17 at the University of Nevada-Las Vegas who confirmed that the
18 paper had reported that there were a number of candidates
19 that had been interviewed by the White House for the Ninth
20 Circuit position, for Judge Hug's seat.

21 Q You being one of them.

22 A No, I was not one of them. No, these were in the
23 Nevada papers. There were four names on the list; my name
24 was not mentioned.

25 Q Uh-huh. Uh-huh.

1 A I had had no communication with the White House, at
2 that point, either initiated by me or initiated by them,
3 about the Ninth Circuit position.

4 Q Okay. All of this summary, it is fair to say, I
5 assume, that you were interested in the Ninth Circuit vacancy
6 and that when the OLC position came up and they asked you to
7 take it, you were willing to take it for whatever reasons,
8 but you obviously wanted to be on the Ninth Circuit
9 eventually?

10 A It was -- I have to say this -- I think it is the
11 goal of every law professor, the dream of every law professor
12 someday to be able to sit on a court of appeals.

13 Q So the answer is yes?

14 A Yes.

15 Q Okay. Thank you.

16 Now, I understand you were nominated to head up OLC on
17 September 4, 2001?

18 A I can't confirm the date. And, Congressman, that
19 may be correct, but there may have been a prior nomination in
20 August because, as I recall, Congress went out in August, and
21 I believe my nomination had been submitted just before then.
22 It expired, and it was renewed in September. My memory is a
23 little hazy on that.

24 Q Well, if you look at Document 11 in the Exhibit 1
25 notebook, which is an April 29th letter from the Senate

1 Judiciary chairman, Pat Leahy, to you --

2 Mr. Mincberg. Off the record.

3 [Discussion off the record.]

4 BY MR. NADLER:

5 Q The bottom of the page, it is a letter to you from
6 Chairman Leahy. It says, "You were nominated by President
7 George Bush to serve as head of OLC on September 4th, 2001.
8 You were confirmed on October 23rd."

9 Do you have any reason to dispute these dates?

10 A I don't. I just wanted to add, I believe there
11 might have been a prior nomination in August that expired
12 during the recess.

13 Q Okay. But this would have been the effective date,
14 the effective nomination?

15 A I don't have any reason to question September 4th.
16 I just don't recall.

17 Q Okay. Now, is it correct that you were first
18 nominated to the bench about 6 months later in May 2002?

19 A From September 4th -- May 22nd I believe is the
20 date that I was nominated.

21 Q Okay. So roughly in May of 2002.

22 A Right.

23 Q Now, to your knowledge, had OLC begun working on
24 the interrogation memos by this time -- that is, by May 2002?

25 A To my knowledge, I don't know. You have shown me

1 today that the matter was, according to the OPR reports,
2 opened in April. I can't pinpoint that discussion.

3 Q Okay. Well, just for the record, page 39 of
4 Document 5, the OPR report, as we discussed already, makes
5 clear that, by April 11th, 2002, work had begun on the memos
6 and you had been briefed on the program by that point?

7 Mr. Johnson. Why do you say he had been briefed on the
8 program by that point?

9 Mr. Nadler. Oh, we don't know that? Let me withdraw
10 that. Let me withdraw that. I thought that was in the OPR
11 report. It's not. It is not. So let me rephrase that.

12 BY MR. NADLER:

13 Q For the record, if you look at page 39 of
14 Document 5, the OPR report, as we have discussed, it makes
15 clear that, by April 11th, 2002, work had begun on the memos,
16 period. Okay? So before the White House nominated you for
17 this judgeship, the office had begun work on the OLC
18 interrogation memos; is that correct?

19 A The matter had been opened. I can't speak to how
20 much work had been done and what had been done at that point.

21 Q Okay. Let me ask you, the two interrogation memos
22 that you signed were completed on August 1st of 2002; is that
23 correct?

24 A Yes.

25 Q And you had not been confirmed by the Senate by

1 that time.

2 A That's correct.

3 Q And did the White House have the power to withdraw
4 or delay the nomination if they had wanted to?

5 A If the President had wished to withdraw my
6 nomination, that certainly was within his powers.

7 Q Okay. Now, before you became a judge, before you
8 were confirmed, the White House actually had to resubmit your
9 name to the Senate; isn't that correct?

10 A The nomination expired, I want to say at the end of
11 the congressional term.

12 Q At the end of 2002?

13 A That's right. So it was resubmitted, I believe, in
14 January of 2003.

15 Q 2003. That's what our records show.

16 A Is the White House obligated to resubmit a nomination
17 that's been returned?

18 A No.

19 Q Okay. And so, if the White House had not been
20 happy with the work you had been doing, is it fair to say,
21 had it not been happy, it might not have resubmitted the
22 nomination for this important position?

23 A I will say, it is true that the White House would
24 ~~not~~ ^{have to} do so. I have to say that, just based on my
25 experience --

1 Q I'm sorry, say that again?

2 A The White House would not have to resubmit any
3 nomination.

4 Q Uh-huh, right.

5 A I would say, based on my experience, it is a little
6 unusual, but the White House would not have to resubmit my
7 nomination.

8 Q And if the White House had been very unhappy with
9 what you were doing, presumably it might not have?

10 A The White House can withdraw it for any reason.

11 Q Not withdraw, not resubmit?

12 A That's correct, not resubmit the nomination. They
13 can not resubmit for whatever reason.

14 Q So the answer is yes.

15 A Yes.

16 Q Okay. In any event, in your case, the President
17 did resubmit the nomination on January 7th, 2003?

18 A I can't confirm the date.

19 Q In January 2003.

20 A Yes.

21 Q And as far as you know, you hadn't given them any
22 reason not to?

23 A I think that's a permissible inference.

24 Q And sort of a rhetorical question.

25 You earlier testified that you did not discuss the

1 interrogation memos directly with the White House while they
2 were being drafted.

3 A Yes.

4 Q Did either of those memos or the subject of legal
5 standards concerning interrogation come up in any
6 communications with anyone at the White House during the
7 period your nomination was under consideration by the Senate?

8 A I don't recall.

9 Mr. Johnson. Well, let me just -- I think this is just
10 my confusion. Could I ask you to read that question back for
11 me, please? Or do you want to repeat it?

12 Mr. Nadler. I could repeat it.

13 Mr. Johnson. I'm not sure whether you're asking him
14 whether it came up in some conversation between someone other
15 than him, or --

16 Mr. Nadler. I'll read it exactly the way I said it.

17 BY MR. NADLER:

18 Q Did either of those -- well, you earlier testified
19 that you did not discuss the interrogation memos directly
20 with the White House while they were being drafted.

21 Did either of those memos or the subject of legal
22 standards concerning interrogation come up in any
23 communications with anyone at the White House during the
24 period your nomination was under consideration by the Senate?

25 A I just want to make sure I'm clear. So, Mr.

1 Nadler, are you asking me whether, for example, whether we
2 ever gave subsequent advise related to ^{those} ^{is} ^{the} ~~matter~~ to ~~that~~ White
3 House?

4 Q Not subsequent, during. During the period, not
5 after. During the period your nomination was under
6 consideration by the Senate. During that period.

7 A I'm sorry. Are you talking about the January 2003
8 period, or are you talking about the May 2002 --

9 Q Either one. Either one.

10 A Okay.

11 Q From the time -- in other words, the White House
12 nominated you first, the Senate didn't act, they resubmitted
13 the nomination. So what --

14 A Could I just try and restate the question and make
15 sure I've got it correct?

16 Q Yes.

17 Mr. Johnson. No, no. I think we're intruding too much,
18 and it's my fault. Why don't you let him finish his --

19 Judge Bybee. Okay.

20 BY MR. NADLER:

21 Q The White House submitted your nomination in the
22 spring, as I recall, of 2002. The Senate didn't act in time.
23 They resubmitted in January 2003. And you were confirmed in,
24 when --

25 A In March.

1 Q In March. So, from April of 2002 to March of 2003
2 is, broadly framed, when your nomination was under
3 consideration by the Senate. It was known to the Senate; it
4 was being considered.

5 A Uh-huh.

6 Q During that time period, did either of the memos or
7 the subject of legal standards concerning interrogation, the
8 subject generally, come up in any communications that you had
9 with anyone at the White House? That's the question.

10 Mr. Johnson. And "you" in this question is Jay Bybee.

11 Mr. Nadler. Yes.

12 Mr. Johnson. And so he's asking about what you
13 discussed with the White House.

14 Judge Bybee. And that would -- I want to make sure I
15 understand again. That would include, did I have any
16 conversations, for example, in the fall of 2002 --

17 Mr. Nadler. Yes.

18 Judge Bybee. -- about interrogation standards with the
19 White House?

20 Mr. Nadler. About interrogation standards or about
21 these two memos.

22 Judge Bybee. Okay. Not that I recall.

23 BY MR. NADLER:

24 Q Okay. So you don't recall any such conversations
25 at that time?

1 A I don't recall.

2 Q Okay. In any event, you were given, subsequent --
3 ultimately, you were given a hearing before the Senate
4 Judiciary Committee?

5 A Yes.

6 Q In February of 2003.

7 A Yes.

8 Q Did you describe your work at OLC on interrogation
9 issues to the Senate committee?

10 A No, I don't believe that I did.

11 Q Did you ever discuss with anyone at the White House
12 whether you could testify about these issues?

13 A Specifically about interrogation or about other
14 things that I was involved in at OLC?

15 Q Both, both, both.

16 A I don't -- I don't recall the question -- I don't
17 recall the question coming up.

18 Q So you don't recall discussing with anyone at the
19 White House either the interrogation memos or the
20 interrogation -- I'm sorry -- whether you could discuss the
21 question of the interrogation memos or the --

22 A I don't recall. I'm going try and be a little more
23 specific and a little more helpful here.

24 I don't recall having a conversation with the White
25 House about preparation for my nomination hearing. That

1 matter was handled by the Office of Legal Policy at the
2 Department of Justice. For example, the murder boards that I
3 went through were conducted by --

4 Q The murder boards?

5 A "Murder boards," that is what they call them, a
6 moot court.

7 Q Okay. A practice --

8 A A practice round.

9 Q Practice confirmation hearing?

10 A "Murder board" is the shorthand that they use.

11 Q To be distinguished from waterboard. Okay. All
12 right, well, let me ask you a different question then. Now,
13 who did you say you just discussed all these questions with,
14 not the White House but --

15 A The Office of Legal Policy.

16 Q The Office of Legal Policy. Which is part of the
17 White House?

18 A Part of the Department of Justice.

19 Q Part of the Department of Justice. And did you
20 discuss with this Department of Legal Policy, did you discuss
21 with the Department of Legal Policy in this time period, May,
22 whenever your nomination was first submitted until it was
23 confirmed, did you discuss at any time in that time period
24 either the interrogation memos or -- either the Bybee memos,
25 or what became known as the Bybee memos, or interrogation

1 methods or -- excuse me. Let me rephrase that.

2 Did you discuss whether you could discuss those
3 questions with the Senate committee?

4 A Yeah, I -- I don't recall. I don't recall in the
5 course of our preparation whether anything came up about what
6 I could say about any memos that I had worked on.

7 Q Or about any matters?

8 A Or any matters that I had worked on at the Office
9 of Legal Counsel.

10 Q So you were not instructed or advised not to
11 discuss these matters with the Senate --

12 A Well, I can't go that far, Congressman. I can only
13 say I don't recall what instructions I received about that.

14 Q So you don't recall being --

15 A Right.

16 Q -- so advised? So you don't recall being so
17 advised?

18 A We spent several hours going through a number of
19 scenarios. It is possible that the Department of Justice
20 anticipated something and might have given me some counsel
21 about how I might respond to questions that related to advice
22 I was providing to my clients. But I don't recall ~~what~~
23 ~~that~~

24 Q And you specifically don't recall whether you
25 discussed whether you could discuss with the Senate the

1 interrogation standards or the Bybee memos?

2 A I think it would have been highly unusual that the
3 Office of Legal Policy would have been even aware of the
4 nature of any opinions that I had signed or issued at the
5 Office of Legal Counsel.

6 Q Well, they don't have to be aware of the nature of
7 what you had signed, but just that you worked in the area.

8 A Well, that would include all matters that I worked
9 on, which would include lots of domestic matters that had
10 nothing to do with terrorism.

11 Q No, no, I understand that. But my question was --
12 let's put it this way: I have no reason to believe or to be
13 interested in whether they said, "Whatever you do, don't
14 answer questions from the Senate committee about domestic
15 relations matters." And maybe they didn't, maybe they
16 didn't, and we have no interest in that question.

17 My question is, do you recall whether the subject of
18 whether, if asked, you should testify about what became known
19 as the Bybee memos or interrogation standards came up?

20 A I don't recall that coming up.

21 Q Okay.

22 Mr. Johnson. Congressman, when you reach a convenient
23 place in your outline, perhaps we could take a quick bathroom
24 break?

25 Mr. Nadler. Yes, we will. Right here, next page.

1 Mr. Johnson. Okay. Great.

2 Mr. Nadler. That will be a very convenient place
3 because we're going to switch topics at that point.

4 Mr. Johnson. Perfect.

5 BY MR. NADLER:

6 Q Now, do you agree that the work you did at OLC
7 would have been relevant to a congressional committee trying
8 to understand your legal qualifications and your approach to
9 difficult issues?

10 A Well, I --

11 Q Not that you would bring it up, but do you agree
12 that it would be relevant if brought up?

13 A I think that --

14 Mr. Johnson. You're talking about all the work at OLC?

15 Mr. Nadler. Yeah, obviously.

16 Judge Bybee. Well, it would be representative of a
17 larger body of work.

18 BY MR. NADLER:

19 Q Okay. And yet -- and do agree that the work that
20 was done on the questions of the Bybee memos and the
21 interrogation standards and everything surrounding that might
22 have been relevant?

23 A I am confident that a Senate committee would have
24 liked to have had as complete a picture as possible in
25 considering any nominee.

1 Q Now, so, whatever the cause, can we agree that the
2 Senate acted without benefit of that full record?

3 Mr. Johnson. What full record?

4 Mr. Nadler. Regarding the Bybee memos and the
5 interrogation standards?

6 Mr. Johnson. Well, it's important -- I mean, I don't
7 want to interrupt, but there are issues of privilege here
8 that the Justice Department may have a view about. A large
9 number of these memoranda, not just the interrogation --

10 Mr. Nadler. All right, but I'm not asking about that.

11 Mr. Johnson. Well, when you say they acted without the
12 benefit, it implies that he could --

13 Mr. Nadler. No. I'm not making any -- let me make it
14 clear for the record. I'm not making any implication as to
15 who -- assuming they should have had it, assuming they acted
16 without benefit of it, I'm making no implication as to why
17 they didn't have it or whose fault they didn't have it,
18 period, just that it might have been nice that they had it.

19 Mr. Johnson. Okay. And just let me add one other
20 thought, because I know you know this --

21 Mr. Nadler. Not might have been nice, that it would
22 have been useful to their work and relevant to have it.

23 Mr. Johnson. Well, I'm not sure that's what he said,
24 but I understand what you're asking.

25 Mr. Nadler. Well, he didn't answer yet.

1 Mr. Johnson. Okay. That's my fault.

2 One of these two memoranda were privileged at the
3 time -- I mean, were classified, rather, at the time, and
4 both were privileged. So, as long as we understand that in
5 the context, that's -- you can answer that, Judge. Go ahead.

6 Judge Bybee. Well, I think the previous answer I gave
7 you is probably the same one. I am sure that a committee
8 considering any nominee would like to have a full record of
9 the matters on which they worked and opinions that they've
10 rendered.

11 BY MR. NADLER:

12 Q And they didn't have that full record, for whatever
13 reason?

14 A For whatever reason.

15 Q Okay. Now, do you think that if the Senators had
16 known or if you had told them about your views on what types
17 of interrogation were permissible under U.S. law, your views
18 as perhaps articulated in the Bybee memos, that might have
19 affected their judgments?

20 Mr. Johnson. You're asking what Senators would have
21 thought in 2003?

22 Mr. Nadler. No, I'm asking what Mr. Bybee thinks the
23 Senators might have thought in 2003.

24 Judge Bybee. Well --

25 Mr. Johnson. How could he possibly answer that?

1 Judge Bybee. I don't know how to answer that, Mr.
2 Nadler. I don't know what the Senate would have thought in
3 2003 about those memos. The Senate had just switched hands;
4 it had just gone from Democratic to Republican.

5 BY MR. NADLER:

6 Q Let me make that question a little more precise,
7 even though it is hypothetical. Do you think that their
8 specific knowledge of these questions that they didn't know
9 about might have affected their judgments?

10 A I don't have any basis for answering that.

11 Q Okay. Are you aware that former Defense Department
12 general counsel Jim Haynes was at one point nominated for a
13 seat on the Fourth Circuit?

14 A Yes, I am.

15 Q On the Fourth Circuit. But when word came out of
16 his significant connection to the administration's
17 interrogation regime, his nomination stalled, and he was
18 never confirmed to the bench. You're aware of that?

19 A I am aware of that.

20 Q If that happened to Jim Haynes, do you think that
21 could have affected your nomination, had these matters been
22 known?

23 Mr. Johnson. You might ask what the dates of those --

24 Mr. Nadler. What?

25 Mr. Johnson. Is there a difference in time? I don't

1 know when Jim's nomination stalled.

2 Mr. Mincberg. I think we can -- just for the record, I
3 think there is no dispute that this was in the '05-'06
4 period.

5 Judge Bybee. It is really beyond my ability to
6 speculate as to how the Senate might have treated this in
7 2003. Had it come up in a different time period with a
8 different composition of the Senate, I -- it is -- I just
9 wouldn't want to speculate on that.

10 BY MR. NADLER:

11 Q Okay. Let me for the record say that there was a
12 New York Times editorial, which is in Document 14, Exhibit
13 1 -- I'm not going to ask you a question about it, so you
14 don't have to look it up if you don't want to. I'm just
15 going to quote it.

16 It says in the second paragraph, "William Haynes II, the
17 Pentagon's general counsel, has been closely involved in
18 shaping some of the Bush administration's most legally and
19 morally objectionable policies, notably on the use of
20 torture. The last thing he is suited to be is a Federal
21 judge," closed quote. So at least some people think that
22 those matters were relevant and, in fact, in one case,
23 dispositive.

24 That Chairman Leahy of the Senate Judiciary Committee
25 has said, quote, "The fact is the Bush administration and Mr.

1 Bybee did not tell the truth. If the Bush administration and
2 Mr. Bybee had told the truth, he never would have been
3 confirmed," closed quote.

4 What is your response to that?

5 A Well, I -- first of all, I would like it clear for
6 the record that I did answer truthfully all of the questions
7 that I was permitted to answer by reasons of privilege or
8 other restrictions by the Department of Justice with respect
9 to my role at the Office of Legal Counsel.

10 Q Well, what Senator Leahy is clearly referring to
11 here -- no one is saying that you -- well, I shouldn't say --
12 let me -- what Senator Leahy is clearly referring to here is
13 being honest by telling the complete truth and explaining
14 what you did at OLC. Do you have any -- not that you
15 specifically, you know, answered "no" when you should've
16 answered "yes" on anything, but that you didn't give the
17 complete picture. That's essentially what he's saying.

18 Do you have any reason to dispute that, if that had been
19 done, you might not have been confirmed?

20 A Well, that's a political judgment, Congressman.

21 Q Okay.

22 And thank you. And, at this point, we can take our
23 bathroom break. So we should recess for what, 5 minutes?

24 Mr. Johnson. Whatever you guys -- I just need to go to
25 the bathroom.

1 Mr. Mincberg. Yeah, 5 minutes.

2 Mr. Nadler. Well, it is now 10:46. Let's reconvene at
3 10:55.

4 Mr. Johnson. Yeah, okay.

5 Mr. Nadler. Nine minutes.

6 [Recess.]

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1 RPTS DOTZLER

2 DCMN BURRELL

3 [10:55 a.m.]

4 BY MR. NADLER:

5 Q Just sitting here reviewing the testimony, there is
6 one ambiguity which I would like to clear up. I didn't ask
7 the question. You testified, and I forget the dates, that
8 you were called by Gonzales. You came to see Gonzales about
9 the Ninth Circuit. Then they brought up the OLC thing, and
10 then you got the OLC appointment. Eventually you got the
11 Ninth Circuit appointment. After you were in the OLC, or
12 after you were appointed there, I will say, when and who
13 first brought up the Ninth Circuit again?

14 A It would have been around, and as I mentioned, I
15 had a conversation with a colleague of mine at the University
16 of Nevada Las Vegas that said, Oh, the local papers are
17 reporting that the following four guys have been interviewed
18 by the White House for the Ninth Circuit.

19 Q That was the vacancy that you didn't get or the one
20 you did get?

21 A That was the one I did get eventually. That was
22 the Procter Hug seat.

23 Q You didn't get the vacancy because of the increased
24 number?

25 A That seat never materialized. Nevada to this date

1 doesn't have that.

2 Q Unfortunately for Nevada.

3 A Then I received a call from the White House that
4 said we have been interviewing people for the Ninth Circuit.
5 Who else in Nevada ought to be on this list?

6 Q You got that call?

7 A I got that call, so I gave them a couple of names
8 of people that I thought, people that I knew that they ought
9 to talk to. I don't know whether these people were on their
10 list or not. At least one of those people called me a couple
11 of days or a week later and said, Hey, I got a call from the
12 White House, I want to talk to you about the Ninth Circuit.

13 Q They wanted to talk with him about the Ninth
14 Circuit?

15 A They wanted to talk to him, right. I will call him
16 Mr. S. So Mr. S. called me, it was one of the names I had
17 given the White House, this is one of the guys you might be
18 interested in talking with, and Mr. S called me and said, I
19 got a call from the White House, who should I talk with?

20 He was curious as to who were all of the people in
21 Washington he should begin phoning because he was very
22 interested. Some time after that, I don't know if it was a
23 week or 2 weeks, I got another call from the White House that
24 said: Would you like to be considered for this position?

25 Q What time frame was this?

1 A My best estimate is probably around the end of
2 January 2001.

3 Q 2001?

4 A I'm sorry, January 2002.

5 Q You began work at OLC when?

6 A After Thanksgiving of 2001.

7 Q You said January?

8 A I had been there about 2 months at that time.

9 Q So sometime in January 2002, you got this call
10 about the Ninth Circuit?

11 A Yes.

12 Q Very good, thank you. Now we can switch topics.

13 Mr. Johnson. I just wanted to come back and clarify one
14 thing or invite Judge Bybee to clarify one thing,
15 Congressman. Thank you.

16 In an earlier series of questions, you asked him about
17 an observation made by Senator Leahy, which I am
18 paraphrasing, but the essence of it was that there was
19 information about Judge Bybee's work at OLC that the Senate
20 Judiciary Committee didn't have and that Judge Bybee was not
21 forthcoming or not truthful with respect to that, and Judge
22 Bybee wanted to add one clarifying point.

23 Mr. Nadler. Do we want to get the quote in the record
24 at this point?

25 Mr. Johnson. If you'd like, yes.

1 BY MR. NADLER:

2 Q The direct quote from Chairman Leahy to which the
3 judge wants to comment on now is, quote, and this is a quote
4 from a few years ago, obviously, from Senator Leahy: "The
5 fact is the Bush administration and Mr. Bybee did not tell
6 the truth. If the Bush administration and Mr. Bybee had told
7 the truth, he never would have been confirmed."

8 A And I told you previously, Congressman, and I want
9 to make it clear on the record that I had told the truth.
10 The clarifying comment I would like to make is that it was
11 not my decision whether to disclose or withhold any of the
12 opinions I had worked on at the Office of Legal Counsel.
13 That was not a personal privilege, it was a privilege that
14 belonged to the executive branch and had to be asserted by
15 the Department of Justice.

16 Q I asked you before whether you were told not to
17 reveal any of that and you said that you didn't recall?

18 A I didn't recall whether we had that conversation.

19 Q So are you saying now that you were told not to
20 discuss that?

21 A I just don't recall whether I had that
22 conversation. Let me clarify one thing. Following my
23 nomination, my hearing, a number of Senators submitted
24 written questions to me that did relate to the Office of
25 Legal Counsel. I don't believe in the transcription of my

1 nomination hearing that I received any questions that I
2 couldn't answer at the hearing. I just don't recall if there
3 were.

4 Q Now that is interesting. You just said several
5 Senators subsequent to the hearing submitted questions with
6 respect to the interrogation standards?

7 A I don't recall anybody asking about interrogation
8 standards. But there would have been general questions about
9 my work at the Office of Legal Counsel.

10 Q And you replied to those?

11 A I replied to those in writing. It is a part of my
12 record. I answered those questions honestly.

13 In a number of places, I had to say I could not answer
14 the question. The reason I couldn't answer the question is
15 because the Department of Justice was --

16 Q Was instructing you not to?

17 A -- was instructing me not to.

18 Q Did those questions that you could not answer
19 relate to the question of interrogation standards or to the
20 Bybee memos?

21 A I would have to go back and look at those
22 questions.

23 Q Well, counsel reminds me that no one outside the
24 Justice Department presumably, and maybe the White House,
25 knew about those memos at the time, so the questions of

1 necessity would have had to be pretty general. But they
2 could have been about interrogation standards.

3 So my question is: Were any of those questions about
4 interrogation standards?

5 A I don't remember the questions that I received as
6 to whether any of them might have arguably covered these
7 particular memos. But the objection was consistent as to
8 anything that the Senators asked that was related to my work
9 at the Department of Justice.

10 Q Hold on a minute. You are saying that the Justice
11 Department said don't tell them anything about what you did
12 at the Department of Justice?

13 A Well, I could reveal client -- it would actually be
14 better, and I don't know if you have the records available.

15 Mr. Mincberg. We don't have them marked as exhibits,
16 but we can certainly get and maybe at some later point.

17 Judge Bybee. It may be more useful to look at exactly
18 what the questions were and what my answers were.

19 Mr. Mincberg. We can get that.

20 Mr. Nadler. We may have to return to that at a
21 subsequent occasion.

22 Mr. Johnson. I realize I am prolonging the
23 clarification, but I think the point Judge Bybee wanted to
24 make clear is to the extent that a privilege was asserted in
25 response to any questions, that was not his personal choice.

1 It was not something that he could decide to do or not do.

2 Mr. Nadler. I think the judge has made that clear.

3 Mr. Johnson. Okay.

4 BY MR. NADLER:

5 Q But we will probably want to know on what subjects,
6 if any, the Justice Department asserted that or instructed
7 you.

8 A It would all be in my written answers to the
9 questions.

10 Q Okay. So we may or may not have to come back.

11 In February of 2007, the International Committee of the
12 Red Cross issued a confidential report on 14 so-called
13 high-value detainees interrogated by the CIA. The ICRC, the
14 February 2007 report, is Document 27 in the Exhibit 1
15 notebook. On page 4 of that report the Red Cross concludes
16 in the last paragraph that the 14 detainees were subjected to
17 "a harsh regime employing a combination of physical and
18 psychological ill treatment with the aim of obtaining
19 compliance with extracting information." The quote begins on
20 the third line of that paragraph. The paragraph reads from
21 the beginning, "The 14 who are identified individually below,
22 described being subjected, in particular during the early
23 stages of their detention, lasting from some days up to
24 several months, to a harsh regime employing a combination of
25 physical and psychological ill treatment with the aim of

1 obtaining compliance and extracting information."

2 Now, please turn to page 6 of the report. It states,
3 reading from the third and fourth full paragraph, that when
4 transferred from one location to another, a detainee "would
5 be made to wear a diaper and dressed in a track suit.
6 Earphones would be placed over his ears through which music
7 would sometimes be played. He would be blindfolded with at
8 least a cloth tied around the head and black goggles. The
9 detainee would be shackled by hands and feet. The detainee
10 was not allowed to go to the toilet."

11 There is some skipping that I am doing.

12 A I'm with you.

13 Q "The detainee would be shackled by hands and feet.
14 The detainee was not allowed to go to the toilet, and if
15 necessary, was obliged to urinate or defecate into the
16 diaper."

17 Now while you were head of OLC, did you ever analyze or
18 approve these techniques for handling a detainee either in
19 Bybee Memos 1 or 2 or otherwise?

20 A I don't believe that some of the things that were
21 mentioned there; for example, let me take the diaper as
22 illustrative, I don't believe the diaper was -- that we were
23 asked specifically by the CIA whether outfitting somebody
24 with a diaper would be an acceptable technique. I don't
25 believe that we were asked the question about, for example,

1 the wearing of diapers.

2 Q Were you asked about any of the techniques
3 described that I just read? There was the diaper. That when
4 detainees were transferred, they would wear a diaper and
5 dress in a track suit. You just said that you don't recall
6 being asked about that.

7 Earphones would be placed over their ears to which music
8 would sometimes be played. What about that one?

9 A There isn't anything in our memorandum that
10 addresses that that I recall.

11 Q Is there anything not in the memorandum?

12 A Not that I recall.

13 Q They would be blindfolded with at least a cloth
14 tied around the head and black goggles, the detainee would be
15 shackled by hands and feet. Were you asked about those
16 techniques?

17 A I don't believe that we were asked, that that was
18 one of the 10 techniques that we were specifically asked
19 about.

20 Q And the same would be true; that is to say; that
21 you were not asked about the detainee not being allowed to go
22 to the toilet and being obliged, if necessary, to urinate or
23 defecate into the diaper?

24 A I don't believe that we were asked anything about
25 that.

1 Q Was there ever a request for approval of any of
2 these techniques as described in the ICRC report; you just
3 said "no"?

4 A I don't know. I'm not aware.

5 Q I shouldn't put words in your mouth, I'm sorry.
6 Let me restate the question so I don't put words in your
7 mouth.

8 Was there ever a request for approval of this technique
9 as described in the ICRC report?

10 A Not that I know of.

11 Q So if these things did occur during your tenure at
12 OLC, is it possible that they were done without authorization
13 from OLC?

14 A I'm not aware that we were ever asked and so that
15 we ever answered any questions related to those types of
16 handling.

17 Q So if you were never asked and therefore you never
18 answered these questions. Then it would be possible if they
19 were done that they were done without authorization from OLC?

20 A Yes.

21 Q Logic says so.

22 At the bottom of page 7 and the top of page 8 of the
23 same exhibit, the ICRC report states, "Throughout the entire
24 period during which they were held in the CIA detention
25 program...which for 11 of the 14 [high value detainees] was

1 over 3 years, the detainees were kept in continuous and
2 solitary confinement and incommunicado detention. They had
3 no knowledge of where they were being held, no contact with
4 persons other than their interrogators...[and] even their
5 guards were usually masked."

6 Was this activity as described permitted under the legal
7 advice you gave in Bybee Memos 1 and 2 or otherwise?

8 A We didn't address that in our memoranda.

9 Q Let's be specific. You didn't address what?

10 A Thank you. The question as to whether detainees
11 could be held, not knowing where they were being held,
12 without contact with persons other than their interrogators.

13 Q Could they be held in solitary confinement,
14 incommunicado detention for over 3 years, with no knowledge
15 of where they were being held and no contact with anybody
16 other than their interrogators?

17 A Those were not questions that the CIA asked us
18 about.

19 Q Or anybody else, not just the CIA?

20 A That's correct.

21 Q So you did not say "yes" to those, or "no" to
22 those, for that matter, in Bybee Memos 1, 2 or otherwise?

23 A Yes. That does not mean that they weren't
24 addressed by somebody; for example, the CIA's General
25 Counsel.

1 Q I understand that, but that is not my question. We
2 are talking about OLC. You were not asked these questions;
3 therefore, in Bybee Memos 1 and 2 or otherwise, you didn't
4 answer them?

5 A Yes, that's correct.

6 Q Okay. During your tenure, did OLC ever authorize
7 extended isolation or solitary confinement as a component of
8 an interrogation regime?

9 A As I sit here now, not that I'm aware of. Not that
10 I recall.

11 Q Okay. Were you ever told that detainees might be
12 held incommunicado in such a fashion?

13 A Not that I recall.

14 Q Would that have been material to the legal analysis
15 of the interrogation of the techniques had you been told
16 that? *[Proposed Bybee change: detainee, Abu Zubaydah
could be]*

17 A I don't know. I would have to know more about what
18 the facts were. We were very careful in what we said to the
19 CIA and we were very careful to repeat back to them the
20 conditions under which their high value ~~detainees, such as~~
21 ~~Abu Zubaydah, were going to be~~ interrogated.

22 Q Let's assume you had been asked the question, would
23 it be legal to keep people incommunicado in solitary
24 confinement for over 3 years with no knowledge of where they
25 were being held, with no contact with anyone other than the

1 interrogators for 3 years?

2 Mr. Johnson. Congressman, by definition the question is
3 hypothetical. He said he hasn't answered that.

4 Mr. Nadler. The question now is in your opinion now
5 would it be legal?

6 Mr. Johnson. No, I don't think there is a
7 miscommunication on that point. The question I was going to
8 raise, and Jay, just address it however you want in your
9 answer, I'm not sure what you mean by legal. The memorandum
10 addressed the torture statute. Are you referring to the
11 torture statute?

12 BY MR. NADLER:

13 Q I'm asking under the laws of the United States
14 generally, is it legal or illegal in your opinion to do what
15 I just described?

16 A I don't think I can answer it. I'm very hesitant
17 to speculate because these are the kinds of questions that
18 may come up before my court. I don't want to be prejudging.

19 Q Let me rephrase the question. Had you been asked
20 the question then, would you have been able at that point to
21 opine on that question?

22 A I don't know. It is just so speculative.

23 Q Thank you.

24 Page 11 of the ICRC report, beginning under the heading
25 "Prolonged Stress Standing," reports that 10 of the 14

1 detainees were subjected to "prolonged stressed standing
2 positions, during which their wrists were shackled to a bar
3 or hook in the ceiling for periods ranging from 2 or 3 days
4 continuously and for up to 2 or 3 months intermittently. All
5 of those detainees who reported being held in this position
6 were allegedly kept naked throughout the use of this form of
7 ill treatment."

8 In the last paragraph on this page continuing into page
9 12, the report states, "While being held in this position,
10 some of the detainees were allowed to defecate in a bucket.
11 A guard would come to release their hands from the bar or
12 hook in the ceiling so that they could sit on the bucket.
13 None of them, however, were allowed to clean themselves
14 afterwards. Others were made to wear a garment that
15 resembled a diaper...[three] detainees specified that they
16 had to defecate and urinate on themselves and remain standing
17 in their only bodily fluids."

18 By contrast; that is, by contrast to this description of
19 what was allegedly done, Bybee Memo 2 describes the proposed
20 use of stress positions at page 3, in the middle of the
21 second full paragraph, as follows: "(1) sitting on the floor
22 with legs extended straight out in front of him with his arms
23 raised above his head; and (2) kneeling on the floor while
24 leaning back at a 45-degree angle."

25 Does Bybee Memo 2 or any other legal advice you gave at

1 OLC authorize shackling a detainee to a hook in the ceiling
2 as was described in my earlier question?

3 A I don't recall that any place in Bybee Memo 2 that
4 we have addressed the question of shackling. So I don't
5 think it was one of the assumptions on which the CIA
6 requested our advice.

7 Q You just said you didn't comment on that in Bybee
8 2. Did you comment on it in any other legal advice?

9 A Aside from Bybee 1 and Bybee 2?

10 Q Well, you didn't comment on it in Bybee 1 or Bybee
11 2; is that correct?

12 A I don't think shackling was addressed as a specific
13 method of interrogation or treatment in Bybee 1, and I don't
14 believe it was among the assumptions that the CIA gave us on
15 which we based Bybee 2.

16 Q So it is fair to state that you do not believe that
17 you told the CIA that this was or was not okay? Either in
18 Bybee 1 or 2 or any other communication?

19 A I don't recall that we authorized the question of
20 shackling, for example, in these memos or in subsequent
21 advice to the CIA.

22 Q Or any advice, before or after?

23 A As far as I know.

24 Q Would the legal analysis of such a technique be the
25 same as the legal analysis of making someone kneel on the

1 floor and lean back at a 45-degree angle as described in
2 Bybee Memo 2?

3 A Again, Congressman, to the extent that calls for a
4 legal conclusion, I am reluctant to answer it because we do
5 end up with questions before my court that deal with these --

6 Q I'm not asking whether that is okay or not. I'm
7 asking a different question. Would the legal analysis, not
8 the conclusion, I'm not asking for a conclusion, would the
9 legal analysis of such a technique be the same as the legal
10 analysis of what is described in Bybee Memo 2; namely, making
11 someone kneel on the floor and lean back? Would the
12 reasoning be the same, not necessarily the conclusion?

13 Mr. Johnson. And the legal analysis in Bybee 2 relates
14 to the torture statute, so I think the Congressman is asking
15 you under the torture statute would you have analyzed this
16 the same way?

17 Judge Bybee. I would have used the same standards under
18 the torture statute to analyze it.

19 I thought I understood just a little different question.
20 I thought you were asking me whether it would have been
21 relevant to our analysis, which is slightly different.

22 BY MR. NADLER:

23 Q No, I wasn't asking relevant to your analysis.
24 What I'm asking, you were asked and you answered in Bybee 2,
25 a question with reference to sitting -- making someone sit on

1 the floor with legs extended straight out in front of them.
2 I'm sorry, with reference to making someone kneel on the
3 floor while leaning back at a 45-degree angle?

4 A Uh-huh.

5 Q That was in Bybee 2. The ICRC report indicates
6 that they did this shackling. You were not asked about that.
7 You don't recall being asked about that. That is your
8 testimony. My question is: Had you been asked about that,
9 would the legal analysis on the two questions be the same
10 legal analysis, not the same conclusions, but the same legal
11 analysis?

12 A Well, the same statute would have applied. The
13 same legal analysis in that sense would have applied. What
14 conclusions we might have arrived at is a very different
15 question.

16 Q I understand that. But you're saying the same
17 legal analysis would have applied?

18 A It was the same statute.

19 Q Okay. Could being chained to a hook in the ceiling
20 be more painful than sitting on the floor with legs out and
21 arms raised?

22 A I don't have a basis for answering that question.

23 Q Okay. Let me ask you a different question then,
24 not in my script. You have no basis for answering that
25 question, and I don't assume you do, how do you analyze, and

1 Bybee Memo 1 or 2, I don't remember which one, talks about
2 the degree of pain, the degree of pain associated with organ
3 failure and the degree of pain associated with this or that.
4 How do you analyze that? In other words, I just asked could
5 being chained to a hook in the ceiling -- could being forced
6 to do this be more painful than being forced to do that? And
7 you say you can't answer that, so how do you judge the things
8 you put in the memo? In other words, that some pain is
9 equivalent to death or organ failure or something else?

10 A The purpose of Bybee Memo No. 1 was to explain the
11 legal standard which we regarded as vague and difficult to
12 understand.

13 In Bybee Memo 2 we tried to apply that.

14 Q The reference was Bybee Memo 1 and 2?

15 Mr. Johnson. I would say it was neither because you
16 were paraphrasing.

17 Mr. Nadler. I was referencing.

18 BY MR. NADLER:

19 Q The subject matter that was discussed where they
20 used the phrase pain equivalent to organ failure or death,
21 that was Bybee 1?

22 A We have an analysis of the statutory term which is
23 severe pain, which is found in Bybee Memo 1. We then took
24 our explanation there and tried to apply that in Bybee 2 to
25 the specific techniques that were asked us by the CIA.

1 Q Did any memo you approved or any advice you gave
2 analyze whether it was lawful to require detainees to
3 defecate on themselves or to stand in their own bodily
4 fluids?

5 A That question was not put to us by the CIA in Bybee
6 Memo 2. I am not aware of any advice that --

7 Q When you say it was not put to you by the CIA, was
8 it put to you by anybody else?

9 A Not that I know of.

10 Q With reference to the last few questions, when you
11 said those questions were not put to you by CIA, you also
12 mean nor by anyone else?

13 A Yes. Not that I know of.

14 Q Fine. Your testimony was to your recollection, it
15 wasn't put to you by the CIA. And when you say that, you
16 mean to your recollection it wasn't put it to you by the CIA
17 or by anyone else?

18 A That's correct.

19 Q So if these things were done during your tenure at
20 the OLC, were they done without OLC's legal approval?

21 Mr. Johnson. These things you're referring now to the
22 ICRC report that you quoted earlier?

23 Mr. Nadler. Yes, the shackling, the incommunicado, the
24 sitting on the floor with legs extended.

25 BY MR. NADLER:

1 Q Not the two things in Bybee Memo 2, but the things
2 in the ICRC that I referred to.

3 A We can use, for example, shackling as sort of an
4 example of those kinds of things?

5 Q All of the things that we talked about except for
6 the two things that I specifically mentioned as referenced
7 here from Bybee Memo 2. The two things were sitting on the
8 floor with legs extended straight out in front with arms
9 raised above his head, and kneeling on the floor while
10 leaning back at a 45-degree angle; those aside, is it fair to
11 say that if these things were done during your tenure, all of
12 the things we talked about, those two aside, is it fair that
13 if these things were done during your tenure at OLC, it was
14 done without OLC legal approval?

15 A To the best of my recollection.

16 Q Okay. Thank you.

17 Page 13, as we proceed through this report, page 13 of
18 the ICRC report states at the top of the page that nine of
19 the 14 detainees alleged they had been subjected to "daily
20 beatings...involving slapping, punching, and, less often,
21 kicking to the body and face. The beatings lasted up to half
22 an hour and were repeated throughout the day and again on
23 subsequent days."

24 Would Bybee Memo 2 or any legal advice you gave while at
25 OLC authorize such beatings?

1 A There is in Bybee Memo 2, and let me see if I can
2 find it, there are two things that could arguably be put
3 there. One would be item number 4, which was called the
4 insult slap.

5 Q Item number 4 in what place?

6 A I'm looking at page 2 of Bybee 2. It just lists
7 the techniques. *[Proposed Bybee change: two techniques*
8 Q I see it. *are either of those things you*
 have referred to in the IRC
 report]

9 A There is one called the facial slap. Then there
10 was -- I'm sorry, number 2 was walling. I don't recognize in
11 this that those are ~~either of those~~ But to the extent that
12 something that was done in that course might have involved
13 ~~one of those two things~~, those things were addressed.

14 Mr. Johnson. When you say "this," the record doesn't
15 reflect what this is. You are referring to tab 27 from which
16 the Congressman just read?

17 Judge Bybee. Yes, page 13. For example, Congressman,
18 on line 2 of page 13, it says slapping. That was one of the
19 questions that the CIA did ask us. Facial slapping. We laid
20 out very carefully what the terms were.

21 BY MR. NADLER:

22 Q So slapping insofar as it involved facial slapping?

23 A Under the conditions that the CIA described for us.
24 The question of punching or kicking do not appear to be
25 covered by any of the techniques that the CIA asked us about.

*[Proposed Bybee change: either an insult slap
or walling]*

1 Q Okay. We are going to get into this more. We are
2 not going to leave it that vague. In fact, Bybee Memo 2
3 states at the bottom of page 10 and the top of page 11 that
4 "Even those techniques that involved physical contact between
5 the interrogator and the individual do not result in severe
6 pain. The facial slap and walling," as defined in the memo,
7 "contain precautions to ensure that no pain even approaching
8 this level results....The facial slap does not produce pain
9 that is difficult to endure. Likewise, walling involves
10 quickly pulling the person forward and then thrusting him
11 against a flexible false wall."

12 Would the beatings described in the Red Cross report
13 raise different issues than the controlled slaps, holds, and
14 wall throws authorized in Bybee Memo 2?

15 Mr. Johnson. Just for the record, you skipped a couple
16 of sentences. I don't think they are relevant to your
17 question.

18 Mr. Nadler. That is true. I try not to read material
19 that just wastes time and gets us off the subject.

20 Judge Bybee. The question, for example, described in
21 the Red Cross report of kicking or punching, if we use those
22 in the common way in which we describe kicking and punching,
23 are not questions we were not asked about and were not
24 covered by Bybee 2.

25 BY MR. NADLER:

1 Q So kicking or punching as described in ICRC report
2 would not be described in --

3 A As we commonly think of those terms.

4 Q And the prolonged stress, well, we went through
5 that. Okay.

6 And the daily beatings involving slapping, punching,
7 kicking would not be okayed by Bybee 2?

8 A I don't see anything in Bybee 2 that describes
9 punching and kicking.

10 Q How about beatings lasting up to half an hour?

11 A The beatings, if I'm thinking about what I would
12 say a beating was, if we were talking about using closed
13 fists, that is not covered by Bybee 2.

14 Q If I gave you one slap, if someone came up to you
15 and said you are a terrible person because you did this and
16 that and slapped you in the face, that would be one thing.
17 If he stood there and slapped you in the face for half an
18 hour, back and forth, you would agree that would be a little
19 different?

20 A That would be different, and we were advised by the
21 CIA and it is expressed in our memo, and this is on page 2 of
22 our memo, it is at the bottom of the carryover paragraph at
23 the top of page 2, it says, "Moreover, you have also orally
24 informed us that although some of these techniques may be
25 used more than once, that repetitions will not be substantial

1 because the techniques generally lose their effectiveness
2 after several repetitions."

3 Q So this would exclude, you would think, beating
4 someone, even if they didn't do punching and kicking, but
5 just slapping for half an hour straight, that would not be
6 covered?

7 A If somebody had said we want to know about the
8 facial slap, here are the conditions under which we are
9 describing, oh, and by the way, we might do it for half an
10 hour or longer, I would consider that time period a relevant
11 fact in my advice.

12 Q But no one ever asked you that?

13 A Not that I know of. We tried to be very, very
14 careful in repeating back to the CIA the assumptions that
15 they had given us.

16 Q Did you ever see requests for approval of the
17 rougher techniques described in the ICRC report?

18 A Which rougher techniques?

19 Q I think you have answered that already, kicking,
20 punching?

21 A I think I have answered that.

22 Q Answer it again.

23 A Well, to the extent that kicking and punching are
24 different from the techniques that we have described here, we
25 have not given any authorization for any of that.

1 Q Thank you. Bybee Memo 2 authorizes sleep
2 deprivation for a period of up to 11 days as stated at page
3 3, at the bottom of the third full paragraph, last sentence.

4 A I see it.

5 Q Bybee Memo 2 authorizes sleep deprivation for
6 periods of up to 11 days as stated at page 3. With regard to
7 this technique, it states in the last full paragraph --

8 Mr. Johnson. Can I just pause here. I'm in the slow
9 reading group. So on page 3 --

10 Mr. Nadler. On page 3 there is that one sentence.

11 BY MR. NADLER:

12 Q "You have orally informed us that you would not
13 deprive Zubaydah of sleep for more than 11 days at a time,
14 and that you have previously kept him awake for 72 hours from
15 which no mental or physical harm resulted."

16 A Okay.

17 Q Now on page 10 it states at the bottom of the last
18 full paragraph, "While sleep deprivation may involve some
19 physical discomfort, such as the fatigue or the discomfort
20 experienced in the difficulty of keeping one's eyes open,
21 these effects remit after the individual is permitted to
22 sleep." That is on page 10.

23 The entire paragraph, "As for sleep deprivation, it is
24 clear that depriving someone of sleep does not involve severe
25 physical pain within the meaning of the statute. "While

1 sleep deprivation may involve some physical discomfort, such
2 as the fatigue or the discomfort experienced in the
3 difficulty of keeping one's eyes open, these effects remit
4 after the individual is permitted to sleep." I will end the
5 quote there.

6 Sitting here today, do you consider that to be an
7 adequate description of how it would feel to be kept awake
8 for 11 straight days?

9 A Well, there is some additional information which is
10 found on page 6 of Bybee Memo 2 where that question is
11 discussed. It discusses the relevant literature and found no
12 empirical data. "You have also reviewed the relevant
13 literature and found no empirical data on the effect of these
14 techniques with the exception of sleep deprivation. With
15 respect to sleep deprivation, you have informed us that it is
16 not uncommon for someone to be deprived of sleep for 72
17 hours."

18 Q And still perform excellently on visual, spatial,
19 memory?

20 A Right. And at the bottom of that --

21 Q Let me read the next sentence: Although some
22 individuals may experience hallucinations, according to the
23 literature you surveyed, those who experienced such psychotic
24 symptoms almost always had such episodes prior to the sleep
25 deprivation.

1 So in other words, what this is saying, and this is in
2 Bybee Memo 2, is that for 72 hours there are no terrible
3 effects although some people who may be particularly prone to
4 that may experience hallucinations after 72 hours. But that
5 is 72 hours. Do you consider that to be an adequate
6 description of how it would feel to be kept awake for 11
7 straight days?

8 Mr. Johnson. I think Judge Bybee was going to point you
9 to the 11-day reference on page 6.

10 Judge Bybee. Yes. It is in the same paragraph. " You
11 have indicated the studies of lengthy sleep deprivation
12 showed no psychosis, loosening of thoughts, flattening of
13 emotions, delusions or paranoid ideas. In one case, even
14 after 11 days of deprivation, no psychosis or permanent brain
15 damage occurred."

16 BY MR. NADLER:

17 Q In one case?

18 A "In fact, the individual reported feeling almost
19 back to normal." ¹ [Bybee proposed change: after one
night's sleep]

20 On page 2, Mr. Nadler, page 3, I'm sorry, page 3, the 11
21 days of course was in no case would they deprive Zubaydah for
22 more than 11 days at a time, and that they had kept him awake
23 for 72 hours.

24 Q And your memo says in the page we were just reading
25 from a moment ago, in one case someone was okay after 11 days

1 of sleep deprivation?

2 A Yes.

3 Q It didn't say that was a normal or usual situation
4 or there were any controlled studies. In one case that
5 happened?

6 A Uh-huh.

7 Q And it said there was no long-term impact, it
8 didn't say how that person felt, which is irrelevant to the
9 question of torture?

10 A The conditions that the CIA described to us was
11 that there would be medical assistance at all times during
12 these enhanced interrogation techniques, and our advice was
13 very carefully couched to them. That if there was any -- as
14 to what severe pain or severe mental pain and suffering might
15 be, you've given us these assumptions, this is the literature
16 you have surveyed. These are the facts presented to us.

17 Q Under those assumptions and facts, what this memo
18 is saying is that in at least one case with 11 days, there is
19 no permanent psychological or physiological damage. It is
20 not saying it is not severely painful, stressful, et cetera?

21 A Yeah. The statute describes both severe pain and
22 severe mental pain. And to ~~suffer~~ severe mental pain the
23 statute says it must ~~be prolonged~~ ←

24 Q Okay. But would you agree that it might be the
25 case that certain induced conduct, staying awake, whatever,

[Bybee proposed change: constitute]

[Bybee proposed change: cause ~~many~~ prolonged
mental harm]

1 might be severely painful but not cause permanent
2 psychological or physiological damage?


3 Mr. Johnson. Severe physical pain, is that what you are
4 asking.

5 Mr. Nadler. No, or severe mental pain, either one.
6 Could it be that you could cause somebody, by doing
7 something, keeping them awake for 5 days, 11 days, 30 days,
8 whatever, that you could cause someone severe mental or
9 physical pain without inducing permanent psychological or
10 physiological damage? In other words, they might recover?
11 In other words, couldn't there be a severely painful thing
12 from which you recover?

13 Mr. Johnson. I think what he was trying to say,
14 although Judge Bybee should say it, an element of severe
15 mental pain as defined in the statute by Congress is
16 prolonged. Prolonged mental harm.

17 BY MR. NADLER:

18 Q Prolonged mental harm or prolonged pain?

19 A No, prolonged mental pain  [Bybee proposed change:
harm]

20 Q So in other words, it is okay to inflict severe
21 mental pain as long as there is no prolonged mental harm?

22 A That is what the terms of the statute say.

23 Q And that wouldn't violate -- those are the terms of
24 the anti-torture statute?

25 A The torture statute. The torture statute says that

1 in order to qualify as severe mental pain or suffering that
2 ~~it must be prolonged~~ ← [Bybee proposed change: there must
be prolonged harm]

3 Q And if you deprive someone of sleep for a lengthy
4 period of time, could you not be causing severe physical
5 pain, too, without prolonged mental harm?

6 A We didn't have any evidence of that from what the
7 CIA told us, and that was based on their studies.

8 Q What the CIA told us?

9 A Not just based on their studies, I'm sorry, based
10 on the literature that they had surveyed.

11 Q Their surveys indicated there was no severe
12 physical pain associated with -- well, the literature that
13 you quote actually talks about one person and 11 days. You
14 can't draw conclusions from one person, can you?

15 A Well --

16 Q If you were doing a medical experiment and you were
17 trying to say is this drug safe, and one person survived
18 being given it, you wouldn't say it is safe?

19 A The CIA told us that they would have medical
20 personnel on site at all times. The personnel, if there were
21 any reason to believe that somebody was suffering severe
22 pain, you would stop. That is why we described the standard
23 with such great care to them.

24 Q So according to these standards, is there any limit
25 on sleep deprivation? Instead of 11 days, if they said 31

1 days?

2 A Well, the CIA gave us as an assumption 11 days, and
3 provided a reference to some medical literature on that.

4 Q But that reference was that one person survived
5 without harm. It was not a reference to anything you would
6 rely on to say it was okay or it was safe?

7 A The CIA did not indicate that they intended to keep
8 Abu Zubaydah awake for 11 days. They said this is what we
9 ~~have done.~~ Here is the best literature on this.

10 Q So if they kept Abu Zubaydah, or someone else awake
11 for 11 days, would that be beyond what you had in effect said
12 it was okay to do?

13 A Eleven days certainly would have been the outer
14 limit of the assumptions the CIA gave us.

15 Q Let me repeat the question. You would not, I
16 assume, certify to the safety of a technique -- well, let's
17 put it this way. If I tested a drug, and what I'm about to
18 describe I wouldn't do on humans and so let's assume that I
19 tested a drug on animals. I tested on 100 animals and one
20 survived and 99 died. You would not describe that is safe?

21 Mr. Johnson. That is a hypothetical?

22 Mr. Nadler. That is a hypothetical. You'll see where I
23 am driving in a minute.

24 BY MR. NADLER:

25 Q If I conducted a drug test and that drug test, I

1 tested it on a 100 mice and 99 died and one survived, nobody
2 would conclude that was a safe drug. They would say it was
3 toxic. If I conducted the same drug test on one mouse and
4 that mouse happened to be the one that survived, because it
5 was only one mouse, you wouldn't conclude it was safe?

6 A I wouldn't have any evidence that there were
7 adverse consequences.

8 Q You won't have any evidence of any nature at all
9 from testing on one mouse or one person, in this case?

10 A It was the only evidence that was available here.
11 They were going to have medical personnel on site. If there
12 were an indication that somebody was suffering either severe
13 physical pain or suffering or someone might suffer severe
14 mental pain, prolonged mental pain or suffering, then I would
15 expect the CIA to stop.

16 Q Okay. You don't find the bland recitation that it
17 may be uncomfortable to keep one's eyelids open to understate
18 these issues?

19 A It is all a shorthand way of describing the
20 literature that the CIA had summarized for us. The CIA had
21 conducted its own investigation of these things.

22 Q Based on what you say in the memo, my conclusion
23 would be that the CIA was asserting, I think to any
24 reasonable person, that the CIA was asserting that 72 hours
25 sleep deprivation with proper precautions was safe and not

[Bybee proposed change: on both
the first and the last page]

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1 severely harmful, and so forth, and that in at least one case
2 11 days was okay, too, but there is no real evidence beyond
3 that?

4 A If the CIA departed from anything that it told us
5 here, if it had any other information that it didn't share
6 with us or if it came into any information that would differ
7 from what they told us here, then the CIA did not have an
8 opinion from OLC. We made that very clear ~~on the last page~~
9 of our opinion.

10 Q Very good. Page 15 of the ICRC report states in
11 the middle of the first paragraph that "sleep was deprived in
12 various ways, and therefore overlaps with other forms of ill
13 treatment," and I skipping some things there also. "From the
14 use of loud repetitive noise or music to long interrogation
15 sessions to prolonged stress standing to spraying with cold
16 water." In other words, they did all of these things on some
17 people.

18 Did Bybee Memo 2 or any other legal advice you gave at
19 OLC authorize dousing detainees with cold water to keep them
20 awake?

21 A Dousing with cold water was not one of the
22 techniques that we were asked about in Bybee 2.

23 Q So the answer is "no"?

24 A That's right.

25 Q Did Bybee Memo 2 or any other legal advice you have

1 at OLC authorize repetitive noise or music at a level
2 sufficient to keep an exhausted person awake?

3 A It is the same answer. Music was not one of the
4 questions that we were asked by the CIA.

5 Q Were you asked about any techniques for keeping
6 someone awake?

7 A Not that I recall.

8 Q So you authorized no such techniques?

9 A Not that I recall.

10 Q So if these things occurred, dousing with cold
11 water, subjecting to loud music to keep people from falling
12 asleep, if that occurred, that means they were done without
13 specific OLC authorization?

[Bybee proposed change: If the assumptions that we were given changed, they]

14 A That's right. ~~The assumptions on which we were~~
15 ~~given this~~ were not authorized specifically.

16 Q So the answer is "yes"?

17 A Those techniques were not authorized.

18 Q Because the question was without specific OLC
19 authorization, so the answer would be "yes"?

20 A That's correct.

21 Q Bybee Memo 2 authorized the technique described as
22 waterboarding, popularly known as waterboarding. In the memo
23 the technique is described at the bottom page 3, continuing
24 on to page 4 as follows, "In this procedure, the individual
25 is bound securely to an inclined bench, which is

1 approximately 4 feet by 7 feet. The individual's feet are
2 elevated. A cloth is placed over the forehead and eyes.
3 Water is then applied to the cloth in a controlled manner.
4 As this is done, the cloth is lowered until it covers both
5 the nose and mouth. Once the cloth is saturated and
6 completely covers the mouth and nose, airflow is slightly
7 restricted for 20 to 40 seconds due to the presence of the
8 cloth." The saturated cloth is what they mean.

9 Now according to a May 30, 2005 OLC memo, which is
10 Document 28, at the bottom of page 37, according to this May
11 30, 2005 OLC memo, the CIA used a waterboarding technique on
12 Zubaydah 83 times during August 2002?

13 A I see that.

14 Q The memo also says that the CIA used the
15 waterboarding technique 183 times on Khalid Sheikh Mohammed
16 during March 2003.

17 Did the part of Bybee Memo 2 analyzing waterboarding,
18 did it consider whether using this technique 83 times in
19 1 month could amount to torture?

20 A I want to be careful here because there are some
21 questions about the terminology that was used as to what
22 constituted times of waterboarding. Whether that was
23 considered a session, whether it means someone was
24 waterboarded as a session 83 times, or whether that was a
25 pour.

1 Q Or whether it was what?

2 A A pour. In other words, whether you were talking
3 about this is one, that is two. So there is some ambiguity
4 about that.

5 Q Either way. Answer both ways.

6 A We were not given any number of sessions as a range
7 by the CIA. I do wish to repeat that we said on page 2 ^{of the} ~~that~~
8 ~~the~~ techniques, ^{memo} page 2 of Bybee 2, that repetition will not
9 be substantial. That was an assumption up front.

10 Q Repetition will not be substantial?

11 A That's correct.

12 Q Now, that is very interesting. If the 83 times was
13 83 pours, as you put it, would you consider that substantial?

14 A I don't know in the SERE training, what was typical
15 for the SERE training.

16 Q Putting that aside, you said it shouldn't be --
17 what did you say?

18 Mr. Johnson. Repetition would not be substantial.

19 BY MR. NADLER:

20 Q Repetition would not be substantial. If someone is
21 waterboarded 83 times in a month, that is three times a day.
22 Almost three times a day. If someone is waterboarded 183
23 times, it is six times a day. There are two possibilities,
24 as you said. Assuming that they did it evenly. They could
25 have done it all in one day, but at least six times a day for

1 the second case and three times a day for the first. If it
2 was three pours or six pours or if it was six sessions, would
3 you consider that substantial repetition?

4 A I would consider that question relevant to the
5 question of what was substantial repetition. The reason I
6 think there is some ambiguity here, and maybe my counsel
7 recalls where this is because I don't recall where it is, but
8 I believe that Zubaydah said elsewhere that he was
9 waterboarded over the course of maybe just a couple of days.

10 Q So that makes it even more substantial?

11 A Well, it raises the question about the ambiguity as
12 to what the 83 times means, what our terminology is.

13 Q It means one or the other thing. It means either
14 pours or sessions.

15 A Let me back up to the principles on which we
16 decided this question. ~~was that we were described the SERE~~
17 ~~program~~ as the basis for the way in which that would be done.

18 Q Let me interrupt you for clarity. The SERE program
19 was a military training program; was it not?

20 A Yes.

21 Q Go ahead.

22 A That the basis for the waterboarding of Abu
23 Zubaydah, the explanation to us was congruent with the
24 techniques that had been used on our own soldiers in the SERE
25 training.

1 Q I would raise one question with that. Assuming
2 that the waterboarding was done exactly in the same way,
3 assuming that the waterboarding for Abu Zubaydah and the
4 other detainee who was tortured, I forget his name, we
5 mentioned him a few minutes ago, assuming that was done
6 exactly the same way as it was in the SERE training, isn't
7 there still a substantial difference, if you are laid down on
8 a board and you are tipped over so your head is below and
9 they put a saturated cloth so you can't breathe, or you think
10 you can't breathe and you have a panic reaction, isn't there
11 a big difference if you are panicking because you think you
12 are drowning or if you know it is a training technique and
13 they are going to take it away?

14 Mr. Johnson. You said in your question, Congressman,
15 that someone was tortured. What you meant was waterboarding,
16 correct?

17 Mr. Nadler. Did I say that? Yes, waterboarding is a
18 term; torturing is a conclusion.

19 BY MR. NADLER:

20 Q My question is if someone is being waterboarded for
21 real as opposed to a training exercise, even if it is done
22 exactly the same way, isn't there a big difference in mental
23 terror and maybe even physiological effect because in the one
24 case, the training, you know if anything happens they are
25 going to take it away right away and give you oxygen and they

1 are not drowning you, and in the other case you don't know
2 that?

3 A I think our understanding in the memo is that the
4 technique was nearly 100 percent effective in circumstances
5 in which soldiers, as you say, would know that they wouldn't
6 let them drown. It is a physiological --

7 Q What do you mean by effective?

8 A That is soldiers who are put through this, as I
9 understood the training, they were put through an exercise.

10 Q In case they were captured?

11 A Right, in which there would be information that
12 they would need to disclose, and that the exercise was nearly
13 100 percent effective on those soldiers; that is, they were
14 willing to give up the information.

15 Q Despite knowing that it wasn't for real?

16 A That's correct. And what the CIA has described for
17 us is a physiological reaction. It is an involuntary
18 reaction. It is like a gag reflection^x that even if you know
19 you are going to survive this, that you can't help it. So
20 whether it is a training exercise or whether it is something
21 that might be for real, I think the response, the
22 physiological response, is identical.

23 Q And the mental response?

24 A Well, the mental response, the evidence on the
25 mental response^[is] found elsewhere in the Bybee 2 memo, on which

1 we had thousands of our own soldiers as evidence that we had
2 not seen any evidence of prolonged mental pain or suffering.

3 Q Now getting back to where we were a moment ago,
4 could the legal analysis of the technique be affected by the
5 frequency with which it would be used?

6 A That is explicit in our memo. If there was
7 substantial repetition, then our advice would not necessarily
8 apply.

9 Q Coming back again, using it 183 times in a month,
10 would that constitute substantial repetition?

11 A Let me see if I can answer the question a little
12 differently because I don't know what the 183 refers to
13 because there is a great deal of ambiguity in the record
14 about what that terminology means, what the 83 or 183 times
15 refers to, whether it is a session, whether it is a pour,
16 whether it is something else. I'm not sure that I am talking
17 about the same thing.

18 What I will answer from the memo is that if it is
19 different from the SERE training and there are substantial
20 repetitions, we told the CIA you don't have a legal opinion
21 from us.

22 Q So they didn't have a legal opinion if there was
23 substantial repetition, whatever that means?

24 A Right.

25 Q And if it was different from the SERE training

1 protocol?

2 A Well, those were the assumptions that we were
3 given. That was their experience, and so that is all we had
4 to base this on.

5 Q So if it was different from the SERE training
6 manner, then you would not have been saying it is okay
7 legally?

8 A Our analysis would have been different. It would
9 have required different analysis, and we did not analyze it.

10 Q You did not analyze it. You did not tell the CIA
11 or anybody else it is okay?

12 A That's right.

13 Q And ditto, you did not tell them it was okay if
14 there was substantial repetition?

15 A That's correct. If there is substantial
16 repetition, it changes all of the assumptions on which our
17 advice on which our advice was given.

18 Mr. Johnson. If I may interrupt, I want to make sure
19 that you didn't misspeak or I didn't mishear you. You said
20 the statute requires prolonged mental suffering. Did you
21 mean prolonged mental harm?

22 Judge Bybee. Prolonged mental harm, yes.

23 BY MR. NADLER:

24 Q The only number you mentioned in the memo is once.
25 In other words, in the Bybee memo I'm told you never talked

1 about -- you say substantial repetition would be different,
2 but the only actual number you say is okay is one. In fact,
3 let me read this to you. Page 2 of the techniques memo at
4 the bottom of the initial paragraph on page 2, it says,
5 "Moreover, you have also orally informed us that although
6 some of these techniques may be used more than once, that
7 repetition will not be substantial because techniques
8 generally lose their effectiveness after several
9 repetitions."

10 So the only thing we know of is not substantial
11 repetition is one. Two or three might not be, but the only
12 thing actually said --

13 A Well, it contemplates that they may be used more
14 than once. It says that right up front. It says they may be
15 used more than once. It is just that we wouldn't have
16 substantial repetitions, which we didn't undertake to define.

17 Q Thank you. So the legal analysis, the original
18 question which got us off on this last couple of questions
19 was could the legal analysis of the technique be affected by
20 the frequency with which it would be used, and the answer is
21 clearly "yes"?

22 A I sorry, could you repeat that?

23 Q Could the legal analysis of the technique, meaning
24 waterboarding, be affected by the frequency with which it
25 would be used; and the answer is "yes"?

1 A Yes.

2 Q And you say on page 11 of Bybee Memo 2 just an
3 illustration of this, in assessing whether the technique
4 inflicts severe physical suffering on the subject,"the
5 waterboard is simply a controlled acute episode lacking the
6 connotation of a protracted period of time generally given to
7 suffering." So if there were a protracted period of time, it
8 would be a different analysis?

9 A It would be a different analysis if we had
10 different facts.

11 Q In fact, the OLC eventually itself eventually
12 concluded that the CIA waterboarding is carried out in a
13 manner different from that described in this opinion, this
14 opinion being Bybee Memo 2. In a May 10, 2005, opinion,
15 which is Document 29 in the Exhibit 1 notebook, on page 41,
16 footnote 51, OLC relied on the findings of the CIA Inspector
17 General and stated that, "In some cases the waterboard was
18 used with far greater frequency than initially indicated, and
19 also was used in a different manner. The difference was in
20 the manner in which the detainee's breathing was obstructed.
21 In the DOJ opinion, the interrogator applies a small amount
22 of water to the cloth in a controlled manner." That is in
23 the Bybee Memo 2. That is what you described.

24 A Uh-huh.

25 Q "By contrast, the agency interrogator applied large

1 volumes of water to a cloth that covered the detainee's mouth
2 and nose."

3 Now, my question is to the extent that the CIA carried
4 out the waterboarding using large volumes of water in a
5 manner different than that described in the memo you signed,
6 does that mean that the technique actually used by the CIA
7 was not in fact specifically authorized by your office? In
8 other words, was it a different technique?

9 A Well, I think that is exactly what the inspector
10 general's report says, that the waterboard was used with
11 greater frequency and it was used in a different manner.

12 Q Not only with greater frequency, but it was used
13 with a larger volume of water; that's right?

14 A To the extent that the CIA departed from what they
15 told us, yes, then we have not issued an opinion.

16 Q So to the extent that this was different than what
17 was described in Bybee Memo 2, which is what the CIA told you
18 they were going to do, you have not authorized it?

19 A That is correct.

20 Q That is, OLC has not authorized it?

21 A That's correct.

22 Q Bybee Memo 2 contains a lengthy discussion of Abu
23 Zubaydah's psychological state. At page 8 of the first full
24 paragraph, the memo states, "According to your reports,
25 Zubaydah does not have ~~my~~ preexisting mental conditions or

any

1 problems that would make him likely to suffer prolonged
2 mental harm from your proposed interrogation methods.
3 Through reading his diaries and interviewing him, you have
4 found no history of mood disturbances or other psychiatric
5 pathology, thought disorder, enduring mood or mental health
6 problems."

7 I assume that you considered this representation
8 relevant to your legal analysis?

9 A Yes. The CIA had provided us with some additional
10 information that was specific to Abu Zubaydah.

11 Q And you would consider that this information which
12 was specific to Abu Zubaydah was specific to your legal
13 analysis?

14 A Yes.

15 Q However, in a recent court filing, the United
16 States has made a rather different statement. Please turn to
17 Document 30 in the Exhibit 1 notebook, which is an excerpt
18 from a response brief filed by Secretary of Defense Gates in
19 Mr. Zubaydah's habeas corpus case. This excerpt deals with
20 Zubaydah's request for discovery regarding his prison
21 diaries. The Justice Department writes in the last paragraph
22 at page 4 of Document 30, which says page 23 at the bottom,
23 and we don't have the entire document in this exhibit.

24 So the Justice Department writes in the last paragraph
25 at page 4 of this exhibit, page 23 of the document,

1 "Respondent acknowledged in the factual return that," and
2 there is something redacted, so "Respondent acknowledged in
3 the factual return that [blank] diaries indicate that he
4 suffered cognitive impairment from a shrapnel injury for a
5 number of years."

6 In other words, the CIA profile as recited in Bybee Memo
7 2 asserts that the diaries show Zubaydah to be healthy and
8 without "preexisting mental conditions or problems." But in
9 Zubaydah's habeas corpus case, the government of the United
10 States states that the diaries reveal he has a "cognitive
11 impairment" from a prior injury. If Zubaydah in fact
12 suffered from a preexisting cognitive impairment as the
13 government filing says he did, could that affect the accuracy
14 of the CIA assertion that he "does not have any preexisting
15 mental conditions or problems"?

16 Mr. Johnson. Hold on just a second. Probably,
17 Congressman, just because we are not up to speed with you, it
18 says Respondent. Do we know who Respondent is?

19 Mr. Mincberg. Respondent is Secretary Gates.

20 Mr. Johnson. And it says he suffered cognitive
21 impairment. Do we know that is Zubaydah?

22 Mr. Mincberg. Clearly he is not talking about Secretary
23 Gates.

24 Mr. Johnson. No, no, he might be talking about the
25 Petitioner.

1 Mr. Nadler. The Petitioner is Mohammed Hussein.

2 Judge Bybee. But it is not even Zubaydah's name on the
3 caption. That is what throws me.

4 Mr. Mincberg. My understanding of this document is that
5 it is Zubaydah's diaries.

6 BY MR. NADLER:

7 Q Let me say this then. On the assumption, which we
8 can verify, on the assumption that this diary is Zubaydah's
9 diary, and that the Respondent, the government, is referring
10 to Zubaydah because I am not asking you the fact, I am asking
11 you a conclusion. In other words, the CIA profile as recited
12 in Bybee Memo 2 asserts that the diaries show Zubaydah to be
13 healthy and without "preexisting mental conditions or
14 problems." That is undisputed. Your memo says that.

15 A It says Zubaydah does not have any preexisting
16 mental conditions or problems.

17 Q That is right. In the habeas corpus case, the
18 government of the United States states that the diaries
19 reveal, on the assumption that we will verify that it is
20 referring to Zubaydah, if this statement is referring to
21 Zubaydah, that the diaries reveal he has a cognitive
22 impairment from a prior injury. Assume for the purpose of my
23 questions that that is Zubaydah.

24 A I'm with you.

25 Q If Zubaydah, in fact, suffered from a preexisting

1 cognitive impairment, could that affect the accuracy of the
2 CIA assertion that he does not have any preexisting mental
3 conditions or problems?

4 Mr. Johnson. We understand that you want us to assume
5 that this refers to Zubaydah, which you will find out, he
6 doesn't know. The other potential ambiguity, here again we
7 have to rely on you for that, is that the diary entries are
8 contemporaneous; in other words, that this wasn't a diary
9 entry made at some point after August 2002 which we don't
10 have a way to know that.

11 Mr. Nadler. Whether it was made before or after August
12 2002 is not the question.

13 Mr. Johnson. It may not be.

14 Mr. Nadler. Because no one is asserting that you knew
15 about it.

16 Mr. Johnson. No, I'm just suggesting that you are
17 suggesting otherwise. I am suggesting if the question goes
18 to the accuracy of the CIA's representation, Judge Bybee
19 won't be able to help you with that.

20 Mr. Nadler. I'm not asking him that.

21 Mr. Johnson. Okay.

22 BY MR. NADLER:

23 Q I'm asking if these two documents, if Zubaydah in
24 fact suffers from preexisting cognitive impairment, and that
25 assumes that the diary referred to Zubaydah and that it was

1 correct, if Zubaydah suffered from a preexisting cognitive
2 impairment, would that effect the accuracy of the CIA
3 assertion that he does not have any preexisting mental
4 conditions or problems? It is a question based on a
5 hypothetical.

6 Mr. Johnson. Do you understand the question?

7 Judge Bybee. Yes. I'm not a psychologist. I am not
8 exactly sure what a cognitive impairment is or how it relates
9 to the assumptions we are given here, but if he suffers a
10 cognitive impairment, and that is relevant to what the CIA
11 has told us here on page 8, it would be relevant.

12 BY MR. NADLER:

13 Q Namely, that he does not have any preexisting
14 mental conditions or problems?

15 A Yes. The cognitive impairment is relevant to that.

16 Q The English language would say that a cognitive
17 impairment is a mental condition or problem.

18 A Right. I don't know whether it is related to
19 things that would make him likely to suffer prolonged mental
20 harm. I don't know how to connect all the dots. I'm not a
21 psychologist.

22 Q The question practically answers itself. If he in
23 fact suffered a preexisting cognitive impairment, would that
24 affect the CIA assertion that he didn't have any preexisting
25 mental condition or problem?

1 A It certainly would be relevant.

2 Q Depending on the nature of such impairment, could
3 it effect the underlying legal analysis of you and your
4 office regarding whether the proposed interrogation
5 techniques would cause severe mental pain or suffering?

6 A It would undermine some of the assumptions that we
7 were given, yes.

8 Q So depending on the nature of such an impairment,
9 it might very well affect your legal analysis?

10 A Yes.

11 Q Your legal analysis of whether the proposed
12 interrogation techniques would cause severe mental pain or
13 suffering?

14 A Yes.

15 Q If the CIA gave OLC a one-sided assessment of his
16 psychological state, if, I am not asking you to say if they
17 did or did not. If the CIA gave OLC a one-sided assessment
18 of Zubaydah's psychological state that cherry-picked
19 information from his diaries or failed to include relevant
20 facts about his mental health, would that affect or could
21 that affect the legal analysis regarding their good faith or
22 their asserted lack of intent to cause Zubaydah severe mental
23 pain or suffering?

24 Mr. Johnson. There are two things in there. One is
25 good faith and the other is --

1 Mr. Nadler. Let me ask the questions separately then.

2 BY MR. NADLER.

3 Q If the CIA gave OLC a one-sided assessment of Abu
4 Zubaydah's psychological state that cherry-picked information
5 from Zubaydah's diaries or failed to include relevant facts
6 about his mental health, could that affect the legal analysis
7 regarding their good faith regarding their asserted lack of
8 intent to cause him severe mental pain or suffering?

9 A I want to be very careful, Congressman, because
10 there may be a difference between the intent of an
11 interrogator who may or may not have had any role in shaping
12 the assumptions that general counsel gave to OLC. That could
13 be very relevant to the question of specific intent.

14 If I can rephrase it, trying to be responsive to your
15 question, if someone who was going to be involved in an
16 interrogation, to conduct an interrogation --

17 Q I'm sorry, say that again.

18 A If an interrogator gave us an assumption which was
19 not true about the mental state of someone about to be
20 interrogated, then our advice would not apply.

21 Q Sure.

22 A It would be beyond our advice.

23 Q And if he gave you that false information
24 knowingly, that might be evidence as to whether -- well, it
25 would certainly mean it was not in good faith if he knowingly

1 told you an untruth?

2 A It is a complicated question simply because of the
3 specific intent requirement in the statute.

4 Q No, no, I didn't ask you that. You wanted me to
5 separate these two questions, so I did. The first one almost
6 answers itself. If a CIA person knowingly gave you false
7 information, that would go to his good faith, obviously?

8 A I think that is probably right. I haven't thought
9 about it.

10 Q Anybody's good faith. If I lied to you, that is
11 not in good faith.

12 Mr. Johnson. He may be, as a judge, thinking in legal
13 terms about "good faith" and you may be using it more in lay
14 terms.

15 BY MR. NADLER:

16 Q If the CIA gave the OLC a one-sided assessment of
17 Abu Zubaydah's psychological state that cherry-picked
18 information from Zubaydah's diaries knowingly, or failed to
19 include relevant facts about his mental health, could that
20 affect the legal analysis regarding their asserted lack of
21 intent to cause him severe mental pain or suffering?

22 A It could affect the analysis, yes.

23 Q Thank you very much. And I think that is it for my
24 part.

25 Mr. Mincberg. Off the record.

1 [Discussion off record.]

2 EXAMINATION

3 BY MS. CHU:

4 Q It is nice to meet you, Judge Bybee. I am
5 Congresswoman Judy Chu. My line of questioning has to do
6 with how much consultation there was for your memos outside
7 of OLC. So other than the attorneys in OLC and at the White
8 House and CIA, who else was consulted on the interrogation
9 project or saw drafts of what was to become Bybee Memos 1 and
10 2.

11 Mr. Johnson. Other than OLC, the White House and the
12 CIA. Do you mean to exclude other Justice Department? ^[Officials]

13 Mr. Mincberg. No.

14 Judge Bybee. I am aware that the draft was also shared
15 with the National Security Council. So aside from the White
16 House, the National Security Council, the CIA, inside the
17 Justice Department I am aware it was seen by Mr. Chertoff,
18 head of the Criminal Division, and I am aware that it was
19 seen by members of the Attorney General staff. I personally
20 briefed the Attorney General on this matter. The OPR report
21 reflects, and this is not a part my own personal
22 recollection, that the draft was also made available to the
23 Deputy Attorney General's Office.

24 BY MS. CHU:

25 Q Did either of them see drafts of the memo? Did the

1 Attorney General or did Assistant Attorney General Chertoff?

2 A I can't answer that question from my own
3 recollection. I know that we would have made memos available
4 to the Attorney General, and I believe that the record says
5 that, the OPR report reflects that the counselor to the
6 Attorney General, Adam Ciongoli, may have reviewed a draft.
7 I briefed the Attorney General on that. I have told you I
8 don't have a recollection about the access that the Deputy's
9 office had, so I don't know what they reviewed or didn't
10 review.

11 Q Then you are saying that the Attorney General did
12 not?

13 A I don't know whether the Attorney General reviewed
14 a draft or not.

15 Q With regard to Chertoff, for clarity, what are you
16 saying with regard to how much he knew of the Bybee Memo 1?

17 A I don't have a recollection myself as to what Mr.
18 Chertoff saw, what draft he had or didn't have. I know what
19 the OPR report says ~~because the drafts were apparently~~ taken
20 to him by Mr. Yoo, my deputy.

21 A ~~That is right~~ [Bybee proposed change: delete]

22 Q The OPR report says in Document 5 says that Mr.
23 Chertoff indeed saw Bybee Memo 1.

24 Was anyone else in DOJ consulted? Deputy Attorney
25 General Thompson or anyone else?

[Bybee proposed change: . It says that
the drafts were

1 A Well, the Deputy Attorney General is one place I
2 can't answer that because I just don't have a recollection.
3 I know that the OPR report says that the Deputy Attorney
4 General's office had access to the memos. I can't vouch for
5 that. I'm not denying it, I just don't have a recollection
6 of that.

7 Q Describe what was conveyed to Attorney General
8 Ashcroft and what feedback you or any others at OLC got from
9 him?

10 A We had a brief meeting with the Attorney General.
11 I told OPR -- I don't recall who was in that meeting. I
12 believe that John Yoo was in the meeting, the Attorney
13 General was in the meeting. I was in the meeting. I don't
14 remember whether anybody else was present in the room.

15 We advised the Attorney General. He was generally aware
16 that the memo was being prepared. I advised him of the
17 substance of our advice; and the Attorney General, the one
18 comment that has stuck with me that I remember was the
19 Attorney General said something to the effect that he was
20 sorry that this was necessary.

21 Q Can you say specifically what you said to Mr.
22 Ashcroft?

23 A It was 8 years ago. I don't remember the
24 conversation any more specifically than that.

25 Q Could you describe what was conveyed to Assistant

1 Attorney General Chertoff and what feedback you or any others
2 got from him?

3 A I'm sorry, when you said "you," are talking about
4 me or are you talking about my deputy, John Yoo?

5 Mr. Johnson. We do this all the time.

6 BY MS. CHU:

7 Q You, Y-O-U.

8 A I don't recall whether I had a conversation with
9 Mr. Chertoff, or whether it might have been John who had the
10 conversation with Mr. Chertoff. And I don't recall the
11 specifics of any of those conversations. My understanding of
12 this has been enriched by reading the OPR report, but I can't
13 tell you from my own memory today what those things are. I
14 can tell you what the OPR report says. I can represent that,
15 but I can't represent from my own memory about that.

16 Q Now I would like to turn to those outside of DOJ
17 and ask about the Department of State. Since the analysis
18 pertains to implementing a treaty that they were involved
19 with, was the Department of State consulted or shown a draft?

20 A As far as I know they were not ~~They were not~~
21 shown a draft or consulted.

22 Q But isn't it correct that the State Department was
23 consulted on a January 22, 2002, OLC memorandum that you
24 signed where you concluded that the Geneva Convention did not
25 apply to al Qaeda and Taliban detainees?

1 Mr. Johnson. Elliot, what I was going to say is, I
2 believe he was also -- he may have been asked questions about
3 this in the earlier interview. I'm not suggesting it is
4 necessary, from Judge Bybee's perspective, to review that.
5 If somebody were going to later compare and ask themselves
6 whether the answers were different or the same, I'd ask you
7 to share with him what he said earlier.

8 Mr. Mincberg. Well, and my recollection, frankly, is
9 what Judge Bybee has said today is very similar to what he
10 said, having read that transcript. And if not, I probably
11 would have done exactly that.

12 In general, what we will try to do is when we see
13 something that he remembers differently now than then, we'll
14 try to point that out, hopefully in an off-the-record way, so
15 we can try to make sure things are done consistently.

16 Mr. Johnson. Fair enough. Thank you.

17 BY MR. MINCBERG:

18 Q Let me ask you to look at what is Document 33,
19 which is actually in the rear pocket, because we ran out of
20 room in the binder of Exhibit 1, which is a memorandum signed
21 by you on March 13th, 2002, for Williams Haynes of the
22 Department of Defense, "re: The President's powers Commander
23 in Chief to transfer captured terrorists to the control and
24 custody of foreign nations."

25 For the record, did you sign this memo and have it sent

1 A I don't know whether the State Department had the
2 draft. The State Department did weigh in on the question of
3 the application of Geneva.

4 Q Let's look at Document 7. This is the January 11,
5 2002, memo from the State Department Legal Adviser Taft to
6 John Yoo, and it specifically comments on a draft opinion on
7 this subject, this subject being the application of the
8 Geneva Convention. Not only that, in Document 8, your
9 January 22 memo indicates a response.

10 A Do you have a page?

11 Q This is Document 8, Exhibit 1. The whole thing is
12 a response to the memo from Taft.

13 Mr. Mincberg. Off the record for a minute.

14 [Discussion off the record.]

15 BY MS. CHU:

16 Q Document 8 indicates you did see this memo from
17 Taft of the State Department and so it acknowledges that.

18 Mr. Johnson. If you can point us to that.

19 BY MS. CHU:

20 Q Document 8 was written, but it is after Document 7,
21 which was submitted to Mr. Yoo from Mr. Taft at the State
22 Department?

23 A I believe that I saw the January 11 memo prior to
24 signing the January 22 memo.

25 Q So then you do acknowledge that you saw that State

1 Department memo?

2 A Yes. I was aware at the time that I signed this
3 that the State Department had weighed in with its own
4 comments on our draft memo.

5 Q And then you saw that the State Department
6 disagreed with Mr. Yoo's draft memo?

7 A Yes.

8 Q In fact, you have stated that there was a good,
9 healthy debate within the administration about the
10 applicability of the Geneva Convention, correct?

11 A Yes. I believe that is what I told -- I believe
12 you are quoting the OPR.

13 Q Exactly.

14 Mr. Johnson. Off the record.

15 [Discussion off the record.]

16 BY MS. CHU:

17 Q With regard to this healthy debate, can you explain
18 to me who took what position? Who made certain decisions?
19 What the nature of the healthy debate was?

20 A I'm not sure I can recreate a debate.

21 Mr. Johnson. Let me ask, are there privilege issues
22 around this debate?

23 Ms. Burton. No.

24 Mr. Johnson. He is free to discuss it?

25 Ms. Burton. Yes.

1 Judge Bybee. That was in January of 2002. I don't have
2 a lot of recollection of the details of that. I knew that
3 the State Department had questions about certain aspects of
4 our discussion here. We disagreed, as many lawyers will, we
5 disagreed with other lawyers about the appropriate analysis.
6 It is not unusual on my court for good, smart lawyers to
7 disagree with each other in a healthy fashion.

8 BY MS. CHU:

9 Q Subsequent to this, the Supreme Court described in
10 the Hamdan v. Rumsfeld case a few years later in 2006 that
11 the Geneva Convention does apply to such detainees?

12 A The Supreme Court, I think, disagreed with portions
13 of our analysis.

14 Q That's correct. So, therefore, it was the State
15 Department ultimately, not OLC, that was correct on this
16 issue; correct?

17 Mr. Johnson. The question assumes complete parity of
18 the issues. If you know the answer, go ahead.

19 Judge Bybee. I don't know the answer. I know that the
20 Supreme Court in Hamdan held the applicability of Geneva to
21 certain detainees and would have disagreed with at least some
22 portions of our analysis here.

23 I would like to point out for the record, it was a 5-3
24 decision. The Chief Justice was recused because he had voted
25 in support of our position, our rough position in the D.C.

1 Circuit, and there were three members of the Court who, I
2 think, thought we had the better of the argument. I think it
3 demonstrates that lawyers disagree.

4 BY MS. CHU:

5 Q So when the Geneva issue came up, the State
6 Department was consulted, and they disagreed with OLC's
7 opinion. Then when the interrogation issue came up, the
8 State Department was not consulted; is that correct?

9 A As far as I know, no one consulted with the State
10 Department on that.

11 Q So going back to the subject of consultation, what
12 you are saying is although the White House and the CIA, who
13 were your clients, were getting the advice and were consulted
14 and saw drafts of the opinion, there was only limited oral
15 consultation with the Attorney General or the State
16 Department?

17 A We did not consult with the State Department,
18 that's correct.

19 Q You said that Mr. Ashcroft said I'm sorry that this
20 is necessary.

21 A Some words to that effect. He expressed sorrow
22 that it was necessary for the United States to take these
23 kinds of steps.

24 Q Did you agree with him?

25 A Oh, I think we were all sobered by the whole

1 question that was put to us.

2 Q Did you express these feelings at the time?

3 A I don't remember how I responded to the Attorney
4 General's statements. The Attorney General's statement stuck
5 with me. I don't recall how I responded at the time.

6 Ms. Chu. Thank you very much.

7 Mr. Mincberg. Off the record.

8 [Whereupon, at 12:30 p.m., the committee was recessed,
9 to reconvene at 1:30 p.m., this same day.]

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1 RPTS DEAN

2 DCMN SECKMAN

3 BY MR. MINCBERG:

4 Q Why don't we go back on the record.

5 Judge Bybee, we also want to ask you a few questions
6 about several other OLC documents from around this time
7 period that relate to interrogation.

8 Take a look, first, if you would, at Document 31 in the
9 Exhibit 1 notebook, which is an August 1st, 2002, letter to
10 Alberto Gonzales, signed by John Yoo, relating to the
11 legality under international law of interrogation methods to
12 be used during the current war on terrorism. It bears the
13 same date as Bybee Memos 1 and 2, although it is not signed
14 by you, by you, Y-O-U.

15 Mr. Johnson. It is only a matter of time in every
16 series before we have to make that correction.

17 BY MR. MINCBERG:

18 Q As head of OLC at the time can you describe what
19 involvement, if any, you had concerning this letter.

20 A Yeah, I don't -- I don't recall whether I saw this
21 letter before John signed it. As a deputy, John would have
22 had authority to sign opinions on behalf of the office.

23 Q Uh-huh.

24 A And I just don't -- I just don't recall.

25 Q Do you recall any discussion or consultation about

1 this, either before or after?

2 A I don't.

3 Q Would this, under the procedures of the office,
4 would this have needed to get a separate log entry in the OLC
5 log? Or could it have been considered an oral request that
6 Mr. Yoo could simply do on his own?

7 A That is a -- that's a good question. I just -- I
8 just don't know the answer to it as to how it was handled.
9 As an -- as an opinion, it should have had a second deputy
10 read. So that would have been the ordinary procedure of the
11 office would have been to have a second deputy do a read to
12 verify it. But it wouldn't necessarily require the advance
13 approval of the Assistant Attorney General.

14 Q And do you have any idea whether it did get a
15 second deputy read?

16 A I don't. I just don't know.

17 Q That deputy, if it had happened, would probably
18 have been Mr. Philbin I assume?

19 A That's my assumption, that it would have been Pat
20 Philbin.

21 Q But, again, we -- you just don't know what
22 happened?

23 A I just don't know.

24 Q So I take it you also don't know whether this
25 originated as an oral request from Mr. Gonzales or somebody

1 from the White House or anything else about how it came to
2 be?

3 A I don't know the circumstances under which the
4 question was posed.

5 Q Okay. Now, take a look at Document 32, in the very
6 next document in the Exhibit 1 notebook, which is a
7 March 14th, 2003, memorandum signed by Mr. Yoo on military
8 interrogation of alien unlawful combatants held outside the
9 United States. As I understand it, you were on your way to
10 the Ninth Circuit when this memo was completed. Did you have
11 any involvement concerning this memo?

12 A I did have involvement in this memo. I -- my
13 recollection is -- is pretty vague, but I did have some
14 involvement with it.

15 Q Tell us what you remember?

16 A I -- one of the sections that, for some reason, I
17 don't know why it, it just stuck in my memory because I
18 thought it was a very, very complicated statute is the
19 section dealing with special maritime jurisdiction.

20 Q Uh-huh.

21 A And I remember having a meeting with [REDACTED] *]
22 [REDACTED] John may have been there, but it was certainly -- I
23 remembered [REDACTED] *]
24 sort of coming around the desk with the
25 book and trying to sort of walk me through what I thought was
an unusually complicated jurisdictional provision. That's

*| Name redacted at DOJ request

1 the most vivid memory I have. I don't know why that one
2 stuck in my head, but it did.

3 Q It is an unusual subject that lawyers don't deal
4 with every day.

5 A Right.

6 Q Do you recall anything at all about the discussion,
7 more specifically, of any of the -- for example, the U.N.
8 Convention Against Torture, which is alluded to in the
9 memorandum?

10 A I -- I don't recall discussions we may have had at
11 the time about -- about that section.

12 Q So, really, the only thing you can remember about
13 this is the discussion about the special maritime
14 jurisdiction?

15 A I'm sorry, but one thing that really stuck with me
16 was the special maritime jurisdiction. I don't know why it
17 made an impression, but it did.

18 Mr. Mincberg. I'm sorry.

19 Mr. Johnson. No, I don't mean to interrupt you. Go
20 ahead.

21 BY MR. MINCBERG:

22 Q Do you recall any disagreements about the content
23 of the memo, either relating to the special maritime section
24 or anything else?

25 A I -- I don't recall any disagreements about it.

1 Mr. Johnson. Elliot, what I was going to say is, I
2 believe he was also -- he may have been asked questions about
3 this in the earlier interview. I'm not suggesting it is
4 necessary, from Judge Bybee's perspective, to review that.
5 If somebody were going to later compare and ask themselves
6 whether the answers were different or the same, I'd ask you
7 to share with him what he said earlier.

8 Mr. Mincberg. Well, and my recollection, frankly, is
9 what Judge Bybee has said today is very similar to what he
10 said, having read that transcript. And if not, I probably
11 would have done exactly that.

12 In general, what we will try to do is when we see
13 something that he remembers differently now than then, we'll
14 try to point that out, hopefully in an off-the-record way, so
15 we can try to make sure things are done consistently.

16 Mr. Johnson. Fair enough. Thank you.

17 BY MR. MINCBERG:

18 Q Let me ask you to look at what is Document 33,
19 which is actually in the rear pocket, because we ran out of
20 room in the binder of Exhibit 1, which is a memorandum signed
21 by you on March 13th, 2002, for Williams Haynes of the
22 Department of Defense, "re: The President's powers Commander
23 in Chief to transfer captured terrorists to the control and
24 custody of foreign nations."

25 For the record, did you sign this memo and have it sent

1 to Mr. Haynes on or about the date that it bears?

2 A Yes.

3 Q When did you learn about the request that led to
4 the writing of Document 33?

5 Mr. Johnson. Let me just ask the Justice Department
6 where there are any privilege concerns around Judge Bybee's
7 testimony in connection with this memorandum.

8 Ms. Burton. We released it, so I don't have any concern
9 at the moment.

10 Mr. Johnson. Okay. We'll be guided by you.

11 Judge Bybee. I don't have any current recollection of
12 the circumstances under which this question was posed to us.

13 Mr. Mincberg. Why don't we -- I'm going to stop for the
14 moment, if this is okay, as I said I would do, and
15 Mr. Johnson is now here. So we'll turn it over to him for
16 some questions at this time.

17 EXAMINATION

18 BY MR. JOHNSON OF GEORGIA:

19 Q Thank you judge.

20 I'm Hank Johnson and I represent the Fourth
21 Congressional District of Georgia, and I serve on the
22 Judiciary Committee, having been elected in 2006 and having
23 taken office in January of 2007, and have served since I was
24 elected. And I have a few questions that I would like to
25 ask.

1 There are some news articles indicating that you told
2 some former law clerks and others about your regret in
3 serving during a time where there were some legal opinions
4 issued through your office that you are perhaps in
5 disagreement now with or felt some hesitancy about.

6 These -- I want to start with the article that appeared
7 in the -- on a Web site, The Recorder, April 13th of 2009?

8 Mr. Mincberg. For the record, this is Document No. 9,
9 Exhibit 1.

10 Mr. Johnson. Am I looking at the right one?

11 Mr. Mincberg. Yes.

12 BY MR. JOHNSON OF GEORGIA:

13 Q And I want to ask you, Judge, have you ever seen
14 this article?

15 A Yes, I believe I did read this, this is the one by
16 Dan Levine.

17 Q And how long ago has it been since you read it?

18 Mr. Johnson. Congressman, he may have seen it in
19 preparation for testimony here today. Did you mean to ask
20 him, prior to that?

21 Mr. Johnson of Georgia. Yes.

22 Judge Bybee. Congressman, I probably saw it when it
23 came out, because The Recorder is a legal newspaper in
24 California. I have actually met Dan Levine at a luncheon.
25 And he and other reporters at that paper often do articles on

1 our court which are posted by our library on a Web site. So
2 they do profiles of judges and things like that. So this is
3 a paper that gets a lot of circulation inside the Ninth
4 Circuit².

5 BY MR. JOHNSON OF GEORGIA:

6 Q And you're a regular reader of it?

7 A Oh, I don't think I've ever seen the newspaper
8 itself, but our library does a little clipping service of
9 articles about cases or judges and posts it on our library
10 Web site. And I often go to that Web site just to keep
11 myself apprised as to what people are saying about us.

12 Q I understand. So you do that pretty regularly?

13 A I do.

14 Q And so you would not have missed this article, "The
15 Half Life of Torture," as it is called? Is that correct?

16 A That's right. I have seen it.

17 Q And having seen it, it states that you told some
18 former law clerks some things about your work. Is that
19 correct?

20 A You're talking about the -- on the first page of
21 this?

22 Q Yes, I'll take you to the second paragraph from the
23 bottom and ask you whether or not in fact you did make some
24 statements to some former law clerks?

25 A I made some statements to some former law clerks,

1 yes.

2 Q And by the way, did you issue any kind of rebuttal
3 to this article, the high life -- or "The Half Life of
4 Torture"?

5 A I don't think that I issued anything in response to
6 this article. Around this time, I believe -- and I hope, we
7 may have it in here -- I did issue a statement which issued
8 in the New York Times. I wanted to make sure that the record
9 was clear that I was standing by the opinions.

10 Q Uh-huh, what date do you recall that New York Times
11 article?

12 Mr. Johnson. Is it in the binder?

13 Mr. Mincberg. Off the record.

14 [Discussion off the record.]

15 BY MR. JOHNSON OF GEORGIA:

16 Q So would you answer that question?

17 A I'm sorry --

18 Q Have you ever issued any written rebuttals of the
19 article, "The Half Life of Torture," which was published in
20 The Recorder, April 19 -- April 13th, 2009?

21 A Just to be clear, I issued a statement in the New
22 York Times it looks about 16 days after this and other
23 articles appeared in order to clarify some of the perceptions
24 out there.

25 Q Now it is true, however, that you did express

1 regret or dissatisfaction concerning your work at OLC?

2 A I hope I can put that in context for you,
3 Congressman.

4 First of all, I don't recall that I said precisely the
5 words that are attributed to me.

6 Q Let me read these words to you.

7 A Fine.

8 Q It says, quote, he said our work has been well
9 researched, carefully written, and that he was very proud of
10 the work that we've done and the opinions his chambers has
11 issued, said Susan -- excuse me, said Tuan Samahon, who was
12 Bybee's first judiciary clerk and is now a University of Las
13 Vegas professor. According to Samahon, the judge then added,
14 I wish I could say that of the prior job I had.

15 Now did you say that?

16 A Well, I don't know whether I said precisely those
17 words, but let me see if I can put it in context for you.

18 This was a fifth year reunion. I was celebrating my
19 5 years on the bench. It was had in, I believe, May of 2008,
20 so it was a year before this. We were at a restaurant with
21 all of our clerks. My wife was there. It was a celebratory
22 evening. There had a been skits. There had been a roast.
23 Everybody was laughing having a good time. I stood up to
24 make some comments and made an offhand comment in the spirit
25 of the evening that I was proud of them, I was proud of all

1 of the work they had done, and, you know, nobody had ever
2 questioned anything that they had done. And then I added
3 something to the effect of, you know, wish I could say that
4 about my prior jobs, without identifying any job or anything
5 in particular. It was meant to be a jocular comment in the
6 spirit of the evening.

7 Q Well, now, the quote is that you said, I wish I
8 could say that of the prior job I had?

9 A Well, I know that's what Tuan is quoting me as
10 saying. I don't recall whether I said precisely those words,
11 but it was, again, in the spirit of, you know, your work has
12 never gotten me into any controversy; I can't say that of the
13 prior job. And that was the nature of the comment.

14 Q Let me ask you, how long had it been since you had
15 worked a job prior to your job at OLC?

16 A Well, my job immediately prior to OLC would have
17 been at the University of Nevada Las Vegas at the William S.
18 Boyd Law School.

19 Q And that would have been?

20 A That would have been November 2001. I was
21 appointed to the bench in March of 2003. At the time this
22 comment was made, I had been on the bench for 5 years.

23 Q So are you saying, then, that you did not refer to
24 your immediate prior job with that remark?

25 A Congressman, I don't -- I don't recall precisely

1 what I said on that occasion.

2 Q Would you dispute the fact that you were in fact
3 referring to your job at OLC when you made that comment?

4 A I didn't -- I didn't refer to OLC, but everybody
5 knew what it was; it was meant to be a funny comment.

6 Q Well, let me ask you a question, do you feel that
7 way about your job, your prior job at OLC, that you -- work
8 was not well researched, not carefully written, and was --
9 you weren't proud of the opinions?

10 A No, I think that our work was well researched. I
11 believe it was very carefully written, and I am proud of our
12 opinions.

13 Q Okay. Now I would like to ask you to take a look
14 at -- I want to ask you to go back, let's go back to the
15 Document No. 9, are you contending that Mr. Samahon made this
16 up?

17 A Oh, no, no, I -- I do recall that I made an offhand
18 comment on that evening. I just can't vouch that these are
19 precisely the words that I said as Tuan has quoted me.

20 Q All right, well, well, I want to turn your
21 attention now to Document 10. In the Exhibit 1 notebook, it
22 is a copy of an article by Karl Vick, entitled "Amid Outcry
23 on Memo, Signer's Private Regret," in The Washington Post of
24 April 25th, 2009.

25 Look at the fifth paragraph. It reads as follows:

1 "I've heard him express regret at the contents of the memo,"
2 said a fellow legal scholar and longtime friend, who spoke on
3 the condition of anonymity while offering remarks that might
4 appear as, "piling on." I've heard him express regret that
5 the memo was misused. I've heard him ^{express} regret at the lack of
6 context -- of the enormous pressure and the enormous time
7 pressure he was under. And anyone could have regrets simply
8 because of the notoriety.'"

9 Now did you say those things to that fellow legal
10 scholar and longtime friend?

11 A I -- I believe I know who this is referring to.

12 Q Who would that be?

13 A A friend who teaches at Brigham Young University.

14 Q His or her name?

15 A Fred Gedicks, G-E-D-I-C-K-S.

16 Q That person was a friend?

17 A He is a friend.

18 Q And he still is a friend?

19 A He still is a friend.

20 Q Do you take issue with any of the assertions that
21 he made in the material I just quoted?

22 A Well, he's not -- he's not quoting me. He is being
23 quoted.

24 Q Yes.

25 A So it all comes out as sort of hearsay. So

1 let's -- if I can go through this --

2 Mr. Johnson. Just before you do, Judge, hold the
3 question.

4 Congressman, are you asking him whether he remembers
5 saying these things or whether he today holds these views?

6 Mr. Johnson of Georgia. I will rephrase the question.

7 BY MR. JOHNSON OF GEORGIA:

8 Q Have you -- did you tell this fellow legal scholar
9 and longtime friend the things that I quoted to you that the
10 friend said?

11 A Well, I have -- these are -- he is not quoting me.
12 I want to be very clear about that, very clear about that.

13 Q Certainly.

14 A I have expressed some regret. Certainly the last
15 part of this is true; I have regrets because of the notoriety
16 that this has brought me. It has imposed enormous pressures
17 on me both professionally and personally. It has had an
18 impact on my family. And I regret that, as a result of my
19 government service, that that kind of attention has been
20 visited on me and on my family.

21 I have expressed some concern, and I have done this in
22 my submissions to the Department of Justice, that at least
23 one section of the memo was not as fulsome as it might have
24 been.

25 Q As wholesome?

1 A Fulsome.

2 Q Fulsome. What did you mean by that?

3 A That it is not as -- it is perhaps not as complete
4 as it could have been. [Bybee proposed change: in order to
alleviate public misunderstanding]

5 Q In what respects?

6 A Well, this is the commander-in-chief section, and I
7 have -- I advised the Department of Justice in my submissions
8 here that it was -- that a fuller discussion might have
9 helped alleviate some of the public controversy, for example,
10 over the question. And that certainly goes to what my friend
11 said here. [Bybee proposed change: As to whether]

12 I have expressed regret that the memo was, well,
13 misused. I think I certainly have said that the memo was
14 misinterpreted. The memo has been widely misinterpreted, I
15 believe, in press accounts and in things that have been
16 attributed to us. There has been speculation about what the
17 Office of Legal Counsel was doing or what was not doing that
18 I felt were gross distortions of the record.

19 Q Did you tell your friend that, quote, I've heard
20 him -- or would you agree with your friend when he asserted
21 that, "I heard him express regrets at the contents of the
22 memo."

23 A Well, I believe that -- I believe that that refers
24 to the fact that I think the commander-in-chief section was
25 not as fully as developed as it might have been and that

1 fuller development would have, I think, helped with the
2 public perception of the memo once it was released.

3 Q All righty. Any other regrets with respect to the
4 content of the memo?

5 Mr. Johnson. Has he historically expressed any, or as
6 he sits here now, does he have any?

7 BY MR. JOHNSON OF GEORGIA:

8 Q No. As you sit now.

9 A You know, Congressman, I'm a sitting judge, and
10 I've heard my colleagues comment that they never saw an
11 opinion that they had written that they didn't think they
12 could improve at a later date. And I think we all, if we're
13 reflective, will find things we might have done a little
14 better at a later date.

15 Q True.

16 Other than what you've already said, are there any other
17 matters that you would regret?

18 A I'm trying to think. I know there are some places
19 in our submission to the Office of Professional
20 Responsibility where we said that, you know, Judge Bybee
21 agrees that this could be a little -- this could have been a
22 little fuller or could have been a little clearer; I think
23 those matters are reflected in our submissions.

24 Q Have you ever voiced any other regrets with respect
25 to the content of the memo?

1 A Well, as I sit here now, I'm not sure I can recall
2 such instances, but I have received a number of questions
3 from friends and others over the last 6 years, and I'm not
4 sure I can account for every comment I've ever made in the
5 last 6 years.

6 Q Explain to us the regret that you have expressed
7 about the lack of context and of the enormous pressure and
8 the enormous time pressure that you were under?

9 Mr. Johnson. I think he's referring to this same --
10 Judge Bybee. We were -- at the time that we authored
11 this, we were under ^(a)~~some~~ deadline from the White House. It
12 came in sort of -- the deadline came in at the end. The
13 memos were well underway, and we did have some -- we did have
14 some pressure at the very end; the White House insisted they
15 be signed by the end of August 1st, which we did; the memos
16 were signed on the evening on August 1st.

17 BY MR. JOHNSON OF GEORGIA:

18 Q When did you get the message of the deadline?

19 A I -- I don't remember when we knew, but it was
20 within a short time before.

21 Q A couple of days?

22 A It could be.

23 Q Three, 4 days?

24 A I couldn't put a specific time on it. I can't
25 frame it; it's been 8 years.

1 Q You were already well into the memo by the time
2 that the deadline came up; is that correct?

3 A Well, the second memo, what we're referring to as
4 the Bybee 2 Memo or what I refer to as the techniques memo,
5 was drafted second, and it was drafted with a lot of factual
6 input from the CIA. And there was a lot of activity going on
7 back and forth in those last days between us and the CIA to
8 make sure that we had all the facts that we needed to answer
9 their question.

10 The other memo, the standards memo, had been in
11 production for some time.

12 Q And can you explain what regrets you've expressed
13 that the memo was misused?

14 A I certainly can give you --- I think I can give you
15 an example of that. It's been widely reported that the
16 Department of Justice concluded that, unless you had organ
17 failure or death, that you hadn't caused the severe pain
18 associated with torture, and that is not what the memo says.
19 And yet I have seen this, it shows up in blogs. It shows up
20 in newspapers, and every time I look at that, I just thought,
21 you haven't read the memo; that's not at all what we said.

22 Q Do you think that any of the conduct that took
23 place as a result of the memo represented a misuse of the
24 memo?

25 Mr. Johnson. By result of the memo, you mean?

1 BY MR. JOHNSON OF GEORGIA:

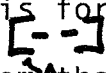
2 Q Yes, in other words, the issuance of the memo, did
3 it result in any conduct that the memo may have condoned and
4 now you feel that any act that -- any particular actions may
5 have been a misuse of the contents of the memo?

6 A Well, we explored earlier this morning that the
7 OIG's office from the CIA described that some actions by the
8 CIA clearly went beyond the advice that the Office of Legal
9 Counsel gave them.

10 Q Do you consider that to be misuse of the memo?

11 A Well --

12 Mr. Johnson. Unless you know whether the memo was used,
13 you should be clear about that.

14 Judge Bybee. I -- I don't whether the memo was --
15 formed the basis for what they did. Our memo was very, very
16 specific to them  that there were certain conditions, certain
17 factual assumptions that CIA gave us, and that if they acted
18 outside of those factual assumptions, that we had not issued
19 an opinion to them.

20 BY MR. JOHNSON OF GEORGIA:

21 Q Well, let me ask you the question again, do you
22 think that anything that was written in that memo was
23 misused, any authority that was granted or was opined about
24 in the memo was stretched too far so as to be a misuse of the
25 contents of the memo?

1 A Well, I don't have any factual basis for answering
2 that question.

3 Q Well, you do know what the opinion was, correct?
4 You do know what the parameters of conduct, interrogation
5 techniques, you're familiar with the contents of the memo in
6 as far as interrogation techniques are concerned?

7 A Yes.

8 Q And how far those techniques could be taken so as
9 to avoid the torture area?

10 A Yes.

11 Q Do you think that the guidance issued within this
12 memo was misused by the administration? And when I say the
13 administration, I mean the questioners; I'm including the
14 interrogators.

15 A I don't have any direct knowledge that would answer
16 that question.

17 What I can answer is that the Inspector General did
18 report that, in his opinion, interrogators had gone beyond
19 the parameters of the advice that the Department of Justice
20 had given them.

21 Q And --

22 A And I don't have any reason --

23 Q In what instances was that?

24 A Well, we could refer to the -- I don't have the
25 Inspector General report, but we referred to it this morning.

1 I believe it is in footnote 51 of the May 10th memo from
2 Steven Bradbury, and he has references to the Inspector
3 General report.

4 Q You read it before?

5 A I looked at the Inspector General report.

6 Coincidentally, Congressman, we actually looked at that
7 footnote earlier this morning in some questioning.

8 Q Uh-huh. Do you remember or do you remember in what
9 ways the report stated that the conduct by the interrogators
10 exceeded the authority that was outlined in your memo?

11 Mr. Johnson. Well, rather than -- it's here, why don't
12 we just take a look at it.

13 . Do you remember what tab it was?

14 Mr. Mincberg. Yeah.

15 Judge Bybee. Bradbury --

16 Mr. Mincberg. Off the record.

17 [Discussion off the record.]

18 Judge Bybee. I'll be happy to read that first sentence,
19 Congressman.

20 BY MR. JOHNSON OF GEORGIA:

21 Q If you would, hold on.

22 A This is the May 10th, 2005, memorandum from ~~John~~
23 ~~Rizzo to~~ ^{to John Rizzo} Steven Bradbury, and it is on -- well, it appears on
24 our page 43. There is some uncertainty about the numbering,
25 but it appears in footnote 51. The first sentence says, the

1 IG report noted that in some cases the waterboard was used
2 with far greater frequency than initially indicated and also
3 that it was used in a different manner.

4 So there was some question there about both frequency
5 and the way in which it was employed.

6 Q All right, well, in the interest of not being
7 redundant, I understand that this issue has been covered
8 already. So I will move on, and I will at this point
9 conclude my questions. Thank you, sir.

10 A Thank you.

11 EXAMINATION

12 BY MR. SCHIFF:

13 Q Judge, I'm Adam Schiff.

14 A Nice to meet you.

15 Q And I apologize, of necessity, some of my questions
16 will cover some of the ground you've already covered, but I
17 would like to talk with you about some of the content of the
18 memos and some of the criticisms that have been raised about
19 the memos in terms of their content.

20 And I'll leave it to my counsel to go into more specific
21 issues raised, but some general questions I had. But I
22 wanted to begin by asking you your thoughts on the office
23 itself.

24 How did you see the role of OLC counsel at the time?
25 How do you see it now? What is their primary responsibility

1 as counsel? How do you see that role?

2 A The Office of Legal Counsel was the principal legal
3 advisor to the Attorney General. It effectively makes the
4 Office of Legal Counsel the office of the general counsel for
5 the Department of Justice. We are also the principal
6 legal -- outside legal advisor for the White House, and we --
7 the office handles questions from all -- from any executive
8 agency that wants to seek advice beyond their own attorneys.

9 Q In terms of your providing advice, particularly to
10 the White House, how do you see your role as differing from
11 White House Counsel? Are you the President's lawyer, or are
12 you giving the administration or the President neutral advice
13 to guide their policy decisions? How do you see the role of
14 OLC in terms of what it advises the administration?

15 A I spent 2 years in the White House Counsel's Office
16 under the first President Bush, 1989 to 1991. And we worked
17 very closely with the Office of Legal Counsel at that time.

18 I do not regard the Office of Legal Counsel or the
19 Assistant Attorney General as the President's lawyer.

20 I regard the Office of Legal Counsel as an outside -- it
21 is known as the Attorney General's law firm, so I regarded
22 myself as the lawyer for the -- for the Department and for
23 the Attorney General in offering advice to clients, including
24 the White House.

25 Q And in that role, then, as the Attorney General's

1 counsel, when responding to a request by the White House, did
2 you see it as your role to provide the White House with a
3 legal justification, the best possible legal justification
4 for what it wanted to do? Or did you see your responsibility
5 as advising the White House of the legal, both pros and cons,
6 pitfalls as well as advantages of a course of action?

7 Mr. Johnson. Or I take it some other thing. You've
8 offered two alternatives.

9 BY MR. SCHIFF:

10 Q Or some other responsibility?

11 A I saw the role of the Office of Legal Counsel as --
12 in some ways, it depended on the kind of question that came
13 to us.

14 Let me give you an example. In some respects, the
15 Office of Legal Counsel acted in a quasi judicial role.
16 There were occasions in which two agencies disagreed over the
17 interpretation of a statute, and it had an impact on each one
18 of them. And they were not able to resolve it among
19 themselves, and in effect, they appealed to the Office of
20 Legal Counsel. And we would then take that kind of a
21 question and resolve it in sort of a quasi judicial role, and
22 our advice was expected to be binding on both of those
23 agencies.

24 On other occasions, we would get ^{questions}~~answers~~ for which there
25 appeared to be clear and obvious answers in cases, or at

1 least, clear and obvious guidance. So let me give you an
2 example there. If I had a First Amendment question, First
3 Amendment questions are going to be litigated. It's just the
4 nature of First Amendment questions, and we have an enormous
5 body of First Amendment literature.

6 I have to admit that I have a very difficult time
7 understanding all of the ins and outs of the establishment
8 clause jurisprudence, but it was nevertheless incumbent on us
9 to make a predictive judgement about how the courts would
10 deal with that, because they surely would answer those kind
11 of questions.

12 Q In the context of an issue that involves a
13 potential conflict between the -- not two agencies but two
14 branches of government, between the executive and the
15 legislative branch, how would you see the role of OLC there?
16 Do you see it as the advocate for the administration's
17 position, vis-a-vis the legislative branch, or do you see it
18 as providing neutral advice as to the constitutionality or
19 legitimacy of an action that is somewhere in conflict between
20 the legislative expression of intent and executive will?

21 A If the matter was a question of a constitutional
22 allocation of power between the legislative branch and the
23 President, and if there was either no -- excuse me.

24 Mr. Johnson. Do you want some water?

25 Judge Bybee. Yeah.

1 And if there was either no guidance or little guidance
2 from the courts, so the matter was perhaps non justiciable in
3 some context, so we had relatively little Supreme Court
4 guidance on the question. In that context, I felt that it
5 was important for the Office of Legal Counsel to stand as a
6 defender of the President's powers, and there I regarded OLC
7 as the guarder of the powers of the Presidency, not the
8 powers of any particular President.

9 BY MR. SCHIFF:

10 Q Why would that be the case? Wouldn't that be the
11 White House Counsel's role to defend the prerogative of the
12 executive? Wouldn't it be more the OLC's role to say that,
13 if the executive wishes to take this course, that if it is
14 ultimately adjudicated by the Supreme Court, here is what
15 they are likely to look at, here is how the legality of the
16 conduct is likely to be measured? Wouldn't that be the
17 proper approach for OLC, rather than, how do we interpret
18 this in a way that maximizes the executive prerogative now
19 and for posterity?

20 Mr. Johnson. Just to be clear in your answer, Judge, I
21 understood your last answer to refer to non justiciable
22 issues. And the question now relates to something that the
23 courts might resolve, and you ought to be clear about that.

24 Judge Bybee. If the matter is one that is likely
25 justiciable and likely to be reviewed by the courts, in most

1 of those cases, I'm assuming that there is at least some good
2 guidance out there for us. And that would be a predictive
3 judgment about the courts.

4 Separation of powers questions in matters that are non
5 justiciable are often worked out informally between the
6 branches. And I regarded those kinds of questions with a
7 great deal of caution. Because if I decided to give away any
8 authority that arguably belonged to the President, I have
9 given it away. And if future offices decided to honor the
10 traditions and opinions of the office, then I had given it
11 away not only for this President but for any future President
12 as well.

13 So I approached a question that was non justiciable with
14 a little bit different perspective because there was some
15 caution there, realizing that I might be final with respect
16 to that question because the question would never arise
17 before a court.

18 BY MR. SCHIFF:

19 Q But why do you view it as the province of OLC to
20 either grant or reduce the power of executive in perpetuity,
21 even a non justiciable area? Obviously, whatever your
22 opinion as OLC is can be revisited by subsequent OLC or by
23 subsequent counsel. What may not seem justiciable may become
24 justiciable. Why not, even in the case where you don't
25 expect it to go to court, isn't it the obligation of OLC, as

1 opposed to White House Counsel, to give the President and
2 executive the most objective view of what the President's
3 power is and where it is limited by the legislative branch?

4 A I don't think there is anything inconsistent,
5 Congressman, between what you described and what I've tried
6 to describe.

7 I would hope our advice was always objective, but I am
8 going to say that in the area in which it was -- there was
9 less guidance from the courts, that is the courts did not
10 stand as a mediating influence in a dispute between the
11 legislature, for example, and the President, that I would
12 approach such questions with an additional degree of caution.

13 Q Now the fact that a question hasn't come before the
14 courts before or hasn't come before it in a certain forum, of
15 course, doesn't mean that it is not capable of being brought
16 before the courts in the future, right?

17 A Certainly.

18 Q And the context that we're discussing here today
19 that was the subject matter of two memos that I think are
20 being described Bybee 1 and Bybee 2, how did you view that
21 issue? Did you view that as a justiciable issue, non
22 justiciable issue? Did you view the issues that were to be
23 discussed in those memos in the context of preserving the
24 maximum prerogative of the executive?

25 Mr. Johnson. Are you referring just to the

[Bybee proposed change: would come up less often]

1 commander-in-chief section or to all of the issues?

2 BY MR. SCHIFF:

3 Q All the issues that were raised in the memo.

4 A I would draw a distinction between the statutory
5 question, which was the principle focus of the Bybee 1 Memo,
6 because that was the first interpretation because there were
7 no court interpretations of 18 U.S. C 2340. And so that was
8 a matter that certainly could come before the courts. We
9 tried to use all of the tools that we thought a court would
10 use in those circumstances.

11 With respect to the commander-in-chief authority, we had
12 some guidance on this question. We had some traditions at
13 OLC, which were our OLC opinions, ^{but} and this was a question
14 that ~~was less clear would be able to come up in~~ ⁱⁿ justiciable
15 context.

16 Q Explain to me again why, because it is still not
17 clear to me, why you think the role of the office changes
18 depending on whether it is likely to be something that can
19 come before the courts? Do you feel OLC is more measured
20 when the court may ultimately be the arbiter of the issue?
21 Should it be more the case where it is less likely to
22 actually be arbitrated by a neutral third party that the OLC
23 should try to maintain its maximum objectivity?

24 A Well, I think that in a case where you know that
25 courts have weighed in and are going to weigh in, in the

1 future, you have a much better set of guidelines for ruling.
2 I expressed some frustration with the establishment clause; I
3 just chose that as an example because I think there are a lot
4 of people who agree that it is very difficult to follow all
5 the ins and outs of the establishment clause jurisprudence.

6 But that's one area where it is very clear it's going to
7 end up in the court. They are going to look to a
8 circumscribed set of cases, and we, therefore, had an
9 obligation to try and enter into a predictive function as to
10 how the courts would treat that question.

11 When we get to the area of the President's
12 commander-in-chief authority, for example, this is one for
13 which there is a lot of academic literature. There is far
14 less actual case law binding either side. And many of those
15 questions have been worked out informally between the
16 branches.

17 Q I understand that. I guess what I fail to
18 understand is, I can appreciate why the job of the OLC may be
19 easier at one level if you have the advantage of case law and
20 subject, and may be more challenging where there is no clear
21 guide post in terms of the case law. But why it would change
22 the nature of the opinion you would give, why it would change
23 the nature of your role and make it more of an advocate for
24 executive prerogative and power and expansive reading as
25 opposed to a more objective, less advocate like role, that I

1 don't understand; why that responsibility and perspective
2 should change merely because one issue might come before the
3 courts and the other might not.

4 A Well, I'll make another run at it. The office
5 still has an obligation of objectivity. That is -- we're --
6 I did not -- I did not and do not regard the office as
7 assuming an obligation of advocacy for any plausible theory
8 of Presidential power. I think it must be rooted in text.
9 Its got to be rooted in the structure of the Constitution. I
10 think we should be looking to the intent, insofar as it has
11 any bearing on ambiguities in those questions. I think we
12 should use all of those tools to try and get a best reading.

13 But, sometimes, we simply run out of room in
14 interpreting the Constitution. ~~I -- well, I better not --~~
15 ~~that related to a question I probably shouldn't discuss.~~
16 ~~There was -- let me leave it there.~~

17 Q Judge, you've read, no doubt, the opinions of
18 Deputy Attorney General Margolis with some of the successors
19 at OLC about the legal analysis in the two memos that were
20 highly critical. Now the Margolis opinion concluded that,
21 the distinction from OPR, OPR had recommended disciplinary
22 action; the Deputy Attorney General recommended against that,
23 but nonetheless, the Deputy Attorney General found serious
24 flaws in the analyses. Do you concur on reading it now, on
25 reading the two memos now, that there were serious flaws.

1 Mr. Johnson. Do you want to ask him specifically about
2 Mr. Margolis articulated the concerns that he had? Do you
3 want to lump them together or describe them serially or --

4 Mr. Schiff. I will go through some of them, and counsel
5 will go through others.

6 BY MR. SCHIFF:

7 Q But I'm interested to know, his general conclusion
8 was, there may have been different standards in terms of the
9 bar disciplinary issues; there are issues of whether you can
10 find specific intent to mislead or that may be necessary to a
11 disciplinary action, but nonetheless, there are serious flaws
12 in the legal analysis. And my question is, now, having the
13 opportunity to review this work at great length since they
14 were written, do you concur that there are serious flaws in
15 the analysis?

16 Mr. Johnson. We don't necessarily accept ~~the~~ ^{of} ~~you~~
17 characterization ~~that~~ Mr. Margolis' ~~is~~ holding, but I think he
18 can understand your question.

19 Judge Bybee. I don't think Mr. Margolis used the term
20 serious flaws. He found that there were some flaws. And I
21 have told the Department of Justice, we advised Mr. Margolis
22 when we filed this appeal that, with respect to the
23 commander-in-chief authority, that I regretted that that
24 section was not as fulsome, that it had -- I thought it had
25 been misconstrued in the press, and I regretted that it was

1 not written in a clearer fashion so that it would have been
2 plainer to those who were reading it and not capable of such
3 misunderstanding.

4 With respect to other issues, I would be happy to
5 discuss those individual issues. I agree that some things
6 could have been written clearer, but I think that they
7 were -- I think that, all in all, I thought that the analysis
8 that we did, I'm going to stand by it.

9 BY MR. SCHIFF:

10 Q I think Mr. Margolis's language I was referring to
11 was at page 67, if you take a look under the heading,
12 "Conclusion."

13 Mr. Mincberg. For the record, this is Document No. 16
14 in the Exhibit 1 notebook.

15 Mr. Johnson. Congressman, and 67, did you say?

16 Mr. Schiff. Yes.

17 BY MR. SCHIFF:

18 Q The passage I'm referring to is, The above analysis
19 leads me to conclude the same thing that many others have
20 concluded to wit, to wit that these memos contain some
21 significant flaws. I said serious, I don't know if there is
22 a different between serious and significant.

23 Mr. Johnson. No, the distinction I was making is you
24 said flaws in the legal analysis being, and I don't -- those
25 were articulate here. I don't mean to quarrel with you about

1 it. He can read this and answer the question.

2 BY MR. SCHIFF:

3 Q So my question then I guess is do you concur now
4 with Mr. Margolis that the memos contained significant flaws?

5 A Well, with respect to the commander-in-chief
6 authority I have conceded that I wish that that section were
7 a fuller, more complete explanation. So to the extent we
8 didn't do everything that we might have done, then I would
9 say then the memo was probably flawed in that respect.

10 Q Do you consider it flawed in the respect it was
11 prepared from the perspective of maximizing the executive
12 prerogative, that it interpreted the role of the OLC as one
13 of defending the maximum extent of executive authority at the
14 expense of other branches?

15 A No, I don't regret defending the President's
16 powers.

17 Q That's not my question. I take it from your
18 earlier comments that, in this context, you viewed it as a
19 non justiciable issue and, therefore, that your
20 responsibility was to defend the prerogative of the executive
21 and provide the legal arguments to defend the prerogative of
22 the President rather than doing what I would describe as a
23 more objective analysis of the competing views of both
24 executive and legislative authority.

25 A Well, I think the criticism that is offered, that

1 the Office of Legal Counsel did not ~~consider~~ all of the
2 competing views. I think is probably an accurate
3 characterization. But what we offered here was our bottom
4 line opinion in what was a very, very lengthy memo.

5 One of the criticisms of OPR is that it seems like, in
6 each section, OPR said, well, they should have done something
7 more. We cited three cases; they wanted five cases. I think
8 that, from my perspective as a judge, I know that, in any
9 opinion that I write, I can always make the opinion longer.

10 Q Well, the failure to cite these adverse authorities
11 or precedent --

12 A No, I don't -- I'm sorry, I want to stop there
13 because I don't think I said adverse authorities or
14 precedent.

15 Q Well, then you characterize it. You said you
16 thought that that section was inadequate for what reason?

17 A Well, I think that we could have offered a fuller
18 defense, a fuller explanation of the President's authority as
19 -- President's authority as commander in chief.

20 One of the things that we did hear is we were talking to
21 very, very experienced executive branch attorneys that we had
22 some history with on these issues.

23 Q And I don't know if we have the capability of
24 reading back, but you used the expression earlier about one
25 of the problems being not providing greater insight into what

1 the -- I don't want to put words into your mouth so maybe we
2 can find what the words were.

3 Mr. Mincberg. Competing views.

4 Mr. Schiff. Competing views.

5 BY MR. SCHIFF:

6 Q Competing views. Tell me more about that, why were
7 the competing views not discussed at greater length in the
8 memo? Did this flow from your view that your responsibility
9 was to provide justification rather than a more objective
10 analysis that included competing views.

11 Mr. Johnson. I don't think you were finished with your
12 prior answer, which may go directly to your question about
13 the nature of the audience that you were talking to. I'm
14 going to misremember, but it was something about
15 sophisticated --

16 Judge Bybee. Okay, well. I'm sorry, could you repeat
17 the question?

18 Mr. Johnson. Sorry.

19 BY MR. SCHIFF:

20 Q If counsel and I are remembering correctly, and I
21 don't know exactly the term you used, but if there was a
22 failure in the memo to have a more wholesome discussion of
23 competing views, did this flow from your view that in this --
24 in this issue, that you were to be an advocate for what the
25 executive wanted to do, as far as maximum prerogative, rather

1 than providing a more objective, balanced assessment that
2 included competing views?

3 Mr. Johnson. I wouldn't -- I wouldn't want his answer
4 to that question to accept your characterization of what he
5 said earlier because it is not accurate, but I think he can
6 answer your question. He said three times he wasn't an
7 advocate.

8 Mr. Schiff. Why don't we stop then, and let's see what
9 the judge said earlier?

10 Mr. Mincberg. It is when he used the phrase "competing
11 views," whatever that question -- whatever that answer was.
12 It is like four or five questions back.

13 The Reporter. [Reading.] Answer: "Well, I think the
14 criticism that is offered that the Office of Legal Counsel
15 did not consider all of the competing views."

16 Mr. Schiff. I'm sorry, can you tell us the context?
17 Can you read the question and the answer that was part of?

18 The Reporter. [Reading.] Question: "I take it from
19 your earlier comments that in this context you viewed it as a
20 non justiciable issue and, therefore, that your
21 responsibility was to defend the prerogative of the executive
22 and provide the legal arguments to defend the prerogative of
23 the President rather than doing what I would describe as more
24 objective analysis of the competing views of both executive
25 and legislative authority."

1 Mr. Schiff: Was that the end of it?

2 The Reporter. [Reading.] Answer: "Well, I think the
3 criticism that is offered that the Office of Legal Counsel
4 did not consider all of the competing views I think was an
5 accurate characterization."

6 BY MR. SCHIFF:

7 Q My question, Judge, is, you testified earlier you
8 think it was an accurate characterization, that criticism.
9 Did the failure to include the competing views that you
10 referenced, did that flow from your conviction that in this
11 non justiciable area, it was your role to be the advocate for
12 the maximum executive prerogative?

13 A There are a lot of things in that question, so let
14 me see if I can deal with all of them.

15 Let me back up to where I was a minute ago on the
16 question that Kip reminded me of. We were dealing with some
17 very, very sophisticated lawyers at the other end of
18 Pennsylvania Avenue, at the White House. And we had dealt
19 with Judge Gonzales and his staff on a substantial number of
20 very, very difficult and complicated questions regarding the
21 extent of the commander-in-chief authority. We had a long
22 history; Judge Gonzales himself characterized our discussion
23 with the commander in chief here as the public walking in on
24 a conversation that was ongoing.

25 But when we wrote this memo and when we wrote the

1 commander-in-chief authority, we referred to a number of our
2 prior opinions, a reference to a number of our prior
3 opinions, without setting forth all of those arguments again,
4 without repeating all of those arguments again.

5 And so I think that we did consider competing views.
6 Some of them were considered in prior memoranda that we
7 referenced here and that our clients would have understood,
8 not everything was fully set forth here as I might if I were
9 writing a law review article or if I were writing some kind
10 of a treatise. I might have written a longer opinion here.

11 And one thing I would like to add is that, at the time,
12 when I saw the commander-in-chief authority section, it
13 occurred to me that I might want a fuller treatment of that,
14 but I had concerns -- I had two concerns. I was concerned it
15 would require another 50 pages, and that would do two things.
16 One, it would delay a memo for which I did have a deadline
17 from the White House. And secondly, it would so overwhelm
18 the memo that we had written, that that section would become
19 disproportionate to what I regarded as the load-bearing --
20 load-bearing section of the memo, which was the analysis of
21 Title 18.

22 Q And why did you think that a fuller analysis of the
23 commander-in-chief section might be desirable?

24 A John had set this up in a way that was a little
25 different from the way I might have approached it. It is --

1 sometimes you approach questions from different ways, and I
2 might have approached it a little different way.

3 Q Why would you have approached it a little different
4 way?

5 A I think we would have arrived at the same place.
6 That's -- otherwise, I wouldn't have signed the memo, but I
7 think I might have emphasized some other things, and I think
8 some other things might have come out in that analysis.

9 I tend to start -- my preference, this is reflected in
10 my academic writings, I tend to start with text and
11 structure. John has more of a tendency to start with text,
12 and ~~I don't know the~~ practice. John's a fairly big picture,
13 text and concepts. ¹⁹⁴⁴ I tend to start with structure of the
14 Constitution itself.

15 Q When you read it, did you feel it should have had a
16 fuller discussion of competing authorities?

17 A No, because I felt like we had referenced a number
18 of our prior discussions.

19 Q Let me ask you about another more specific
20 criticism of Mr. Margolis on page 68.

21 Mr. Johnson. Tab 16?

22 Mr. Mincberg. Yes.

23 BY MR. SCHIFF:

24 Q After explaining that you and Mr. Yoo did not
25 violate a clear professional disciplinary standard, Mr.

1 Margolis stated, However, as I have noted, the standard that
2 OPR identified is consistent with the action that the
3 Department reasonably expects of its attorneys. In
4 contradiction to that high standard, the unclassified Bybee
5 Memo consistently took an expansive view of executive
6 authority and narrowly construed the torture statute, while
7 often failing to expose, much less refute, countervailing
8 arguments and overstating the certainty of its conclusions.

9 Do you agree with that analysis by Mr. Margolis?

10 A Well, Mr. Margolis is dealing at a pretty high
11 level of abstraction there. He hasn't referenced things in
12 particular, so let me see if I can unpack this just a little
13 bit.

14 We took a muscular view of executive authority. That is
15 consistent with the views of the Office of Legal Counsel
16 during the time I was Assistant Attorney General. We thought
17 that was consistent with the views of the Office of Legal
18 Counsel prior to the time that I became Assistant Attorney
19 General.

20 I have told you that we did not, if his criticism is to
21 expose countervailing arguments, it is true that we did not
22 outline all possible countervailing arguments. It would have
23 extended the memo. We were offering our opinion. We were
24 offering a bottom line to a client who wanted to know what he
25 could do and what he couldn't do. I wasn't running a

1 debating society, and I wasn't running a law school.

2 So I think that -- if that's a criticism, we did not
3 consider all and explore all the possible countervailing
4 arguments.

5 Mr. Johnson. When you say consider or explore, do you
6 mean in the memo because that can be misleading?

7 Judge Bybee. Right, in the memo, we did not explore in
8 writing all of the countervailing arguments.

9 BY MR. SCHIFF:

10 Q Are you suggesting by that that you explored orally
11 with the administration the countervailing arguments?

12 A Well, I don't -- I don't recall everything that we
13 did in our discussions, so I -- this has been sort of a
14 recurring theme. It has been 8 years since I was in those
15 meetings with John Yoo and Pat Philbin and [REDACTED] *]
16 And I just can't recreate all of the discussions that we had.

17 Q So, then, Judge, at this point, you can't say
18 whether you had any discussion outside of the written memos
19 about what countervailing arguments or precedent may have had
20 to say?

21 A Whether I did or whether I didn't, that's right.
22 ~~Overstating the uncertainty of its conclusions,~~ ^{as noted} there is
23 one other area in which, ~~I think~~ in our submission to Mr.
24 Margolis, that I would say I think that we probably did
25 overstate the certainty of our conclusions. It has to do

[Bybee proposed change: delete]

*] Name redacted at DOJ request

1 with the interpretation of a very, very minor case, but that
2 was the Israel case, a case by the Israeli Supreme Court. I
3 think the phrase that Mr. Margolis later criticized was that
4 we said that the best reading of this case, and after looking
5 at that case over the last week, I think the reading is a
6 fair and plausible one. I'm not sure it is the best reading
7 of the case, but I think it's a fair reading. I don't think
8 it had any impact on the conclusions.

9 Q Had this been an area where you thought it might
10 lead over or likely lead to court review, in other words a
11 justiciable area, would you have had a less expansive view of
12 executive authority?

13 A No, I don't believe so.

14 Q How does that square, then, with what you said
15 earlier about your view of the office changing depending on
16 whether you're in a justiciable area or non justiciable area?

17 A I think that, in both cases, OLC must be objective.

18 I think what I described was a certain aura of caution
19 in dealing with questions where the answer is uncertain, and
20 one path will lead me to cede ground that the President
21 arguably has. And where the questions are not clear, I think
22 that I have to favor the President on that.

23 Q Does that make you more incautious where it is less
24 likely to be reviewed by a court?

25 Mr. Johnson. Could you read that back? I don't think

1 he was ever said he was incautious.

2 Mr. Schiff. Incautious.

3 Mr. Johnson. I don't think he ever said he was
4 incautious.

5 Judge Bybee. No, I don't think I would be incautious.

6 I think what I said was that I would be very cautious
7 about if I have -- if two things seem equally plausible or
8 equally likely and one of them favors the President, I think
9 that probably is my obligation as head of OLC to favor the
10 President. If two things are of equal interpretation, I
11 think that I need to hesitate long and hard before I rule
12 against the President on that.

13 BY MR. SCHIFF:

14 Q So you're more cautious about the scope of
15 Presidential authority where the court can review it, and
16 you're less cautious about presidential authority where --

17 Mr. Johnson. I don't think that's -- that's not even
18 close to what he said.

19 Mr. Schiff. That's why I'm asking the question.

20 BY MR. SCHIFF:

21 Q You said that you that you're more cautious in
22 areas that are justiciable, and more is a comparative term.

23 A I don't think that's what I said.

24 Q Well, then, what are you saying about the level of
25 caution you exercise?

1 A I think that I said I was --

2 Mr. Johnson. Let him finish.

3 Judge Bybee. I'm sorry.

4 BY MR. SCHIFF:

5 Q Then what are you saying about the level of caution
6 you exercise when something is justiciable compared to areas
7 that are not likely to be supervised by the courts?

8 Mr. Johnson. I'll just state the obvious, I think he's
9 tried to answer that there three or four times, but try
10 again.

11 Judge Bybee. I'm going to be very cautious if I have
12 areas that are ~~non~~ justiciable, in which that is an informal
13 arrangement between the President and the Congress, about
14 giving away Presidential authority if I think that there is
15 good basis for asserting the President's authority in that
16 area.

17 BY MR. SCHIFF:

18 Q Let me ask you about another of Mr. Margolis's
19 criticisms.

20 In the same paragraph that I just referred to, he goes
21 on to state, I believe primarily that the unclassified Bybee
22 Memorandum overstates the certainty of its conclusions in a
23 way the -- I think it should be that -- represents a marked
24 contrast to the action that the Department may reasonably
25 expect an attorney exercising good judgment to take. Thus, I

1 conclude that Yoo and Bybee exercise poor judgment by
2 overstating the certainty of their conclusions and
3 underexposing countervailing arguments.

4 It seems to me this is an opinion by Mr. Margolis that
5 you should have been more cautious in stating your
6 conclusions and exposing countervailing arguments. Do you
7 agree with that criticism?

8 A Well, let me first of all observe that that is a
9 criticism that is applicable only to the unclassified memo;
10 we're referring to that as Bybee 1. Mr. Margolis never
11 questions our conclusions or our analysis under Bybee 2, not
12 in this section.

13 I have a good deal of respect for Mr. Margolis. He has
14 a wonderful reputation. He had a wonderful reputation when I
15 was at the Department of Justice. At some point, I have
16 learned from time on my court that sometimes lawyers just
17 simply disagree with how they see things. And sometimes we
18 disagree with each other vigorously, and I am here. I just
19 respectfully disagree.

20 Q Finally, towards the bottom of page 64, Mr.
21 Margolis states --

22 Mr. Johnson. Congressman, 64.

23 Mr. Mincberg. Page 64.

24 Mr. Johnson. Let us look back.

25 Mr. Mincberg. It is right under where it says

1 "conclusion."

2 Mr. Johnson. Thanks, Elliot.

3 BY MR. SCHIFF:

4 Q In sum, I concluded that in the unclassified Bybee
5 memo Yoo and Bybee's discussion of severe pain, PCATI v.
6 Israel, commander-in-chief authority, and self-defense,
7 particularly discussion of In re Neagle, were flawed.

8 His next sentence goes on to say, On the other hand,
9 although the analysis of specific intent, the CAT
10 ratification history, United States judicial interpretations,
11 Ireland v. United Kingdom, and the necessity defense were
12 debatable, those analyses were most susceptible to criticism
13 because they slanted toward a narrow interpretation of the
14 torture statute at every turn. Do you agree with that
15 analysis by Mr. Margolis?

16 A Well, as a general matter, no, I would happy to
17 discuss, you know, how we would unpack any of the individual
18 questions there. There are -- there is a lot in there.

19 Q Well, part of his criticism is that the analyses
20 slanted toward a narrow interpretation of the torture statute
21 at every turn. Can you give us an illustration of where you
22 took in a broader interpretation of the torture statute?

23 A Well, our -- I think that what we did do, and I
24 think we showed this in our submission to Mr. Margolis, is
25 that we pointed out that we couched much of our analysis in

1 conditional language. We advised our clients that some of
2 these were tentative. We told them up front that the torture
3 statute had never been construed by any court. We were
4 clearly embarking in territory that none of us were familiar
5 with. We have a whole -- an entire appendix, it was Appendix
6 18 to our submission to Mr. Margolis that catalogued all the
7 instances in which we couched our analysis in conditional
8 language.

9 Q Were there any circumstances, though, in the memo
10 where you consider two interpretations of the torture statute
11 and caution the administration that the broader
12 interpretation of the torture statute was probably the more
13 correct one?

14 A I don't know of an instance of that, as I sit here,
15 in the way that you've characterized that.

16 Am I missing something?

17 Mr. Johnson. Well, I'm not sure they want us to refresh
18 your memory at this point, so we'll talk to you on a break.

19 Judge Bybee. Okay.

20 BY MR. SCHIFF:

21 Q Let me ask you about what a couple of other
22 attorneys in the Bush administration said in their analyses.

23 Mr. Johnson. Can you tell me which document?

24 Mr. Mincberg. This would be Document 5, which is the
25 OPR report.

1 BY MR. SCHIFF:

2 Q If you could take a look at page 160 of that
3 document, in the second full paragraph of that page, OPR
4 quotes a number of attorneys within the Bush Justice
5 Department, including some who urged OPR not to find
6 professional misconduct. These include three of your
7 successors at OLC, Dan Levin, Jack Goldsmith and Steven
8 Bradbury, as well as Attorney General Mukasey.

9 Beginning on the fourth line of the paragraph, it
10 states, Levin stated when he first read the Bybee memo, I had
11 the same reaction I think everybody who reads it has, this is
12 insane, who wrote this? Jack Goldsmith found that the
13 memoranda were riddled with error, concluded that key
14 portions were plainly wrong, and characterized them as an
15 one-sided effort to eliminate any hurdles posed by the
16 torture law. Bradbury told us that Yoo did not adequately
17 consider counter arguments in writing the memoranda and that
18 someone should have exercised some adult leadership with
19 respect to Yoo's section on the commander-in-chief powers.
20 Mukasey acknowledged that the Bybee memo was a slovenly
21 mistake, even though he urged us not to find misconduct.

22 Do you say agree with any of those characterizations?

23 A Well, that's a very broad question. I'm sorry, the
24 question was, do I agree with any of them?

25 Q Yes.

1 A Well, first of all, what OPR didn't state here was
2 that each one of these people also told OPR that they didn't
3 believe there was any basis for an ethics investigation.

4 Q And I -- I acknowledge that they did not -- well,
5 that some or all did not urge OPR to find professional
6 misconduct.

7 A Right.

8 Q Nonetheless, I think it shows -- that indicates, at
9 a minimum, that they are not out to get you.

10 A I believe that the Levin comment was offered in the
11 context of the specific intent requirement. And correct me
12 if I am wrong, but I think -- that's my recollection is that
13 Levin there, when he said, this is insane, who wrote this,
14 was referring to specific intent.

15 Well, Mr. Margolis finds that we were actually
16 vindicated on that point and that he thought that the Bybee
17 memo had a better discussion of that than the Levin memo in
18 light of the Pierre case in the Third Circuit. The Third
19 Circuit quoted both memos and en banc came out in favor of
20 the position taken in our memo and against the position that
21 was advocated ⁱⁿ ~~by~~ a concurring opinion that ~~was~~ taken by the
22 Levin memo.

23 The Goldsmith comments, these were offered, I believe
24 these comments were made in the context of the memo signed by
25 John Yoo in March 2003.

[Bybee proposed change: favored the approach]

1 With respect to the Bradbury -- with respect to the
2 Bradbury comment, I have told you, I think I have told you
3 very frankly, I wish I had -- I think there was an
4 opportunity here for us to offer a more fulsome discussion of
5 the commander in chief.

6 Q And what's your assessment of former Attorney
7 General Mukasey's conclusion that the memo was a slovenly
8 mistake?

9 Mr. Johnson. Actually, I think that mischaracterizes
10 what Mukasey said. Do you have the Mukasey letter here? We
11 should look at what the Attorney General actually said about
12 OPR's work and the memo, because it is quite instructive.

13 Mr. Mincberg. We do. Well, why don't we -- I think
14 Mr. Schiff or another Member will get to that a little later,
15 and why don't we put that on hold for now, and we can get to
16 what the Attorney General said a little later.

17 BY MR. SCHIFF:

18 Q Let me go back to what Mr. Levin said, if you turn
19 to page 168 of that same Document 5. Beginning the second
20 sentence, it states, Levin told us he thought the Bybee
21 memo's analysis on this point was wrong because of this --
22 this is talking about the specific intent element of the
23 torture statute -- because it sort of suggested that if I hit
24 you on the hit with a, you know, steel hammer, even though I
25 know it is going to cause specific pain; if the reason I'm

1 doing it is it to get you to talk rather than to cause pain,
2 I'm not violating the statute. I think that's just
3 ridiculous. It's just not the law. I mean, as far as I can
4 tell, it's just not the law.

5 Do you think that that is the law?

6 A I don't think that's what our memo says. I don't
7 think that's what the memo ever said. This is the point I
8 referred you to just a minute ago. This is the discussion of
9 specific intent. In 2007 -- I think 2007 or 2008, the Third
10 Circuit considered this question in the context of CAT, the
11 Convention Against Torture, and found that specific intent
12 and described it in almost identical terms to the ways that
13 we had described intent -- that the -- Mr. Margolis termed it
14 as near vindication of Bybee Memo on this point and Levin had
15 dismissed it all in a footnote in his memo and said, it was
16 too hard a question; he didn't think we were right.

17 It turns out, according to the Third Circuit en banc, we
18 were right.

19 Q Do you think Mr. Levin was just misinterpreting
20 your memo?

21 A I think he was misinterpreting the memo. I think
22 he's just wrong.

23 Q Now, you mention earlier that you were, in writing
24 these memos, dealing with a sophisticated group of attorneys
25 who began with some understanding of the subject matter. The

1 same is true of Mr. Levin, isn't it?

2 A I -- I met Dan many, many years ago and have a lot
3 of respect for him. He's been around. I don't know
4 specifically what his background is. I've missed a decade of
5 experience in there. I met him 20 years ago at the
6 Department of Justice at some point.

7 Q But if Mr. Levin and Mr. Margolis and
8 Mr. Goldsmith, Mr. Bradbury and others, individually and
9 collectively, found significant flaws, doesn't that indicate
10 that the administration reading these memos might be subject
11 to the same flawed legal reasoning?

12 Mr. Johnson. Are you suggesting Mr. Margolis agreed
13 with this?

14 Mr. Schiff. I'm suggesting -- I read Mr. Margolis's
15 criticisms, which were quite extensive?

16 Mr. Johnson. But it has nothing to do with what we're
17 looking at here on page 68.

18 Mr. Schiff. I was referring to criticism by each of --

19 Mr. Johnson. You're back now on the general criticisms?

20 Mr. Schiff. Let me just restate the question.

21 BY MR. SCHIFF:

22 Q Each of the following attorneys, Deputy Attorney
23 General Margolis, your successors at OLC, Dan Levin, Jack
24 Goldsmith, Steven Bradbury, former Attorney General Mukasey,
25 all had serious issues with this memo. Do you think they are

1 operating under some level of malice? Do you think they just
2 have a completely different legal view? Why do you think
3 that they have been so critical of your analyses?

4 A Well, I'm not going to try to get inside their
5 head, and I have a great deal of respect. Mr. Levin, I've
6 meet years ago. Mr. Goldsmith I know casually.
7 Mr. Bradbury, I don't think ^[we] I've ever meet; I may have spoken
8 with him on the phone once. I don't have any reason to
9 question their judgment on this, that it is their judgment.

10 But I do know that on my court we disagree with each
11 other all the time, and sometimes we disagree very, very
12 vigorously. But it doesn't -- it doesn't mean we are
13 unreasonable people. The fact that we could engage in very
14 strong language criticizing each other's work doesn't mean
15 that it is not our honest opinion or it wasn't what we
16 thought it was right at the time. Sometimes this kind of
17 criticism even arises in a dissent in our court.

18 Q Let me have you turn to page 199 of that same
19 Document 5.

20 Mr. Johnson. Congressman, let me just ask my client one
21 question, because I don't want to do it while a question is
22 pending.

23 Mr. Mincberg. Let's go off the record for a minute.

24 [Discussion off the record.]

25 BY MR. SCHIFF:

1 Q If we could take a look at page 199, the same
2 Document 5, the OPR report, the paragraph right under
3 President's commander-in-chief power, it states, as discussed
4 above, Bradbury commented that Yoo's approach to the issue of
5 commander-in-chief powers reflected a school of thought that
6 is not a mainstream view and did not adequately consider
7 counter arguments. Levin commented that he did not believe
8 it was appropriate to address the question of the
9 commander-in-chief powers in the abstract and that the
10 memorandum should have addressed ways to comply with the law,
11 not circumvent it. Goldsmith believed that the section
12 overly broad and unnecessary but also that it contained
13 errors and constituted an advance pardon.

14 How would you respond to those criticisms?

15 Mr. Johnson. I think you can treat them separately if
16 that helps.

17 Judge Bybee. Let me begin with Mr. Bradbury's comment
18 that it was not a mainstream view and did not adequately
19 consider counter arguments. I think I already discussed the
20 counter arguments question, but I would like to observe that
21 none of these three, Mr. Bradbury, Mr. Levin and
22 Mr. Goldsmith, ever stated affirmatively that they thought
23 that the section was simply wrong. They disagreed that it
24 should -- as to whether it should be in there. They
25 disagreed with -- that perhaps it should have been more

1 refined.

2 Goldsmith says that he believes that it was overly broad
3 and unnecessary. Well, in some respect, the question may
4 have been unnecessary to the questions that were being asked
5 by the CIA, but it was there because our client requested it.
6 So to say it was unnecessary, it was unnecessary to the
7 questions being asked -- to the questions being posed to us
8 by the CIA, but I would disagree that if our client
9 requested, I disagree that we would -- that we should not
10 have addressed it. These gentlemen may have seen something
11 different if they had been in our position at the time.

12 BY MR. SCHIFF:

13 Q When you worked at OLC, did you, not necessarily on
14 this issue but on others, refer to prior OLC opinions for
15 guidance?

16 A Frequently.

17 Q And would you also look at arguments in prior OLC
18 opinions that would be, if they were legal decisions,
19 considered a dicta, but nonetheless were an analysis in a
20 prior OLC opinion?

21 A You know, I can't think of a specific example, but
22 we tried to be very careful about looking back at prior OLC
23 opinions to make sure our opinion was consistent with
24 previous advice.

25 Q So, even if an argument wasn't necessary to the

1 conclusion in the memo, it still might have an effect on
2 subsequent OLC opinions if it was contained in your analysis,
3 right?

4 A Yes, this is an interesting argument that is
5 ongoing in our court over what constitutes dicta and how we
6 ought to treat it.

7 Q You mentioned that, in these non justiciable areas,
8 that you would be very cautious not to, and I'm paraphrasing,
9 but to delimit the President's powers in a way that might
10 take away those powers going forward. Was it ever a concern
11 also that an overly broad interpretation of the President's
12 powers may also carry on in the future?

13 A Are you asking -- I'm sorry, I want to make sure I
14 understand the question. Are you asking, did we consider at
15 the time that if we sort of oversubscribed the President's
16 powers, that that might have some ~~Presidential~~^{precedential} effect?

17 Q Yes.

18 A I don't ever remember considering that.

19 Q Shouldn't that have been considered?

20 A Well, it certainly would be considered -- but I
21 think it would be part of our analysis of, you know, what we
22 thought the best answer was.

23 Q But you don't remember considering that point?

24 A I don't -- I don't remember considering that
25 precise point.

1 Q What's your response to the argument by
2 Mr. Goldsmith that the section constituted an advance pardon?

3 A I don't believe that the section constituted an
4 advance pardon. It could not have constituted an advance
5 parson.

6 Q In the review of the memo or in the discussion that
7 you had, did you consider whether the memo could be used in
8 that way, even if that was not the intention?

9 Mr. Johnson. Used by?

10 Mr. Schiff. Used basically as a, for all intents and
11 purposes, as a pardon.

12 Judge Bybee. You're asking me whether I recall now
13 whether we considered then whether it could be used as an
14 advance pardon?

15 BY MR. SCHIFF:

16 Q Yes. In other words, did you consider in writing
17 the OLC opinion that it could be used to immunize or provide
18 a pardon for conduct at the time that you were working on or
19 approving the memo?

20 A Well, I don't recall. As I sit here today, I don't
21 recall the substance of our conversations about this section
22 in that regard.

23 Q As a practical matter, where the OLC opinion
24 condones certain conduct, does it provide a form of pardon or
25 immunity?

1 A No, I don't believe so.

2 Q Can't you make a pretty compelling defense that
3 your conduct was based on an opinion of OLC, and therefore,
4 you acted in good faith and are not subject to the reach of
5 criminal liability?

6 A I want to make sure I understand the question. Can
7 you make it a little more specific, because I'm having a hard
8 time sort of following it. It is at a very high level of
9 generality.

10 Q Let's say that an OLC opinion says that certain
11 conduct doesn't constitute torture. As a practical matter,
12 can't that opinion later be used by anyone who follows the
13 parameters of that opinion to say, I cannot be held
14 criminally liable because I was relying on the opinion of
15 OLC?

16 A Well, OLC opinions can be overturned. I can be
17 reversed by a subsequent head of the Office of Legal Counsel.
18 I could be overturned by the Attorney General. I could be
19 overturned by the President.

20 Q But you can't overturn someone who follows the
21 direction of a then existing OLC opinion, right?

22 A Well, we had noted, we had noted previously that
23 the torture statute had not been construed by any court. We
24 were offering our best interpretation, and the best that we
25 could tell the CIA was that if you follow our advice, our

[Bybee proposed change: OLC is]

1 best judgment is that you are not guilty of torture. But
2 that was something that, in context, we don't have control
3 over. ~~I'm not an Article III court, so I cannot~~ ~~I cannot~~
4 judge that. [Bybee proposed change: OLC]

5 Q Well, if a hypothetical case came before the court
6 where someone was acting in reliance on your memo, wouldn't
7 they have a pretty good defense that their conduct could not
8 be prosecuted?

9 Mr. Johnson. Judge, I don't think the Congressman is
10 asking you how to predict, when he says your court, I don't
11 think he really means the Ninth Circuit, but if he does, then
12 you shouldn't predict how you would rule on a case --

13 Mr. Schiff. Well, let's make it a court.

14 Mr. Johnson. Well, you're asking him about how this
15 memo might be used. You're not asking him about some case in
16 which he's set sitting as a judge.

17 Mr. Schiff. Correct. .

18 Mr. Johnson. Does that make sense to you?

19 Judge Bybee. Yes.

20 And I do want to clarify, have the parameters of the
21 advice that we gave in the Bybee Memo 2 been followed or have
22 they not been followed?

23 BY MR. SCHIFF:

24 Q Well, assuming that the parameters of the memo are
25 followed, doesn't someone acting following the parameters of

1 an OLC opinion have a pretty compelling, if not conclusive,
2 defense by saying, I was relying in good faith on the opinion
3 of OLC?

4 A And by defense, you mean defense raised in what
5 context?

6 Q In a criminal prosecution?

7 A If it has been brought in a criminal prosecution,
8 then, by the very premise of the question, somebody has
9 overruled OLC.

10 Q Not necessarily.

11 A Well, that question might go to the question of
12 intent, and particularly here in a statute where we have a
13 specific intent question. But if you have a prosecution, and
14 that's why I asked you very carefully whether the subject of
15 the prosecution had followed to a T all of the advice that we
16 had given them.

17 Q I'm not discussing a situation in which someone is
18 not following the advice given in the memo, but rather the
19 case where someone follows exactly what the advice is given
20 in the memo. Under those circumstances, even if the OLC
21 opinion is withdrawn later, doesn't someone have effective
22 immunity, effectively an advance pardon, because they can
23 make almost an air tight defense by saying I was relying on
24 the Office of Legal Counsel opinion.

25 A The effect of the memo, and you and I may be using

1 slightly different terminology, they certainly do not in the
2 way we typically use the word immunity have immunity from
3 suit, because they have been sued; they have been prosecuted.
4 So they don't have immunity from suit. You may be
5 requesting, do they have some kind of defense --

6 Q Yeah, I am not talking about immunity from suit,
7 because in a prosecution, by definition, they are being sued
8 in a criminal forum. But rather, don't they have a near
9 perfect defense of saying, I was relying on the opinion of
10 counsel and not just any counsel but the opinion of OLC?

11 A Well, in this context, it certainly may go to the
12 question of specific intent, in which case they wouldn't be
13 guilty of violating the statute. What effect a court would
14 give to an OLC opinion, I don't know. I suspect that the
15 argument that you have hypothesized is one that would be
16 made. What effect it would have, I really don't know.

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2 RPTS DOTZLER

3 DCMN HOFSTAD

4 [3:01 p.m.]

5 BY MR. SCHIFF:

6 Q If you could turn to Document 18 in the notebook,
7 which is an excerpt from Mr. Goldsmith's book, "The Terror
8 Presidency," there is a paragraph at the bottom of page 144
9 where he states, "On the surface, the interrogation opinions
10 seemed like typically thorough and scholarly OLC work, but
11 not far below the surface there were problems. One was that
12 the opinion interpreted the term 'torture' too narrowly.
13 Most notorious was OLC's conclusion that, in order for
14 inflicted pain to amount to torture, it must be equivalent in
15 intensity to the pain accompanying serious physical injuries
16 such as organ failure, impairment of bodily functions, or
17 even death.

18 "OLC culled this definition, ironically, from a statute
19 authorizing health benefits. That statute defined an
20 emergency medical condition that warranted certain health
21 benefits as a condition manifesting itself by acute symptoms
22 of sufficient severity, including severe pain, such that the
23 absence of immediate medical care might reasonably be thought
24 to result in death, organ failure, or impairment of bodily
25 function.

1 "It is appropriate, when trying to figure out the
2 meaning of words in a statute, to see how the same words are
3 defined or used in similar contexts. But the health benefit
4 statute's use of 'severe pain' had no relationship whatsoever
5 to the torture statute. And even if it did, the health
6 benefit statute did not define 'severe pain.' Rather, it used
7 the term 'severe pain' as a sign of an emergency medical
8 condition that, if not treated, might cause organ failure and
9 the like. It is very hard to say in the abstract what
10 'severe pain' means, but OLC's clumsy definitional arbitrage
11 didn't seem even in the ballpark."

12 Is this paragraph correct? Is that where, in a sense,
13 that -- is that where the definition or where that phrase
14 came from? Did it come from a medical benefit statute?

15 A Yes. That is explicit in the memo. I will be
16 happy to turn to the page.

17 Q And was that the closest analogy that could be
18 found, a health benefit statute?

19 A Well, in the statute, in my view, the critical term
20 was the term "severe pain," which everybody who has looked at
21 this statute, whether they agreed with us or not, has agreed
22 was vague. That is not a recognized legal term. It is also
23 not a recognized medical term. Because we looked, and Dan
24 Levin looked. We couldn't find anything that the term
25 "severe pain" meant something, either medically or legally.

1 So, as we began looking for other clues as to what it
2 meant, there was almost no legislative history that would
3 shed light on that phrase, "severe pain" -- I'm sorry, in
4 legislative history in Congress -- and we began looking
5 elsewhere in the U.S. Code to see if we could find that
6 phrase. That phrase appears in the HHS statutes. It is the
7 only other place in the U.S. Code where the term "severe
8 pain" appears.

9 We acknowledged that it was -- I am looking at this --

10 Mr. Johnson. You should probably say what tab, what
11 opinion you're in there.

12 Judge Bybee. I'm in Bybee 1.

13 We, after citing the reference, the only other
14 references to the term "severe pain," we said, "These
15 statutes address a substantially different subject from
16 Section 2340." We then worked to try and see if we could
17 glean something from this that would help shed some light on
18 what "severe pain" was.

19 BY MR. SCHIFF:

20 Q Did you feel the health benefit statute shed light
21 on what "severe pain" was for the purpose of the torture
22 statute?

23 A Well, it was -- I think it did offer some help. We
24 were trying to get some concept as to what "severe pain"
25 meant. And when we found it in one other statute in the U.S.

1 Code, again, with no other recognized legal or medical
2 cognate, we thought that that might be helpful by analogy.
3 Again, we acknowledged it was on a substantially different
4 subject. We did not make an in pari materia argument here.

5 Q But how could that even be relevant when the
6 purposes for which the question is asked, "What does severe
7 pain mean," are so different in the torture context as in the
8 health benefit context? How could that even be relevant or
9 useful?

10 A Well, the health benefit statute was trying to
11 describe an action level as the level at which the hospital
12 must admit you. We were trying to describe a level of pain,
13 and that is just a hard thing to do.

14 Mr. Johnson. Just before you ask another question.

15 [Discussion off the record.]

16 BY MR. SCHIFF:

17 Q Mr. Goldsmith's conclusion I just mentioned was
18 that the use of this term and its origin didn't even seem in
19 the right ballpark. Do you agree with that conclusion?

20 A No. This is one of the areas where I really think
21 the memo has been misinterpreted and misread.

22 In many accounts -- and I mentioned this earlier, I
23 think, when Congressman Johnson was here -- we have been
24 accused of authorizing anything -- of limiting torture to
25 those things that might cause organ failure or death. That

1 is not what the statute says, and it is not what we said.

2 We were trying to get to a definition of "pain." We
3 used a number of different ways of trying to define that. We
4 defined it by way of example. We said that, for example,
5 beatings, we used the example of cigarette burns or the use
6 of needles, for example, needles under the fingernails, were
7 all examples of things that would satisfy the torture
8 statute. Those things are not organ failure or death.

9 We were also very careful to use those things only by
10 example after describing the level of pain that might be
11 associated with or akin to serious physical injury.

12 Q Judge, last couple questions. Do you continue,
13 then, to stand by your conclusion about what constitutes
14 torture, as you outlined it in your memo? Do you continue to
15 stand by your legal reasoning in those memos and your
16 conclusion?

17 A We have -- I stand by -- I want to make sure I
18 understand the question. ^{Are you} ~~You are~~ asking, then, now, about
19 the techniques memo, about ~~those things once~~ ^{how} we applied it to
20 the questions that were asked to us by the CIA?

21 Q Yes, both parts.

22 A Yeah. Let me start with that question.

23 Yes, I stand by Bybee Memo 2. That was a memo on which
24 Mr. Margolis did not take issue. Mr. Margolis did not
25 disagree with our analysis here, did not find fault with it.

[Bybee proposed change: That is, they authorized
essentially the same techniques.]

200

1 That is also an analysis that was confirmed by Mr. Levin. It
2 was also confirmed by Mr. Bradbury. It was confirmed in
3 writing. And I do not disagree. They have all agreed, they
4 have all concurred in our judgment on that one.

5 With respect to Bybee Memo 1, I think I have told you
6 that there are sections there that I think could benefit with
7 some -- in hindsight, could benefit with a more fulsome
8 discussion. And so there are things that I might have done
9 differently in crafting Bybee Memo 1. We might have been
10 clearer in some places. But, in terms of the analysis, I am
11 going to stand by the memo.

12 Q So you continue to stand by both the analysis in
13 both memos as well as the legal conclusions that are drawn?

14 A With the exceptions, with the caveats that I have
15 given you about Bybee Memo 1 and places where I think that it
16 could be improved, I agree with the legal conclusions that I
17 reached in that memo.

18 Q In both memos?

19 A I certainly agree -- I agree with the legal
20 conclusion I reached in Memo 1. I agree with the legal
21 conclusions I reached in Bybee Memo 2.

22 Mr. Schiff. That concludes my questions. Thank you.

23 Judge Bybee. Thank you.

24 Mr. Mincberg. Why don't we take a 5-minute break.

25 [Recess.]

Mr. Mincberg. Okay. So if we could go back on the record.

EXAMINATION

BY MR. MINCBERG:

Q Judge Bybee, I want to pick up with some of the questions that Mr. Schiff was just asking you.

I thought I heard you say that you thought that Mr. Margolis vindicated your analysis on specific intent. Is that correct?

A No. If you want, we can look at Mr. Margolis's paper; I think we can see what he said.

Q So you would agree that he did indicate -- and this is on page 64 of Exhibit 16 -- that the analysis of specific intent and several other areas were most susceptible to criticism because they slanted toward a narrow interpretation of the torture statute at every turn.

A Well, no, I don't agree with that characterization.
I mean, I --

Q You agree that he said that.

A I agree that he said that. If --

Q So he certainly was not vindicating your analysis?

A No, no, no.

Mr. Johnson. Well, why don't you read what else he said about specific intent, though? That is one of the great mysteries to us. But there is a lot of stuff in there --

1 BY MR. MINCBERG:

2 Q No, I -- well, if you want to take time to read the
3 entire thing, you can. But I am simply getting to the
4 question of whether Mr. Margolis fully vindicated your
5 analysis of specific intent. And would you agree that he did
6 not?

7 A I don't believe that is what I said. That is why I
8 want to make it --

9 Q Okay. Well, then, regardless of what you said
10 before, would you agree that Mr. Margolis did not fully
11 vindicate your memo's analysis of specific intent?

12 A Yeah, I don't believe that is what I said about Mr.
13 Margolis.

14 Q I'm willing to --

15 Mr. Johnson. Can he just answer the question? Because
16 I think he can explain what he meant by that.

17 Mr. Mincberg. That's fine.

18 Judge Bybee. I thought that he used the word
19 "vindication." Do you recall where that is in Margolis? I
20 thought he used the word "vindication." I thought he said
21 something like, "It nearly vindicates" or something like
22 that.

23 Oh, I'm sorry, here it is. It is on page 31 of
24 Margolis. He said, "It was virtual endorsement." I thought
25 it said "near vindication." "Virtual endorsement" came out

[Bybee proposed change: , frequently, different lawyers] will disagree with each other over different matters. 203
Here, the Third Circuit.]

1 as "near vindication" in my recollection.

2 Mr. Johnson. Only because you've read into the record
3 only a couple of words. Why don't you say where you are and
4 read that again, please?

5 Judge Bybee. Certainly.

6 The last paragraph on page 31 of Mr. Margolis's report
7 says, "This juxtaposition of the Third Circuit's virtual
8 endorsement of the unclassified Bybee memo approach to
9 specific intent, despite OLC's previous rejection of it,
10 illustrates the difficulty in conducting the analysis OPR
11 conducted in this case."

12 Then he made the point that ~~simply different lawyers can~~
13 ~~agree on different things but that~~ the Third Circuit had
14 virtually endorsed our conclusion.

15 BY MR. MINCBERG:

16 Q But you would certainly agree that Mr. Margolis was
17 not vindicating your analysis of specific intent?

18 A No, I -- I think when I used that word, if I said
19 that he was vindicating our analysis, I was trying to quote
20 this -- I was trying to come up with this phrase; it was a
21 virtual endorsement.

22 Q But you would agree that he was vindicating your
23 analysis of specific intent?

24 A I think that's -- I think that's correct. Mr.
25 Margolis isn't endorsing the Third Circuit's conclusions

1 either, just for the record.

2 Q Right. And, indeed, Mr. Margolis, who concluded
3 that you did not violate professional disciplinary rules and
4 should not be referred, did conclude that certainly Bybee
5 Memo 1 contained significant flaws and represented poor
6 judgment. But I think we have been over those words before,
7 correct?

8 A Those are words that he used, yes.

9 Q Right. So it certainly would not be fair to say
10 that, overall, Mr. Margolis vindicated the substantive work
11 that was done in the memos?

12 A I don't think I've ever suggested that.

13 Mr. Johnson. You said, in that last question, you said
14 "in the memos"?

15 Mr. Mincberg. I meant to say Bybee Memo 1, for the
16 moment. The record does reflect, by the way -- and I won't
17 get into detail here -- but there are some instances, even
18 with respect to Bybee Memo 2, where Mr. Margolis had some
19 concerns. But that will speak for itself, and we don't need
20 to take the time to go over the specifics now.

21 BY MR. MINCBERG:

22 Q Now, you also indicted when Mr. Schiff asked you
23 about the comments by your three successors -- Mr. Bradbury,
24 Mr. Levin, and Mr. Goldsmith -- on the Commander-in-Chief
25 section, I thought I heard you say that none of them said

1 that your analysis was wrong. Is that correct?

2 A My understanding is that none of the three of them
3 have ever denied that there might be instances in which
4 actions ordered by the President ~~in~~^{on} a field of battle might
5 protect a core of Presidential authority under the
6 Commander-in-Chief authority.

7 Q And that is a much more general principle even than
8 the one that you outlined in Bybee Memo 1. But is it your
9 interpretation that the three of them endorsed the analysis,
10 the substantive analysis?

11 A Well, I don't think I've ever used the words,
12 "endorsed the analysis." I thought I put it in the
13 negative -- that is, that I didn't see that they had
14 affirmatively disagreed with the core principle.

15 Q Well, in fact, isn't it true that several years
16 later Mr. Bradbury issued an OLC opinion that specifically
17 repudiated the view that the Commander-in-Chief power means
18 that Congress can't pass a law like the anti-torture law that
19 regulates interrogation of enemy combatants?

20 A I'm sorry. Would you repeat the question?

21 Q Sure. Isn't it correct that, far from endorsing
22 the view of the Commander-in-Chief power in your memorandum,
23 that Mr. Bradbury issued an OLC memorandum that specifically
24 refutes the view that Congress cannot pass a law that
25 regulates interrogation of enemy combatants?

1 A I can't speak to it because I'm not sure what memo
2 you're referring to.

3 Q Okay. Well, let's take a look at Exhibit 17 in the
4 Exhibit 1 notebook, which is a January 15th, 2009, opinion by
5 Mr. Bradbury concerning the status of certain OLC opinions.

6 And the part I am talking about is on pages 3 to 5 of
7 this memo, and you may want to read this in a little more
8 detail. It goes on to list a number of previous OLC
9 memoranda, and, indeed, one of those memoranda at the top of
10 page 3 is Bybee Memo 1.

11 A Uh-huh.

12 Q And let me know when you've had a chance to look at
13 those couple of pages.

14 Mr. Johnson. What is your question about this, Elliot?

15 Mr. Mincberg. I think it would make sense for the judge
16 to read those couple of pages, and then I will reformulate my
17 question.

18 For the record, my questions will focus on the part from
19 page 3 to about the first third of page 4. If you would like
20 to read the rest, feel free to.

21 Judge Bybee. Yeah, there is one thing I would like to
22 just look at.

23 Mr. Mincberg. Sure. Go right ahead.

24 [Discussion off the record.]

25 BY MR. MINCBERG:

1 Q Have you finished reviewing the material?

2 A If I need to look at it -- I appreciate it. If I
3 need to look at it again, I'll let you know.

4 Q Okay. Going to the middle of page 3 of Document
5 17, Mr. Bradbury, of course, first records that Bybee Memo
6 No. 1 has been withdrawn.

7 A Uh-huh.

8 Q Then he goes on to say, "We" -- I think referring
9 to himself -- "have also previously expressed our
10 disagreement with specific assertions excerpted from the
11 August 1, 2002, interrogation opinion." Do you see that?

12 A Yes.

13 Q And he goes on to state, "The August 1, 2002,
14 memorandum reasoned that 'any effort by Congress to regulate
15 the interrogation of battlefield combatants would violate the
16 Constitution's sole vesting of the Commander-in-Chief
17 authority in the President.' I disagree with that view."

18 Would it be fair to say that Mr. Bradbury there is
19 expressing substantive disagreement with one of the
20 conclusions in the Commander-in-Chief section?

21 A I think that he -- I think he's disputing a
22 statement which may have been misread and may, therefore, be
23 imprecise.

24 Q Well, did the August 1st memorandum contain that
25 sentence that he quotes, or is that a misquote?

1 A No. I believe -- I haven't checked it, but I
2 believe it's accurate.

3 Q Okay.

4 And then I won't read the entire quotation, but Mr.
5 Bradbury goes on to state, in quoting himself in an answer
6 that he gave to Senator Kennedy, that, "The statement to the
7 contrary from the August 1, 2002, memorandum, quoted above"
8 -- that statement I just quoted -- "has been withdrawn and
9 superseded. And, in any event, I do not find that statement
10 persuasive."

11 Would you now agree with Mr. Bradbury on this, or do you
12 continue to adhere to your view on that?

13 Mr. Johnson. I'm not sure what the "this" is.

14 Mr. Mincberg. Let's start with the sentence that is
15 quoted in the middle of page 3, that any effort by Congress
16 to regulate the interrogation of battlefield combatants would
17 violate the Constitution's sole vesting of the
18 Commander-in-Chief authority in the President.

19 Mr. Johnson. Yeah, I think we probably need to -- in
20 response to his earlier question, I think what I understood
21 him to say is he thinks that Mr. Bradbury might have been
22 misreading -- although the words are there, he might have
23 been misinterpreting the memo. And that is what is going to
24 make subsequent questions confusing.

25 So maybe he could, Elliot, if it helps you, in response

1 to your questions, refer to his actual memorandum, as opposed
2 to Mr. Bradbury's characterization of snippets of it.

3 Mr. Mincberg. Sure.

4 Judge Bybee. I believe that appears on page 36. I
5 think.

6 Mr. Mincberg. This is page 36 of Bybee Memo --

7 Judge Bybee. It's not page 36. No, it is on page 31 of
8 Bybee 1.

9 Yeah, this is one of those areas in which I think we
10 have been misunderstood and which I think we could have been
11 a little bit clearer, although I think that the essentials
12 are all there. Let me start with the first couple of
13 sentences.

14 "The statute would be unconstitutional if it
15 impermissibly encroached on the President's constitutional
16 power to conduct a military campaign." The next sentence
17 begins with this predicate: "As Commander in Chief, the
18 President has the constitutional authority to order
19 interrogations of enemy combatants." That's the predicate,
20 then, for the concluding sentence, which is the one that has
21 been quoted by Mr. Bradbury.

22 Now, Mr. Bradbury, I think, and maybe others, may have
23 done this. If you read the sentence with some emphasis --
24 and I don't know how this will get reflected in the record --
25 but it may come out like this: "ANY effort to apply Section

1 2340A in a manner that interferes with the President's
2 direction...would thus be unconstitutional." I have put some
3 ellipses in there. I believe that maybe the sentence ought
4 to be read as follows: "Any effort to apply Section 2340A in
5 a manner that interferes with the PRESIDENT'S direction of
6 such core war matters as the detention and interrogation of
7 enemy combatants would thus be unconstitutional."

8 It is a difference of emphasis between whether we are
9 talking about any effort or whether we are talking about
10 efforts to constrain a core executive power that belongs to
11 the President.

12 Q So you are suggesting that, essentially, Mr.
13 Bradbury's interpretation accords more authority to the
14 President than you intended in your memo?

15 Mr. Johnson. Mr. Bradbury?

16 Mr. Mincberg. Is that what you're saying? In Mr.
17 Bradbury's interpretation. Because I think what you are
18 indicating is that Mr. Bradbury's quote of your memo doesn't
19 fully --

20 Judge Bybee. I think it may have read more into that
21 than what we said by a careful ~~looking up~~ of the entire
22 paragraph.

23 BY MR. MINCBERG:

24 Q Take a look at, as long as we're on Bybee Memo 1,
25 page 39 of Bybee Memo 1 under the heading, "Defenses" --

[Bybee proposed change: reading]



1 A Uh-huh.

2 Q -- where, in that first paragraph, you are
3 essentially summarizing what came before.

4 A Uh-huh.

5 Q In the second sentence, you say, "We have also
6 demonstrated that Section 2340A, as applied to interrogations
7 of enemy combatants ordered by the President pursuant to his
8 Commander-in-Chief power, would be unconstitutional."

9 A Uh-huh.

10 Q I take it you stand by that sentence?

11 A And I would like to emphasize the words "ordered by
12 the President."

13 Q So if the President orders it, then it would be
14 unconstitutional to apply it, in your view?

15 A Well, that's -- I would have to qualify that. This
16 would have to be in an exercise of his authority as Commander
17 in Chief, which we have described here as going to questions
18 on the battlefield which we regard as the core of his power.

19 Q Uh-huh. Well, at least as he interpreted it, it
20 would be fair to say that Mr. Bradbury did not agree with
21 your conclusions with respect to Commander in Chief. Is that
22 a fair statement?

23 A No. He said that he disagreed.

24 Q Okay. Fair enough.

25 A He disagreed.

1 Q Fair enough.

2 A I would like to add one thing here --

3 Q Sure.

4 A -- to the statement by Mr. Bradbury here on page 3.

5 Mr. Johnson. This is tab 17.

6 Judge Bybee. And that is, I don't think there is
7 anything in our memorandum that suggests that the torture
8 statute is unconstitutional in all of its applications. That
9 is, it is not unconstitutional on its face. That's why we
10 went through all of the analysis.

11 Mr. Mincberg. Right.

12 Judge Bybee. I think what we have suggested is there
13 may be certain applications that go to the core of where we
14 are talking about something directed by the President.

15 Mr. Mincberg. Applications where the President
16 essentially has authorized certain content.

17 Judge Bybee. Where the President has directed certain
18 matters that are within that core.

19 BY MR. MINCBERG:

20 Q And within that core, in that context, you would
21 stand by your view that the application of torture statute to
22 those applications would be unconstitutional?

23 A In those specific -- in those narrow circumstances,
24 the torture statute might be unconstitutional.

25 Q Let me, finally, on this subject, ask you to turn

[Bybee proposed change: application of the]

1 to Exhibit 18 again, which is your other successor, Mr.
2 Goldsmith's view, and these are the excerpts from his book.
3 And take a look at page 148 to 149, where he discusses the
4 analysis of the Commander-in-Chief power.

5 And, again, maybe, in your view, he also is
6 misinterpreting. But at the bottom of page 148, he says,
7 "But the opinion went much further. 'Any'" -- underlining
8 "any" -- "'effort by Congress to regulate the interrogation
9 of battlefield detainees would violate the Constitution's
10 sole vesting of the Commander-in-Chief authority in the
11 President,' the August 2002 memo concluded. This extreme
12 conclusion has no foundation in prior OLC opinions or in
13 judicial decisions or in any other source of law."

14 Will you agree with Mr. Goldsmith on that?

15 Mr. Johnson. Just for completeness of the record,
16 Elliot, could you read the sentence before the one that you
17 began reading?

18 Mr. Mincberg. I could, but I would first like to --
19 fine. Let me read the whole thing.

20 Mr. Johnson. It says, "OLC might have limited" --

21 Mr. Mincberg. "OLC might have limited its set-aside of
22 the torture statute to the rare situations in which the
23 President believed that exceeding the law was necessary in an
24 emergency, leaving the torture law intact in the vast
25 majority of instances. But the opinion went much further.

1 'Any effort by Congress to regulate the interrogation of
2 battlefield detainees would violate the Constitution's sole
3 vesting of the Commander-in-Chief authority in the
4 President,' the August 2002 memo concluded. This extreme
5 conclusion has no foundation in prior OLC opinions or in
6 judicial decisions or in any other source of law."

7 BY MR. MINCBERG:

8 Q Now let me repeat my question. Do you believe Mr.
9 Goldsmith is correct?

10 A Correct as to which? That the conclusion has no
11 foundation?

12 Q Well, the part I was interested in is the part
13 beginning, "But the opinion went much further," yes.

14 A Well, Mr. Goldsmith has done exactly what I
15 described just a minute ago. He has -- actually, and this is
16 not reflected in what you read. Your voice, I think,
17 reflected this, Elliot, but it may not be reflected in the
18 record. But in Mr. Goldsmith's book, the word "any" is
19 italicized. ^{ANY}~~Any~~ "Any effort by Congress" may be the wrong place
20 to place the emphasis. Because, in my view -- and I think if
21 you read that whole paragraph on page 31 -- and there are
22 other places where we said this, as well --

23 Mr. Johnson. Page 31 of what?

24 Judge Bybee. Page 31 of Bybee 1.

25 Mr. Mincberg. Uh-huh.

1 Judge Bybee. It needs to be read, "Any effort by
2 Congress to regulate the interrogation of battlefield
3 detainees would violate" -- I'm sorry. I am a little
4 confused. Does anybody know where this sentences comes from?
5 Because that was not the sentence that Bradbury read.

6 Mr. Mincberg. No, I believe Mr. Goldsmith is
7 interpreting yet a different sentence.

8 Judge Bybee. Do you know where the sentence comes from?

9 Mr. Mincberg. We can find that, although -- if you want
10 to, we can take a break and get his book, but I think it
11 would be probably more efficient for us to move along.

12 Judge Bybee. No. But it violates the Constitution's
13 sole vesting of the Commander-in-Chief authority in the
14 President.

15 Mr. Mincberg. Uh-huh.

16 Judge Bybee. If you place the emphasis in a different
17 place in the sentence, I think the sentence will be read in a
18 very different way. We didn't emphasize the word "any."
19 That's Mr. Goldsmith's emphasis. So I think that that is a
20 bit of a mischaracterization.

21 BY MR. MINCBERG:

22 Q Okay. Well, let me ask you this. Putting the
23 emphasis where Mr. Goldsmith puts it -- let's start with
24 that -- would you agree with his conclusion that this extreme
25 conclusion has no foundation in prior OLC opinions or

1 judicial decisions or any other source of law?

2 A If the question is whether any effort -- that is,
3 that there is nothing that Congress can do at all -- then I
4 think the statement is probably overbroad.

5 Q My question is, do you agree with what Mr.
6 Goldsmith says, that not merely that it is overbroad but that
7 it has no foundation in prior OLC opinions, judicial
8 decisions, or any other source of law?

9 Mr. Johnson. That is a little bit unfair to ask him to
10 recall prior OLC opinions --

11 Mr. Mincberg. No, I'm simply asking whether he agrees
12 or disagrees with what his successor said. If he doesn't
13 want to answer the question, that is fine.

14 Mr. Johnson. Well, I am just saying it's not a fair
15 question, because the question incorporates the world of law,
16 and you are asking for his memory --

17 Mr. Mincberg. I am asking for his reaction to a
18 statement of criticism by one of his successors.

19 Judge Bybee. Okay. Well, yeah, it is a very
20 complicated question because this whole area is very, very
21 complicated.

22 One of things that we did was we have referred
23 previously to the transfers opinions, where we reached
24 certain conclusions about, for example, the captures clause ^a
25 ~~And~~ the question as to whether Congress can regulate -- ~~might~~

[Bybee proposed change: can regulate prisoners
as captures]

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1 ~~have some effort to regulate, of course.~~ Congress would have
2 some power, for example, under the spending clause to
3 determine that we would or wouldn't construct certain kinds
4 of facilities.

5 So the observation of this extreme conclusion -- that
6 is, that Congress has no powers in this area -- I don't know
7 of prior OLC opinions or judicial opinions or other sources
8 of law that would support that conclusion. I don't think
9 that's our conclusion.

10 Mr. Mincberg. And you certainly would agree that that
11 conclusion is overbroad. I think you said that just a minute
12 ago.

13 Mr. Johnson. I think that was a reference to --

14 Judge Bybee. The interpretation of the --

15 Mr. Mincberg. Right.

16 Judge Bybee. Right.

17 BY MR. MINCBERG:

18 Q So essentially what you are saying is that both Mr.
19 Goldsmith and Mr. Bradbury, two of your successors,
20 misinterpreted this part of your opinion. Is that correct?

21 A I think that it has been -- I think that it was not
22 read, perhaps, as carefully as we would have read it.

23 Q Is it conceivable to you that other lawyers in the
24 executive branch might have interpreted it similarly to the
25 way Mr. Goldsmith and Mr. Bradbury did?

[Bybee proposed change: from firsthand knowledge]

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1 A I don't know how -- I don't know ~~for a fact~~ how
2 other people interpreted it.

3 Q In any event, you would certainly agree with me
4 that, at least as they interpreted it, both Mr. Goldsmith and
5 Mr. Bradbury disagree with the substance of the
6 Commander-in-Chief section of your memo?

7 A They disagree with that reading, that any
8 authority -- or that any effort would be unconstitutional.

9 Q They disagree in terms of their interpretation of
10 the Commander-in-Chief section?

11 A Right.

12 Mr. Johnson. Well, I think the point the judge is
13 making is the sentence I asked you to read. ~~He~~ actually
14 agrees with the idea that the President would have this
15 authority. And that's why I was troubled that you left that
16 sentence out and you're leaving it out now.

17 Mr. Mincberg. Very good.

18 Now, why don't we move on, back to Exhibit 5, if we
19 could, to the OPR report. I wanted to ask you about one
20 other statement of criticism.

21 Mr. Johnson. Say the page again.

22 Mr. Mincberg. I'm going to in just a moment, as soon as
23 I look it up.

24 Mr. Johnson. Oh, you said Tab 5 already. I apologize.

25 Mr. Mincberg. Yes, Tab 5.

[Bybee proposed change: Mr. Goldsmith]

1 And look, if you would, at page 4, in the middle of the
2 page, where it quotes a statement by White House Counsel
3 Alberto Gonzales. And I will read the paragraph for the
4 record.

5 Mr. Mincberg. And, of course, Mr. Gonzales, by the way,
6 was the recipient of the first Bybee memo, correct?

7 Judge Bybee. Yes.

8 Mr. Mincberg. Quote, "To the extent that," referring to
9 the Bybee memo, is "in the context of interrogations,
10 explored broad legal theories, including legal theories about
11 the scope of the President's power as Commander in Chief,
12 some of their discussion, quite frankly, is irrelevant and
13 unnecessary to support any action taken by the President....
14 Unnecessary, overbroad discussions that address abstract
15 legal theories or discussions subject to misinterpretation
16 but not relied upon by decision-makers are under review and
17 may be replaced, if appropriate, with more concrete guidance
18 addressing only those issues necessary for the legal analysis
19 of actual practices," end quote.

20 Now, I recognize that by June of 2004, after the Abu
21 Ghraib scandal had broken, you had left OLC and were on the
22 Federal bench. But do you have any response to the statement
23 by Mr. Gonzales?

24 Mr. Johnson. Just for the record -- Judge, you can
25 certainly answer this -- but OPR deleted something from this

1 statement. We don't know what it is, but something is
2 missing, because of the ellipses at the end of the first
3 paragraph.

4 Mr. Mincberg. Okay.

5 Mr. Johnson. So if you could acknowledge that's an
6 incomplete --

7 Mr. Mincberg. If you can answer that question, that's
8 fine. If necessary, we'll be here until late, and we can get
9 every single word that Mr. Gonzales said.

10 Mr. Johnson. I doubt you can get every single word of
11 this.

12 Mr. Mincberg. But I think it's a fair representation.
13 But can you answer the question, Judge Bybee?

14 Judge Bybee. Your question is, do I have any reaction
15 --

16 Mr. Mincberg. Any response?

17 Judge Bybee. -- any response to this? Well, it's a
18 very, very general discussion. He hasn't explained precisely
19 what he had in mind, and I'm not going to speculate as to
20 what he was thinking.

21 BY MR. MINCBERG:

22 Q After the Bybee memos were submitted and before you
23 left for the Federal bench, did Mr. Gonzales or anyone else
24 at the White House express any dissatisfaction with either of
25 the Bybee memos?

1 A I'm sorry. After what?

2 Q After August 1st, when the memos were submitted,
3 and before you left OLC, before you left for the bench, did
4 Mr. Gonzales or anyone else at the White House express any
5 dissatisfaction with either of the Bybee memos?

6 A Not that I know of.

7 Q Now, I want to go back, if I could, to one or two
8 additional comments by your successor, Mr. Goldsmith. And I
9 am correct, and I believe you know this, that Mr. Goldsmith
10 was the one who formally revoked Bybee Memo 1. Correct?

11 A I believe that's correct.

12 Q Okay.

13 Turn, if you would, to page 149 to 150 of Goldsmith,
14 which is, again, Exhibit 18. And he says, and I quote,
15 "Another problem with the opinions was their tendentious
16 tone. 'It reads like a bad defense counsel's brief, not an
17 OLC opinion'" --

18 Mr. Johnson. Can I pause you for just a second? I just
19 haven't found the page yet, so I'm behind you. Say the page
20 again? 147-148?

21 Mr. Mincberg. No. 149-150. Are we okay?

22 Mr. Johnson. Gotcha. Go ahead.

23 BY MR. MINCBERG:

24 Q And, again, I'm going to ask you about the
25 statement by your successor, Jack Goldsmith, relating to the

1 work that you had done relating to interrogation.

2 Quote, "Another problem with the opinions was their
3 tendentious tone. 'It reads like a bad defense counsel's
4 brief, not an OLC opinion,' a senior government lawyer said
5 of the August 2002 opinion when he learned I was withdrawing
6 it in the summer of 2004. The opinions lacked the tenor of
7 detachment and caution that usually characterizes OLC work
8 and that is so central to the legitimacy of OLC.

9 "In their redundant and one-sided effort to eliminate
10 any hurdles posed by the torture law and in analysis of
11 defenses and other ways to avoid prosecution for executive
12 branch violation of Federal laws, the opinions could be
13 interpreted as if they were designed to confer immunity for
14 bad acts.

15 "Its everyday job of interpreting criminal laws gives
16 OLC the incidental power to determine what those laws mean
17 and, thus, effectively to immunize officials for prosecutions
18 for wrongdoing. This is a hazardous power for an anonymous
19 office to possess, and it is crucial that it be exercised
20 judiciously. But the interrogation opinions seemed to do the
21 opposite. They seemed like an exercise of sheer power rather
22 than reasoned analysis."

23 Would you agree with Mr. Goldsmith's characterization?

24 A No.

25 Q Can you explain, please?

1 A Well, that's -- there are a number of -- I mean,
2 that's a very long paragraph.

3 Q Yes, it is.

4 A He is characterizing the opinions of a senior
5 government lawyer. I don't know who the lawyer is, and I
6 just would respectfully disagree.

7 Q Well, let's -- so you would disagree. Let's do
8 this piece by piece. So, regardless of who it was, you would
9 disagree that the tone was tendentious and that it read
10 like a bad defense counsel's brief rather than an OLC
11 opinion?

12 A Well, that is a matter of opinion. I can't -- how
13 can I comment on what somebody else perceives? Someone else
14 might see something in a Matisse that I don't --

15 Q But you would disagree with that?

16 A I would disagree with that.

17 Q Okay.

18 Mr. Johnson. I think there are actually two speakers in
19 those two sentences, because I think the first sentence is
20 the author's and the second is an anonymous ^{attorney}.

21 BY MR. MINCBERG:

22 Q But I'm assuming that you're disagreeing with both.
23 Is that correct, Judge Bybee?

24 A Yes.

25 Q Okay.

1 Now, it goes on to say, "The opinion lacked the tenor of
2 detachment and caution that usually characterizes OLC work
3 and is so central to the legitimacy of OLC." Would you
4 disagree with that?

5 A Yes, I would.

6 Q Any comment you want to offer on that?

7 A No.

8 Q He goes on to say -- this is Mr. Goldsmith -- "In
9 their redundant and one-sided effort to eliminate any hurdles
10 posed by the torture law and in their analysis of defenses
11 and other ways to avoid prosecution for executive branch
12 violations of Federal laws, the opinions could be interpreted
13 as if they were designed to confer immunity for bad acts."

14 I take it you would you disagree with that.

15 A I would disagree with that. I don't think that our
16 opinions can confer immunity for bad acts. I had this
17 discussion with Mr. Schiff earlier.

18 First of all, the use of the word "immunity" there is
19 very, very misleading because it is clear that, if somebody
20 is being prosecuted, that they do not have immunity from
21 suit. That is what immunity is, if they are being
22 prosecuted. If somebody is being prosecuted under the
23 torture statute and somebody, you know, arguably, followed
24 our advice, it means that the memo was of no account in
25 preventing their prosecution. That's not much of a

1 protection.

2 Q But it could prevent their conviction, even under
3 that hypothetical.

4 A It may be. But on the question of, for example,
5 affirmative defenses, which is what Mr. Goldsmith is
6 referring to there, the defenses are matters that have to be
7 asserted affirmatively. They are not matters that have to be
8 honored by the Department of Justice. In fact, the fact that
9 the Department has decided to prosecute them effectively
10 eliminates the possibility that the Department believes that
11 there are defenses. Because the defenses have to be
12 asserted; that is what they are, they are affirmative
13 defenses. And that means that all of that is going to be
14 decided in a court. So this section at the end, dealing
15 with, for example, the defenses, could not provide immunity
16 to anybody.

17 Q Anything else you want to add in responding to Mr.
18 Goldsmith?

19 A No.

20 Q Okay. Let me ask you to look at one more excerpt
21 from his book, which is on page 169. In the first full
22 paragraph where he refers to what he, Mr. Goldsmith, calls
23 the failure of Mr. Yoo's superiors to supervise him
24 adequately.

25 Looking at that paragraph, he suggests that -- there

1 were two reasons that he suggests for this: that, quote,
2 "Under pressure to push the envelope, they liked the answers
3 he gave, and, lacking relevant experience, they deferred to
4 his judgment," end of quote.

5 He goes on to say, with respect to you in particular,
6 that he expresses his view that you are a, quote, "fine
7 lawyer and judge," end quote, but have, quote, "no training
8 in issues of war or interrogation, and he tended to approve
9 Yoo's draft opinions on these topics with minimal critical
10 input," end quote.

11 Do you agree with that analysis by Mr. Goldsmith?

12 A No. Let's unpack -- could we unpack this one, as
13 well?

14 Q Absolutely.

15 A Okay. First of all, let me -- we have left out
16 just a little bit in the middle. And I'm not going to ask
17 you to reread it, but I will sort of restate it in my own
18 terms.

19 John Yoo brought an enormous amount of experience to the
20 Office of Legal Counsel. And he brought -- it is true that
21 he brought experience in areas where I did not have
22 experience, either through litigation experience at the
23 Department of Justice or in private practice or by teaching.
24 These were not areas in which I taught. John had written
25 substantially in the area of treaties and national security.

1 He had written specifically about the war powers of the
2 President. And my academic interests tended more towards
3 domestic forms of constitutional interpretation.

4 So John brought an enormous amount of experience to this
5 office, and much of that compensated for experience that I
6 did not bring to the office. I would also add that John
7 brought experience that I don't think anybody else among my
8 deputies brought, as well.

9 Q Uh-huh, uh-huh.

10 A So, to say that I had no training in issues of war
11 or interrogation, I would say this is arguably true. I am
12 not former military, and I have not had experience in issues
13 of war or interrogation. I don't know very many people, may
14 not know anybody who does. John at least had some experience
15 dealing with the war powers.

16 As to the criticism that I tended to approve Yoo's draft
17 opinions on these topics with minimal critical input, I quite
18 disagree with that. I believe that I did have critical
19 input. John and I had a number of vigorous conversations on
20 any number of constitutional topics, including the scope of
21 the Commander-in-Chief authority, and John did not always
22 prevail in the office.

23 Q Can you give me an example of an instance where he
24 --

25 Mr. Johnson. Before you do that, we would want to know

1 whether we might be treading on some privilege. Is it
2 important to you to know the substance, or is it generic?
3 Because, otherwise, we can ask Faith.

4 Mr. Mincberg. Well, I think I would like to know the
5 substance of an area where that happened.

6 Mr. Johnson. Okay. Why don't we go off the record for
7 a second, and we'll get the judge to tell Faith what it is
8 he's thinking of.

9 [Discussion off the record.]

10 Mr. Mincberg. Okay, I think that Ms. Burton with the
11 Justice Department wanted to interpose something with respect
12 to the pending question.

13 Ms. Burton. Elliot, in order for Judge Bybee to answer
14 the question that Elliot has asked, he wants to discuss his
15 interactions with his deputy, John Yoo, about several other
16 items. To the extent that these items involve legal advice
17 on issues that have nothing to do with the interrogation
18 memos and, indeed, may not have to do with any memos, may be
19 unrelated to the development of any formal OLC advice, but
20 may implicate confidentiality interests of the executive
21 branch relating to those other matters which we cannot
22 evaluate sitting here today, I am suggesting that the
23 committee's interest can be accommodated by the description
24 he is prepared to give you, which I think is, if I
25 understand, quite responsive to the question you're asking.

1 without getting into the level of detail about what the
2 agency was or what the specific request for advice was that,
3 as I say, may implicate executive branch confidentiality
4 interests.

5 My goal here is to be helpful to you in getting the
6 information from Judge Bybee. I'm not in a position, at the
7 moment, to go beyond that in terms of evaluating these other
8 executive branch interests, except to tell you they are not
9 about any of these memoranda.

10 Mr. Mincberg. Well, and let's start with that. Why
11 don't I withdraw my last question and start again.

12 BY MR. MINCBERG:

13 Q Is it correct, as Ms. Burton has just represented,
14 that the disagreements that you had with Mr. Yoo, in which
15 Mr. Yoo did not prevail, did not relate to any of the
16 interrogation opinions?

17 A Well, the items that I -- you had previously asked
18 me about my supervision of Mr. Yoo in response to a statement
19 by Professor Goldsmith. And I wanted to disagree with the
20 characterization that I had somehow fallen down on the job in
21 supervising Mr. Yoo.

22 You asked me a slightly different question, which is,
23 did John and I disagree over matters involving the
24 interrogation memos. And all I can tell you from my
25 recollection is that we had a number of good discussions; I

1 don't recall matters that divided the office in ways that I
2 recall in these other things that Faith has referred to.

3 Q Okay. So, sitting here today, you don't recall any
4 instances with respect to the interrogation opinions where
5 now-Professor Yoo promulgated an argument or a theory where
6 you disagreed?

7 A Well, I just don't recall it rising to that level.
8 We often had discussions about where things went. In the
9 other instances that I recall, there were places where it
10 reached a more formal level, and I simply disagreed with
11 John, at least once in writing.

12 Q Okay. Why don't you proceed to describe those as
13 fully as you believe you can, and then we'll take it from
14 there.

15 A Okay.

16 Mr. Johnson. Well, you should describe them in the way
17 that Faith --

18 Judge Bybee. That Faith has authorized.

19 Mr. Mincberg. Uh-huh, uh-huh.

20 Judge Bybee. Sorry, I dropped an example. Oh, yeah.

21 Okay. Yes, I would like to describe a couple of
22 examples ~~in which I believe~~ that I exercised appropriate
23 supervisory authority over Mr. Yoo.

24 On one matter, I was involved in offering oral advice to
25 a client agency, and Mr. Yoo had found himself in a casual

1 situation with one of the principal attorneys at that agency.
2 And that attorney had asked Mr. Yoo, just off the cuff, his
3 advice, and John had given an answer that was contrary to the
4 advice that I was in the process of giving that agency
5 informally. I called Mr. Yoo in and talked with John about
6 that, and John argued pretty vigorously that he thought that
7 I was wrong. And I told John, based on my research and my
8 work, that I disagreed with him and proceeded to give the
9 agency advice based on my own work.

10 In the second instance, John brought a draft opinion to
11 me that he wanted me to review and to sign and issue. And,
12 after reviewing that memo, I believed that there were a
13 number of places where the memo was incomplete or wrong,
14 places where I had lots of questions and lots of comments. I
15 had written all over this lengthy memo. And I sent it back
16 to John for a complete rewrite. And I do not recall seeing
17 that memo again -- that draft opinion again.

18 The third instance -- this was shortly after I joined
19 the Office of Legal Counsel; Mr. Yoo had been there for
20 several months. There was a project that was consuming a lot
21 of time among a number of OLC attorney advisors that we
22 anticipated would culminate in an opinion. And I felt that
23 the occasion for that question had passed, under the
24 circumstances. And I called the principal attorney at the
25 client agency and verified with him that they would no longer

1 be needing the opinion and pulled the project. So I simply
2 cancelled the project even though John would have liked to
3 have pursued it.

4 I feel like those examples are ones that I would like to
5 have on the record as an explanation of examples in which
6 John and I simply disagreed about things and John didn't
7 always win.

8 Q Uh-huh. Let me go back to try a few additional
9 questions about those, and we'll see if we can get some
10 additional information.

11 On your example number one, did the subject on which
12 you, Y-O-U, and Mr. Yoo disagreed have anything to do with
13 Presidential authority?

14 Mr. Johnson. So, just -- it won't surprise you -- can
15 he answer that question yes or no?

16 Ms. Burton. Yes.

17 Judge Bybee. Yes.

18 BY MR. MINCBERG:

19 Q It did have to do with Presidential authority?

20 A Yes, it did.

21 Q Okay. Did it relate to Presidential authority in
22 the context of the possible applicability of a congressional
23 statute?

24 A No.

25 Q So it would have had to do with the President's

1 authority per se, not President versus Congress on a
2 particular issue?

3 A I believe that's correct.

4 Q Did it have anything to do with the
5 Commander-in-Chief power?

6 A Yes.

7 Q It did have to do with the Commander-in-Chief
8 power?

9 A I feel like we're playing 20 Questions. I know
10 it's frustrating for you; it's a little frustrating for me,
11 as well. But we'll be careful.

12 Ms. Burton. It's all right.

13 BY MR. MINCBERG:

14 Q On this one, I think that the committee may have an
15 interest in finding out more information, because it does --
16 although it was not -- I'm sorry, let me ask one other thing.
17 Notwithstanding what we just said, what you have indicated is
18 that it does not relate to interrogation or, I assume, other
19 treatment of detainees?

20 A No, it does not.

21 Q Okay.

22 On this one, the committee may have an interest in
23 finding out more information about it. And what I'm going to
24 suggest that we attempt to do is see if, after we finish, we
25 can work out a three-party agreement where you might write us

1 a letter or something of that nature, or perhaps we could
2 handle it in a more confidential way, that would give us a
3 little bit more information. Because it does relate to the
4 President's Commander-in-Chief power, which is, of course,
5 one of the things we've been talking about.

6 Let me go to your example number two. Again, I'll ask,
7 does this have to do with Presidential power?

8 Mr. Johnson. And it's okay for him to answer that?

9 Ms. Burton. Yes.

10 Judge Bybee. I don't think so.

11 Mr. Mincberg. Is it related to the authority of an
12 agency of --

13 Judge Bybee. Well --

14 Mr. Johnson. If your concern is, in describing what it
15 was about, it would reveal the client agency, you should tell
16 him that.

17 Judge Bybee. Yes, it may. It did not involve -- I do
18 not believe it involved the Commander-in-Chief authority,
19 although I can't be 100 percent sure.

20 Mr. Mincberg. Or any other Presidential --

21 Judge Bybee. ~~My principal disagreements with John they~~
22 ~~are I don't think~~ related to the Commander-in-Chief
23 authority.

24 BY MR. MINCBERG:

25 Q Or any other Presidential authority?

[Bybee proposed change: I do not think my
principal disagreements with John]

1 A I think that is probably right.

2 Q Did they relate at all to an interpretation of a
3 congressional statute?

4 A I don't think so.

5 Q We may be in better shape on number two, in light
6 of those answers.

7 Now, with respect to number three, as I understand it,
8 that one doesn't really relate to a substantive disagreement
9 but just a determination on your part that the issue was
10 effectively moot or didn't any longer require an OLC opinion.
11 Is that a fair statement?

12 A I think that's a fair statement.

13 Mr. Mincberg. Give me just a second.

14 All right. Well, that is very helpful. And, as I said,
15 I think with respect to the first example, Judge Bybee, we
16 may want to see if we can work out something where the
17 committee can get some additional information in a way that
18 will not require you to be present a second time.

19 And I appreciate your going as far as Justice indicated
20 you could go. I think we would pretty strongly take the
21 position that we ought to be able to get that information,
22 but I think we can reserve on that and hopefully try to work
23 it out.

24 Ms. Burton. I'm sorry. Off the record.

25 [Discussion off the record.]

1 BY MR. MINCBERG:

2 Q Now, while we are on the subject of Professor Yoo,
3 I know you had answered some questions from one of the
4 Members before relating to Attorney General Ashcroft's view
5 that Mr. Yoo should not be made permanent head of the Office
6 of Legal Counsel because they felt he was too close to the
7 White House. And I recall your indicating that your belief
8 was that Professor Yoo was not necessarily disqualified
9 because of that.

10 Regardless of whether he was disqualified, do you,
11 yourself, agree or disagree with Mr. Ashcroft's view that it
12 would be better to have somebody, unlike Professor Yoo, that
13 didn't have quite that close relationship with the White
14 House?

15 A The reason I am hesitating is because, of course,
16 this is all tied up in the personalities of who John was and
17 whether I thought that he would be a good successor. And so
18 I am a little reluctant to answer.

19 If the general question is, should a person who is head
20 of OLC feel some independence from the White House, the
21 answer is, yes, of course he should feel some independence
22 from the White House.

23 Q And do you think that that would have been a fair
24 characterization of Mr. Yoo?

25 A The reason I am hesitating, Elliot, is I may know

1 more today about Mr. Yoo's relationship with the White House
2 than I did at the time. And --

3 Q Well, why don't we break it up in time then? At
4 that time, around the time that you left OLC for the Federal
5 bench, how would you answer the question?

6 A Would I have thought that John was too close to the
7 White House to be head of OLC?

8 Q Right.

9 A No, I don't think I thought that John was too close
10 to be head of OLC.

11 Q Do you think that now?

12 A There are additional things that have come to
13 light, that I would be worried about.

14 Q And what are those additional things?

15 A John was apparently -- well, John was involved with
16 the White House in a number of apparently war-planning
17 things -- some of these I have learned from Jack Goldsmith's
18 book -- that I was not aware of. John had not told me of a
19 number of these meetings. And that would give me some
20 concern, I think.

21 Q And you're talking now -- I think you're
22 referring -- I don't have this part of the book in front of
23 me, but I think we both recollect it -- I think you're
24 referring to Mr. Goldsmith's discussion of, kind of, an
25 informal war council that involved Mr. Yoo and people at the

1 White House related to planning of the war on terror. Is
2 that correct?

3 A Yes.

4 Q Now, I want to ask you about one more set of
5 opinions by Bush DOJ attorneys concerning the Bybee memos.
6 And this refers, as your counsel had asked before, to the
7 views of former Attorney General Michael Mukasey and Deputy
8 Attorney General Mark Filip, who wrote a letter to OPR
9 arguing that you and Mr. Yoo should not be found guilty of
10 professional misconduct, but even they had some criticisms of
11 the interrogation memos.

12 So I want to ask you to turn to Document 19 in the
13 Exhibit 1 notebook, which is, for the record, the letter from
14 Mr. Mukasey and Mr. Filip to Marshall Jarrett of OPR on
15 January 19th, 2009. And look at page 4, the first full
16 paragraph.

17 Beginning in the second sentence, they say, quote, "We
18 agree that important aspects of the opinions under review
19 were incorrect or inadequately supported and that those
20 aspects should have been and have been corrected by the
21 Department. The flaws in the opinions under review include,
22 for example, the Bybee memo's analysis of severe pain, its
23 conclusion concerning certain affirmative defenses, and its
24 conclusion that the statute's terms do not apply to the
25 Commander in Chief and those acting pursuant to his

1 direction."

2 And then, just to complete this, it references then
3 footnote 2 at the bottom of the page, where they quote Mr.
4 Mukasey's answers to questions by Senator Kennedy where he
5 characterizes the -- I believe we are talking about Bybee
6 Memo 1, as a, quote, "mistake" and disagreeing with memo's
7 conclusions that, quote, "necessity" or, quote,
8 "self-defense" may justify a violation of the torture statute
9 and that the Commander in Chief has the constitutional
10 authority to direct acts of torture.

11 There is a reference further to Mr. Filip, who
12 characterizes it as a flawed legal document. And I want to
13 ask you questions about this. But, just for the record,
14 Exhibit 20 includes the excerpts from Mr. Filip's answers,
15 where, if you or your counsel want to look, you'll see that
16 he talks about the same parts of the memo that Mr. Mukasey
17 does.

18 So my question to you is, do you agree with this
19 analysis by Attorney General Mukasey and Deputy Attorney
20 General Filip, then the two top officials at the Department
21 of Justice?

22

23

24

25

1 RPTS DEAN

2 DCMN BURRELL

3 [4:30 p.m.]

4 A Well, this is quite a compound question because
5 it's a compound statement. They've said that portions were
6 incorrect or inadequately supported. Those are two, very,
7 very different concepts.

8 Q All right. Well, let's take this separate.

9 A They didn't analyze or they didn't state which they
10 thought were incorrect or which ones they thought were
11 inadequately supported. So I don't have any way of analyzing
12 what they thought, what things they thought those applied to.
13 There are statements in section 2, I'm sorry footnote 2, that
14 I just don't think that the memo says.

15 Q Okay. Well, let's try to unpack that a little bit.
16 First of all, let's talk about their conclusions. They
17 conclude, using the terms quoted here, that Bybee Memo 1 was
18 a "mistake" and a "flawed legal document?"

19 A Tell me what you're referring to.

20 Q I'm referring now to the quotes in footnote 2 on
21 page 4. Attorney General Mukasey, quoting himself, calls it
22 a "mistake" and Mr. Filip calls it a "flawed legal document."
23 Would you agree or disagree with those conclusions?

24 A I would generally disagree. Again with the
25 reservation I express that I'm not exactly sure what

1 criticisms apply where.

2 Q Now, let's talk about the more specific sections
3 that Attorney General Mukasey and as I indicated these are
4 also in Mr. Filip's answers refer to, the memos -- first the
5 memo's conclusion that "necessity ~~for~~ self defense may
6 justify a violation of the torture statute. Is it your view
7 that that is an incorrect characterization of the memo or
8 that you disagree with their view?

9 Mr. Johnson. Or something else.

10 Mr. Mincberg. Or something else, yes.

11 Judge Bybee. I am going to generally disagree that
12 necessity or self-defense cannot justify a violation of the
13 torture statute. I think we have described in our memo in
14 the self-defense section the circumstances under which those
15 things might be available. I think we were very careful in
16 couching the language that we were not telling you that those
17 were available and certainly that the Department would honor
18 that, that would have to be taken before a court in a
19 prosecution, it is the only context in which it could arise.

20 BY MR. MINCBERG:

21 Q So you disagree with Attorney General Mukasey and
22 Mr. Filip's conclusion that the memo was incorrect in
23 concluding that necessity or self-defense may justify a
24 violation of the torture statute?

25 A Well, I think that we concluded that necessity and

1 self-defense may be available as an affirmative defense and
2 prosecution under the statute.

3 Q So you would disagree with them on that point?

4 A I think we would say we disagree.

5 Q And then they go on to say -- to represent their
6 view of the memo as suggesting, "The Commander in Chief has
7 constitutional authority to direct acts of torture."

8 First, do you think that that is a fair characterization
9 of the memo, your memo, Bybee Memo 1?

10 A No, I don't think it's correct.

11 Q So they also have in your view misinterpreted the
12 memo?

13 A This is a very, very broad statement and I am not
14 exactly sure where it comes from.

15 Q Okay, but you do believe then that they have
16 disagreed -- misinterpreted the Commander in Chief section?

17 A I'm -- that is not -- I don't think that's an
18 accurate representation of anything that we said.

19 Q Now, given that, so far we have seen Attorney
20 General Mukasey, Deputy Attorney General Filip and your
21 successors Mr. Bradbury and Mr. Goldsmith have in your view
22 misinterpreted the Commander in Chief section of the memo.
23 Is it possible that others in the executive branch, reading
24 your memo, might have misinterpreted it?

25 A I don't know, I can't speak to that.

[Bybee proposed change: from firsthand knowledge]

1 Q Going all right back up to the page referring to
2 the other flaws that Mr. Mukasey and Mr. Filip talk about,
3 they say that among the flaws are the Bybee memo's analysis
4 of severe pain. Do you disagree with their conclusion that
5 that section was either incorrect or inadequately supported?

6 Mr. Johnson. I'm not even sure that's what it says,
7 this was --

8 Mr. Mincberg. Well, it is quite clear that they start
9 out by saying, we agree that important aspects were incorrect
10 or inadequately supported. And then they give some
11 specifics, and one of those specifics is the analysis of
12 severe pain. So my question is do you agree or disagree with
13 the pretty clear conclusion by the Attorney General and the
14 Deputy that the Bybee Memo 1's analysis of severe pain was
15 incorrect or inadequately supported?

16 Mr. Johnson. Here's my problem with the question,
17 Elliot, and I think the Judge can answer it. Do you purport
18 to know a lot of what they meant by severe pain? The
19 analysis^{of} severe pain is a multi-headed, multi-faceted,
20 multi-page analysis. I can't tell from reading this, even if
21 you can, which part of that analysis they are being critical
22 of.

23 Mr. Mincberg. Would you like to give your own response
24 to that or adopt your counsel's?

25 Judge Bybee. Well, I will offer my own response. I

1 have some difficulty in understanding that because he
2 describes this as a section that is flawed. ~~It is the~~
3 ~~previous section that some sections were incorrect or~~
4 ~~inadequately supported~~ I'm not exactly sure what he's
5 referring to here under severe pain. [Bybee proposed change:
Delete]

6 Mr. Mincberg. Well, it's pretty clear that Attorney
7 General Mukasey and Mr. Filip, after we finish parsing the
8 words, are saying that they disagree for one reason or
9 another and what they characterize as Bybee Memo 1's analysis
10 of severe pain.

11 Mr. Johnson. They disagree with something in here.

12 Judge Bybee. I'm not sure what they disagree with. ^

13 BY MR. MINCBERG:

14 Q So you think they actually agree with everything
15 the memo says about the analysis?

16 Mr. Johnson. That's not what he's saying. ^

17 Judge Bybee. I can't answer that question as to whether
18 they agree with everything, or whether they disagree with
19 something, or whether they disagree with an emphasis or
20 whether they disagree with a reading of something. I know
21 what the public criticism of the statute was concerning the
22 using of the HHS statute, went over that with Mr. Schiff
23 earlier today, but this is very difficult for me to know. ^ I
24 understand there has been much public criticism of that
25 section, but I don't know what of that. You are asking me to

[Bybee proposed change: they would accept or
disagree with.]

1 read their minds, and I can't do that.

2 BY MR. MINCBERG:

3 Q Okay.

4 A And they didn't offer any more detail.

5 Q Well, the record will speak for itself on what this
6 letter says and I think what it clearly means, but I take it
7 you would still stand by Bybee Memo 1's analysis of severe
8 pain; is that correct?

9 A What do you mean by our analysis of severe pain?
10 Are you talking about that particular page or are you talking
11 about a whole course of conduct?

12 Q I mean everything in the memo.

13 A We have described that severe pain was a very high
14 threshold, that the pain was akin to the pain accompanying
15 severe physical injury.

16 Q Uh-huh.

17 A The analogies that we drew are very similar to what
18 Congress did later on in the Military Commission Act. I
19 think that the discussion is a fair one and I will stand by
20 it.

21 Q Okay.

22 A Could we have done something different? We might
23 have done something different.

24 Q That's fair enough. That's all I wanted to find
25 out.

1 So is it fair to say that all three of your successors
2 as head of the OLC under the Bush administration, that would
3 be Mr. Levin, Mr. Goldsmith and Mr. Bradbury, Mr. Margolis,
4 Attorney General Mukasey and his Deputy Mark Filip have
5 criticized OLC's work on the interrogation?

6 A It is fair to say they have criticized OLC's work
7 on these memos, yes.

8 Q In your view, other than what you've said here on
9 the record about could have been a little bit clearer on the
10 Commander in Chief power and some other issues, you would
11 still defend those opinions; is that correct?

12 A I would defend -- I would defend the conclusions
13 that we reached here as a whole course of conduct. We went
14 through the legislative history, we went through the CAT
15 ratification agreement, we offered example, ^{stand} we didn't ~~confine~~
16 ~~ourselves~~ to organ failure or death. We tried to offer
17 advice to our client in a number of ways and then applied
18 that very, very carefully and cautiously in the second memo,
19 a memo with which none of these officials disagrees.

20 Q I actually want to get into a few questions
21 relating to that second memo if we could. The second memo on
22 specific techniques, which was called Bybee Memo 2, concluded
23 that with the conditions as described in that memo that the
24 waterboard would not violate the torture statute; is that
25 correct?

1 A Correct.

2 Q Now, the memo does not mention the times in U.S.
3 history when individuals have been prosecuted for various
4 water tortures, including waterboarding, including Federal
5 prosecution of a Texas sheriff in 1984, the court martial of
6 a U.S. soldier, war crimes prosecutions of several Japanese
7 soldiers, at least one civil case under the Torture Victim
8 Protection Act, the Marcos case also describes water torture.
9 You would agree with me that none of these are mentioned in
10 Bybee Memo 2; is that correct?

11 A If you're referring to U.S. v. Lee and the
12 prosecution of U.S. soldiers during World War II, as already
13 mentioned, you mentioned a third example.

14 Q There were war prosecutions for several Japanese
15 soldiers and the Marcos case?

16 A The Marcos case was the third example. The Marcos
17 case is of course referred to in our memo, it is in the
18 appendix.

19 Q Okay.

20 A The other matters, the Lee case and the World War
21 II era prosecutions, are not mentioned in our memo.

22 Q There has been some pretty significant criticism by
23 others that a responsible legal analysis should have not
24 simply ignored these cases but talked about them in analyzing
25 this serious issue. How would you respond to that?

[Bybee proposed change: Mr. Margolis agreed. Also the Office of Legal Counsel later agreed with us and reapproved waterboarding without considering those cases.] 248

1 A I didn't do it the initial research or
2 investigation here, so I don't know what my attorneys saw or
3 what they didn't see here. I cannot speak to everything that
4 my attorneys did in their coverage of this. I was not aware
5 of those cases. I'm not sure as I've reflected, I'm trying
6 to figure out how on earth you would ever find those, where
7 one would even look. But I don't think that any of those
8 cases are relevant. I don't think they would have affected
9 the analysis. ~~In fact, when the Office of Legal Counsel~~
10 ~~reviewed these and considered those matters, it did not~~
11 ~~affect their analysis and they agreed with us~~

12 The second memo was never withdrawn. I want to make
13 sure that's clear.

14 Q And I take it that you think -- explain to me why
15 you think, for example, the case involving the Texas sheriff,
16 the U.S. v. Lee case, is not relevant.

17 Mr. Johnson. If you know the case. I mean you're
18 asking him to say why it is irrelevant.

19 Mr. Mincberg. Well, he just indicated on the record
20 that he thought they were not relevant, so I wanted him to
21 explain. [Bybee proposed change: In that case,
22 Judge Bybee. On the first case it was not under the
23 torture statute because the torture statute wasn't even in
24 existence at that time, in fact, CAT wasn't even in existence
25 at the time. ~~The 1983 section~~ we have deputies and the

[Bybee proposed change: by anyone in the prior administration]

1 court has only described it as some form of water torture.
2 We would have to go into the records in order to figure out
3 what the deputies did because the case itself doesn't really
4 describe what it is. It only describes something as water
5 torture. It is really not helpful because it is in an
6 entirely different context. It is being judged under a
7 different standard, and without further information I think
8 it is very difficult to know whether that would have any
9 bearing on our analysis.

10 BY MR. MINCBERG:

11 Q But let's say you were -- and I know you won't be,
12 but say you're a judge sitting on a case relating to the
13 subject of whether some form of water torture is or is not
14 improper, whether under the -- let's say specifically under
15 the torture statute. Even though cases may have been brought
16 under a different statute or perhaps the technique is exactly
17 the same, wouldn't you as a judge want your law clerk to
18 bring your attention to those other kinds of cases?

19 Mr. Johnson. What makes me nervous is just your
20 phrasing as a judge. Because he is a judge it is not
21 hypothetical and not inconceivable that these issues could
22 arise.

23 Mr. Mincberg. Well, I would think he --

24 Mr. Johnson. That part of the question was rhetorical,
25 I mean I think you can ask it without reference to him

1 sitting as a judge.

2 Mr. Mincberg. Okay. I would think that he would, I
3 assume, recuse himself from the case, but putting that aside.

4 BY MR. MINCBERG:

5 Q As a decision maker, regardless of what kind of a
6 decision maker, trying to evaluate whether a particular kind
7 of use of water in interrogation or water torture was in fact
8 torture under the torture statute, wouldn't you want a law
9 clerk or somebody else to bring to your attention other cases
10 involving the use of water to interrogate prisoners, even if
11 there were distinctions to be drawn?

12 A Well, certainly if there was something useful. Let
13 me be more direct. If somebody came to me and said we found,
14 we found this case out of the 5th Circuit, it is a ~~1983 case~~,
15 it doesn't deal with -- ^{but} it doesn't deal with waterboarding
16 per se that we can tell, [^]they used the term "water torture,"
17 you know, should we cite it or shouldn't we cite it? My
18 inclination would probably be to deal with it. But I don't
19 think it would have affected our analysis. In fact, Mr.
20 Margolis said in reviewing the World War II era cases, which
21 were more on point, and the 5th Circuit case, that these were
22 really quite distinguishable and therefore not relevant to
23 the analysis.

24 Q But you did find that a health benefit statute
25 which seems pretty far afield from torture was something that

1 was relevant to your analysis?

2 Mr. Johnson. Wait a minute. Stop, stop, stop, stop,
3 stop, stop. What's the question?

4 Mr. Mincberg. Is that correct?

5 Mr. Johnson. That was just rhetorical I take it. It is
6 cited -- the health statute is cited in the opinion, so I'm
7 not sure what you're asking.

8 BY MR. MINCBERG:

9 Q Would you agree with your counsel, Judge Bybee?

10 A The health statute is cited, I think it is quite a
11 different context. I think it's quite a different case.

12 Q Let me ask you to take a look at what Senator
13 Sheldon Whitehouse said relating to the subject in tab 22,
14 Document 22 in the Exhibit 1 notebook. It is in the bottom
15 paragraph on page 2. Senator Whitehouse --

16 Mr. Johnson. Hold on one second.

17 Mr. Mincberg. Sure. Off the record.

18 [Discussion off the record.]

19 Mr. Johnson. Go ahead.

20 BY MR. MINCBERG:

21 Q I'm referring now to page 2 of Document 22 where
22 Senator Whitehouse, himself a lawyer and former U.S.
23 Attorney, put the question this way, referring to the Texas
24 case. "How is it that the OLC, the elite legal conscience of
25 DOJ, completely missed a U.S. appeals case on point, a case

1 in which DOJ brought the charges and a case whose prosecuting
2 Assistant U.S. Attorney still in the Department? Is this a
3 failure of legal analysis or something much, much worse?"

4 How would you respond to this statement by Senator
5 Whitehouse?

6 Mr. Johnson. On point, do you think he took into
7 account it is a different law or --

8 Mr. Mincberg. I don't know, I just want to ask Judge --
9 and I'm sure Judge Bybee could probably give that answer all
10 by himself, but I would just like Judge Bybee to respond to
11 Senator Whitehouse..

12 Judge Bybee. Well, I quite disagree it is a case on
13 point and I think Mr. Margolis's own analysis agrees that the
14 case is not on point and wouldn't affect it. But aside from
15 that, Mr. Whitehouse himself gives us an interesting clue,
16 this case was first raised in this article by Mr. Wallach
17 which is in the Columbia Journal of Transnational Law. I
18 believe the date is 2007. My interview with OPR was in 2005.
19 There is no ^{indication} ~~indicate~~ in anything that OPR asked me that OPR
20 was aware of the case.

21 BY MR. MINCBERG:

22 Q Uh-huh.

23 A Nobody else had found this either. And if we found
24 it, it would not have affected the analysis. So I'm quite
25 puzzled that it is a case on point. It is a case of

1 interest, it is a case that we might have included had we
2 seen it, but it does not use the word "waterboard." In fact
3 we could only find -- we actually looked in the databases to
4 see if we could find the term "waterboard" any place in U.S.
5 cases and we couldn't find anything except for a reference to
6 literally a waterboard in Texas.

7 Mr. Johnson. You mean a municipal?

8 Judge Bybee. A municipal water board.

9 BY MR. MINCBERG:

10 Q With a space in between the words.

11 A Right.

12 Q There also have been some -- we talked about the
13 Commander in Chief sections before the criticism by DOJ
14 attorneys. There has also been some criticism by outside
15 experts and I want to ask you to look at the criticism by
16 then Professor Marty Lederman, who is now at OLC and was
17 previously at OLC under both the Bush and Clinton
18 administration. Did he overlap with you, by the way?

19 A Oh, yes, Marty was there for almost the entire time
20 I was there.

21 Q Okay. Turn if you would to exhibit -- Document 23,
22 which is a January 7th, 2005, article and go to the very last
23 page, where he says, and I quote, the 2002 opinion did not
24 even mention the seminal Supreme Court case speaking to the
25 question of statute of limits on the Commander in Chief

1 power, *Youngstown Sheet and Tube Co. v. Sawyer*, nor did the
2 opinion acknowledge that the Constitution gives Congress the
3 powers to define and punish offenses and the law of nations
4 to make rules concerning captures on land and water and to
5 make rules for the government and regulation of the land and
6 naval forces.

7 Let me ask you first, do you think that it is
8 appropriate to determine whether in some circumstances the
9 torture statute could be an unconstitutional intrusion on the
10 President's Commander in Chief power without mentioning
11 Congress's power to make rules for the government and
12 regulation of the land and naval forces?

13 A These -- I believe that these -- that many of these
14 questions were addressed in a prior memo which was referred
15 to in by Bybee 1, that was the transfer memo. We dealt -- it
16 was devoted -- it was a lengthy discussion of the captures on
17 land and water clause, but it also addressed some of these
18 other questions. We could have repeated the analysis from
19 there, but we were dealing with people who had -- who should
20 have been familiar with our -- or would have been familiar
21 with our prior work.

22 Q So just so we're clear here, when you refer to the
23 prior opinion on transfers, you mean Document 33, the
24 March 13th, 2002, memo on the --

25 A Yes.

1 Q -- power to transfer captured terrorists?

2 A Yes.

3 Q Now, the Bybee memo cites, and this is on page 40.
4 of the memo, the Bailey --

5 Mr. Johnson. Hold on just a second, sir.

6 Mr. Johnson. You're talking about Bybee 1?

7 Mr. Mincberg. Yes. Bybee Memo 1.

8 Mr. Johnson. Page 40.

9 Mr. Mincberg. Yes.

10 Mr. Johnson. Okay.

11 BY MR. MINCBERG:

12 Q Well, cites a 1980 Supreme Court decision, I think
13 is the Bailey decision, to support the following point,
14 "Although there is no Federal statute that generally
15 establishes necessity or other justifications as defenses to
16 Federal criminal laws, the Supreme Court has recognized the
17 defense."

18 Do you see that?

19 A Yes.

20 Q Yet just months before the approval of this memo
21 the Supreme Court addressed the necessity issue and in
22 Justice Thomas's opinion for the Court said, "As an initial
23 matter we note that it is an open question whether Federal
24 courts ever have authority to recognize a necessity defense
25 not provided by statute. And if you want to look at it this

1 is the Oakland Cannabis decision that is in Document 24 on
2 pages 5 to 6 of the Exhibit 1 notebook.

3 Mr. Johnson. Your question --

4 Mr. Mincberg. I'm about to ask it.

5 BY MR. MINCBERG:

6 Q If someone gave you as a judge a brief telling you
7 that the Supreme Court had "recognized" a principle, but
8 failed to tell you that just months earlier the Court had
9 expressly declared that principle "an open question, "would
10 you consider that an accurate or a good brief?

11 A I would -- I certainly would have wanted to know
12 about Oakland Cannabis.

13 Q And indeed a brief like that submitted to you could
14 very well be misleading, isn't that right, by not even
15 mentioning the Supreme Court had commented on that just a few
16 months earlier?

17 A Well, it might be, but in this case, Oakland
18 Cannabis was not, again this is -- again Mr. Margolis found
19 that the memo would have been better if it was included. I
20 agree with that. We missed this, I don't know how, but we
21 should have found it.

22 Q Okay.

23 A But I don't think that Oakland Cannabis would have
24 changed the analysis because Justice Thomas hasn't got the
25 votes for the theory. In fact it is actually, I think,

1 really in our favor, because I think it does establish that
2 there is such a defense and that's -- certainly Justice
3 Stevens in his concurring opinion reiterated that, that the
4 Court had recognized it before and the Court did not have the
5 votes to adopt Justice Thomas's theory.

6 Q Despite the fact that the memo did not mention the
7 decision that said this was an open question if a necessity
8 defense was available in a Federal statutory prosecution,
9 you're comfortable with the Bybee Memo 1 conclusion that it
10 appears that under the current circumstances the necessity
11 events could be successfully maintained in response to an
12 allegation of a 234⁰A -- 2340A violation; is that correct.

13 Mr. Johnson. Are you suggesting that Oakland Cannabis
14 is a decision because he just said the opposite?

15 Mr. Mincberg. I'm -- I don't believe I used the word
16 "decision." I'll be happy to restate the question.

17 BY MR. MINCBERG:

18 Q I take it then, Judge Bybee, that you are
19 comfortable that with the conclusion of the Bybee Memo 1
20 that "It appears to us that under the current circumstances
21 the necessity defense could be successfully maintained in
22 response to an allegation of a section 2340A violation",
23 without even mentioning that 2 months earlier there was an
24 opinion in the Supreme Court that had suggested it was a
25 "open question"?

[Bybee proposed change: as the Supreme Court later confirmed]
in the Dixon case in 2006.]

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1 A I have 2 responses to the question, first of all I
2 think I've acknowledged the opinion would have been more
3 complete if we had cited Oakland Cannabis and noted that. My
4 second point is I don't believe that it would have affected
5 our analysis here because I don't think that Oakland Cannabis
6 dismisses the possibility that we may have a self-defense
7 defense. I believe that was established in Bailey and I
8 don't think that Oakland Cannabis undoes that.

9 Q Okay. I want to focus a little bit more on the
10 process that was used to put together the interrogation memos
11 and some bipartisan suggestions that have been made relating
12 to standards for OLC opinions. Then I will go back to that
13 March 2002 memo, and I think we will then be done.

14 Take a look, if you would, at Document 25 in the
15 Exhibit 1 notebook, and this is a memorandum for attorneys of
16 the office, ^{re:} ~~renewable energy~~ best practices for OLC opinions.
17 Have you had a chance to review this?

18 A I have seen the memo.

19 Q Is there anything in it that you disagree with?
20 I'm going to ask you about some specific things.

21 A Well, that's a very -- that's a very general
22 question. As a question of sort of best practices I'm not
23 sure that there's anything in there to disagree with.

24 Q Okay. Take a look at page 2 of the memorandum
25 under soliciting the views of interested agencies, which

1 describe the desirability of seeking the views of agencies in
2 addition to the client agency that have subject matter
3 expertise. And they indicate that, for example, when the
4 question involves interpretation or treaty or matter of
5 foreign relations our practice is to seek the views of the
6 State Department; do you see that?

7 A I do.

8 Q I think we discussed you did do that with respect
9 to what became the January 2002 memorandum in which State
10 disagreed with you, but you nonetheless concluded that the
11 Geneva Convention did not apply to al Qaeda detainees; is
12 that correct?

13 A Uh-huh.

14 Q But in fact the State Department was not consulted
15 with respect to Bybee Memos 1 or 2; is that correct?

16 A That's correct, as far as I know.

17 Q Now.

18 Mr. Johnson. Just on this point, can I interrupt you
19 for just one second? The Congressman who asked this question
20 earlier didn't ask -- you know the OPR explains, the OPR
21 report explains is there some reason guys don't ask, because
22 you leave the impression that Judge Bybee decided not ask the
23 State Department and you know that not to be accurate, and so
24 why don't you ever ask it?

25 Mr. Mincberg. Just Bybee, why don't you answer your

1 counsel's question?

2 Judge Bybee. Well, the OPR report states that John was
3 requested by John Bellinger, who was then a legal advisor to
4 the NSC, that the matter was to be closely held and not
5 shared with the State Department. That would be consistent
6 with the last sentence in the best practices memo which
7 suggests that before a copy of an opinion can be circulated
8 to an agency a request for third party -- I'm sorry, I
9 paraphrased, I should have just read it. "We will not,
10 however, circulate a copy of an opinion request to third
11 party agencies without the prior consent of the requesting
12 agency." ²

13 BY MR. MINCBERG:

14 Q So in other words, the White House essentially,
15 using the term more broadly to include National Security
16 Council, determined they didn't want this to go to the State
17 Department or other --

18 Mr. Johnson. His memory -- he only know what the OPR
19 report says.

20 Judge Bybee. I'm not representing that as information
21 that I'm holding. I am representing that as ^[from] ~~of~~ the OPR
22 reports of what John said about his conversation with
23 Mr. Bellinger.

24 BY MR. MINCBERG:

25 Q And you have no reason to disagree?

1 A I don't have any reason to contradict that or
2 disagree with that. If John Bellinger told us that it was to
3 be closely held and ask that it not shared outside of the
4 client agencies, that's a request that we would honor.

5 Q Now, at page 3 of memorandum, Document 25, under
6 the heading "Secondary Review of Draft Opinions," it refers
7 to the fact that the desired and general practice is to
8 actually circulate draft opinions to the Office of the
9 Attorney General and the Office of the Deputy Attorney
10 General for review and comment, do you see that?

11 A No.

12 Mr. Johnson. Can you just read or point --

13 Mr. Mincberg. It is in the second paragraph under
14 secondary review.

15 Judge Bybee. Here we go.

16 BY MR. MINCBERG:

17 Q Our general practice is to circulate draft opinions
18 to the Office of the Attorney General and the Office of the
19 Deputy Attorney General for review and comment; is that
20 correct?

21 A That's what I'm reading, yes.

22 Q Now, I think you indicated before that Mr. Ciongoli
23 actually saw a draft of the memo. But at least according to
24 what we have seen from the OPR report and elsewhere, there is
25 no indication that a copy was ever given to the Deputy

1 Attorney General's office. Do you have any information that
2 contradicts that?

3 A I don't have any information that contradicts that.
4 I believe that there are statements in the OPR report that
5 suggest that the Deputy Attorney General's office had an
6 opportunity to review it. I can't supply any information.

7 Q Let me just say the only thing we could find, and I
8 want to be clear on this one for the record, is on page 60 of
9 the OPR report, which is Document 5, footnote 59, referring
10 to discussions with Mr. Ashcroft and Mr. Ciongoli on the
11 Bybee Memo, the footnote -- let me wait until you're there.

12 Mr. Johnson. I'm slow, sorry.

13 Mr. Mincberg. No, that's all right.

14 BY MR. MINCBERG:

15 Q Page 60, footnote 59. It says, "According to ^{you}~~you~~
16 he also briefed then deputy Attorney General Larry Thompson
17 about the memorandum at some point." But I did not see nor
18 did any of my colleagues see a reference to an actual copy
19 being circulated from the Deputy. Do you have any
20 information in addition to this footnote?

21 A I can't shed any light on that.

22 Q Okay.

23 A If -- I'll speak to my meeting with the Attorney
24 General. If the Attorney General had said I would like to
25 see the memorandum before it goes out, there would have been

1 no question.

2 Q Of course.

3 A That we could have delivered a copy to the Attorney
4 General.

5 Q Now, I want you to take a look at Document 26 in
6 the notebook, which is a document entitled "Principles to
7 Guide the Office" --

8 Mr. Johnson. Can we just before you change topics, can
9 we help you a little bit. Judge Bybee testified he doesn't
10 know, so we're just reading the OPR report the same as
11 everybody else does. But on page 39 it says at that point
12 the Attorney General decided that access would be limited to
13 Attorney General Ashcroft, Ciongoli, Deputy Attorney General
14 Larry Thompson, AAG Bybee, Yoo and OLC Deputy Patrick
15 Philbin.

16 Mr. Mincberg. Right, but I did not understand that
17 reference to mean that all these people actually got memos.

18 Mr. Johnson. Somebody else would have to answer that
19 question.

20 Mr. Mincberg. Rather, my understanding was that by
21 access the reference was access to information about the
22 assignment.

23 BY MR. MINCBERG:

24 Q Does that make sense, Judge Bybee?

25 A I can't -- I can't add anything more than what's

1 there²

2 Q Fair enough, we've got the record and it will speak
3 for itself.

4 Now going back to Document 26 entitled "Principles to
5 Guide the Office of Legal Counsel," the document explains it
6 was drafted by a bipartisan group of former attorneys in OLC
7 to set forth principles and practices based in large part on
8 the longstanding practices of the AG and the OLC. Have you
9 seen this document before?

10 A Yes.

11 Q Let's start with the first principle at the bottom
12 of page -- well actually before we get to that, am I correct,
13 I'm paraphrasing a little bit what you said to Congressman
14 Schiff but I'm trying to look at some other text, that you
15 have stated that John, referring to John Yoo, was a vigorous
16 defender of executive powers but that was also my
17 responsibility as head of the Office of Legal Counsel, was to
18 be a vigorous defender of the President's prerogative.

19 A I'm sorry, you're quoting from something? Are you
20 quoting from the record?

21 Q Let's go off --

22 Mr. Mincberg. Let's go off the record.

23 [Discussion off the record.]

24 BY MR. MINCBERG:

25 Q I've read it for the record already. So --

1 A Uh-huh, okay.

2 Mr. Johnson. Hold on just one second.

3 [Discussion off the record.]

4 BY MR. MINCBERG:

5 Q Let me rephrase it. After Justice's indication
6 that they don't object to this, we won't physically put this
7 entire document in the record, but there was an exchange that
8 you had with OPR that I want to quote and I'll quote the full
9 question and answer and just ask you to affirm its accuracy.

10 You were asked, referring to Mr. Yoo, well, how about
11 the time he was at OLC, did you feel he had a radical point
12 of view on certain issues like executive privilege --

13 Answer: Referring to ^{Yoo}~~you~~ -- no, I wouldn't describe it
14 as a radical point of view.

15 Question: Okay.

16 Answer: And I think John, I want to be sure that I
17 answer the question fully and fairly, John was a vigorous
18 defender of executive powers, but that was also my
19 responsibility as head of the Office of Legal Counsel, was to
20 be a vigorous defenders of President's prerogative.

21 Is that an accurate statement?

22 A Yes, I believe it to be.

23 Q Now, returning back to Document 26, the first
24 principle in these bipartisan principles to guide the Office
25 of Legal Counsel states that when providing legal advice to

1 guide contemplated executive action OLC should provide an
2 accurate and honest appraisal of applicable law, even if that
3 advice will constrain the administration's pursuit of desired
4 policies. The advocacy modeling of lawyering, in which
5 lawyers craft merely plausible legal arguments to support
6 their clients' desired actions, inadequately promotes the
7 President's constitutional obligation to ensure the legality
8 of executive action.

9 Do you believe that this principle number 1 was fully
10 and completely complied with in producing Bybee Memos 1 and
11 2?

12 Mr. Johnson. Well, it didn't exist at the time of
13 Bybee --

14 Mr. Mincberg. I understand that.

15 BY MR. MINCBERG:

16 Q Assuming that the principle as the document states
17 was derived from prior practices, do you contend that this
18 principle was fully and completely complied with in producing
19 Bybee Memos 1 and 2?

20 A Let me unpack it just a little bit. OLC should
21 provide an accurate and honest appraisal of applicable law.
22 I believe we provided an accurate and honest appraisal of
23 applicable law. The advocacy model of lawyering in which
24 lawyers craft merely plausible legal arguments, I do not
25 believe that we provided merely plausible legal arguments.

1 We offered our best view of what the law provided and advised
2 our clients accordingly.

3 Q Well, we'll let the record speak on that subject as
4 well as the views of others at OLC, but I appreciate your
5 answer, Judge Bybee.

6 Now, let me ask you to turn to page 4.

7 Mr. Johnson. The same document?

8 Mr. Mincberg. Of the same document.

9 BY MR. MINCBERG:

10 Q Principle 6, that says OLC should publicly disclose
11 its written opinions in a timely manner absent strong reasons
12 for delay or nondisclosure.

13 Now obviously, as you have indicated to us before, one
14 of the two Bybee memos was classified, the other I believe
15 was -- Bybee Memo 1 was not; is that correct?

16 A I'm sorry, it was not -- it was not classified,
17 that's correct.

18 Q I know that arguments were made at the time by the
19 client agencies that the opinions should be kept
20 confidential. As we have seen, they were not disclosed for a
21 number of years and making even a legal analysis available
22 has certainly allowed others to help identify flaws in the
23 opinions.

24 In your view, would it have been a desirable thing to
25 have made all or part of Bybee Memos 1 and 2 more publicly

1 available prior to when they were?

2 A Do you have a particular time frame? Are you
3 talking about sort of contemporaneous with the issuance of
4 Bybee 1.

5 Q Earlier than exactly happened?

6 A I don't know whether -- that's a very subjective
7 kind of call. I don't have any way of assessing that.

8 Q Okay. Some would certainly argue that some of the
9 factors that we talked about, the members and others, may
10 have contributed in some ways to what other Bush DOJ
11 attorneys have regarded as flaws or inadequacies in the
12 opinions. Is there anything else that you would attribute
13 those at least what others have contended are flaws and
14 inadequacies too?

15 Mr. Johnson. The only reason I'm interrupting is my
16 brain shut off in the middle of the question. Could I ask
17 you to read it back to me, please.

18 [The reporter read the record as requested.]

19 Mr. Mincberg. Would you like me to rephrase it?

20 Judge Bybee. I would.

21 BY MR. MINCBERG:

22 Q There have been contentions which I won't rehearse
23 with you here that some of what many have contended are
24 problems in the opinions are attributable to some of the
25 processes that we've discussed, but my question to you is a

1 different one. Is there anything -- you yourself have
2 acknowledged that there are some areas where you wish the
3 opinions would have done more, could have been better. And
4 certainly we have seen that a number of Bush Justice
5 Department attorneys have criticized what they have called,
6 and I know you haven't agreed with, significant flaws or
7 errors in judgment. Looking back, to what would you a
8 tribute those to?

9 Mr. Johnson. Assuming he agrees that there were --

10 Mr. Mincberg. Right. And he can go as far as he wants
11 with that.

12 Judge Bybee. To what would I attribute any flaws that I
13 see?

14 BY MR. MINCBERG:

15 Q Uh-huh.

16 A Well, let me go back to the one we discussed most
17 recently, the omission of Oakland Cannabis. I have no idea
18 why that was missed, it should have been there. I've
19 explained to you why I think it wasn't relevant, but I simply
20 can't explain that. With respect to the section that has --
21 that I have said is the one section that I wish I had had an
22 opportunity -- I wish had I done more with, the Commander in
23 Chief section, this section, as the OPR report discloses, was
24 drafted a little later in the process and I wish that I had
25 had maybe a little more time to think about that one before I

[Bybee proposed change: I do not recall considering that approach at the time. I thought the memo was correct and should be issued in time to meet the client's deadline.] 270

1 shipped it out.¹⁰ or I could have done something different. As
2 a managerial matter, I could have called the client and said
3 is it okay if I cut this one and do this one in a separate
4 memo and do it at a later date. That would have been a
5 managerial kind of thing and would have given us more time to
6 sort of think through some things and issue the longer memo
7 that I thought perhaps was deserving without having it
8 overshadow anything that was in the opinion. So there's a
9 couple of suggestions.

10 Q Very good.

11 Now I probably want to go back to the document we had
12 begun talking about earlier, Document 33 in Exhibit 1
13 notebook, which you've referred to, the March 13th, 2002,
14 opinion. And I had just asked you when and how did you learn
15 about the request that led to the writing of this. How would
16 you answer that?

17 A I don't recall. It's been -- that's been more than
18 8 years.

19 Q Do you recall in the course of the work on this
20 memo who you did communicate with, either orally or in
21 writing?

22 A No.

23 Q I presume Professor Yoo would have been one of
24 those people?

25 A Oh, certainly Professor Yoo.

[Bybee proposed change: delete]

1 Q You don't recall anything about the context for the
2 request, what particular things the administration was
3 thinking about doing or not doing?

4 A No, we had any number of questions on my desk about
5 terrorism, in addition to all of OLC sort of regular work.

6 So, no, I'm sorry I can't reconstruct it, I can't as I'm
7 sitting here. ~~It didn't occur to me until earlier today~~
8 I'm not even sure I can tell you who the attorney adviser was
9 who worked on this. I just don't recall.

10 Q Do you recall whether there was a request with
11 regard to a particular suspect or suspects?

12 A I don't know.

13 Q Now you've --

14 A I want to say I don't recall.

15 Q Right, right. You have already explained that
16 Mr. Yoo handled communications with the White House and the
17 CIA for the other memos that we've discussed. Was this memo
18 handled the same way in that respect with Mr. Yoo being the
19 person --

20 A I don't -- I can't say. I don't know, I don't
21 know. I don't remember when this matter would have been
22 entered. For all I know it could have been entered before I
23 became Assistant Attorney General so I just can't -- I don't
24 have any recollection and can't help you on that one.

25 Q So you don't recall even when Mr. Yoo worked on

1 this?

2 A No, I'm confident that Mr. Yoo worked on this, but
3 I don't recall at what point this thing would have been
4 opened as a matter, it possibly was opened even before I
5 became Assistant Attorney General, which has been only just a
6 couple months before this.

7 Q In any event, whether it was Mr. Yoo or not you
8 were not the person that was involved in communications with
9 the client, getting the request, et cetera, on this project;
10 is that correct, as best you can --

11 A I don't recall, but I don't have any affirmative
12 ~~evidence~~ ^{recollection} of talking with a client about this one.

13 Mr. Johnson. Elliot, just before you ask your next
14 question or maybe there isn't a next question. If you -- he
15 obviously doesn't have much recollection around this. If you
16 all have any documents or information that would refresh his
17 recollection.

18 Mr. Mincberg. No, I'm happy to state on the record that
19 as far as we know there are really not much. I'm not not
20 set -- I'm leading to other questions.

21 Mr. Johnson. No, I didn't think you were, I was
22 offering to have them.

23 BY MR. MINCBERG:

24 Q But let me ask if you know, and I realize your
25 recollection is not crystal clear on this, other than

1 attorneys within OLC, do you know who, if anyone else, was
2 consulted on this memo or saw drafts of the memo?

3 A No, I don't.

4 Q Do you know whether the State Department was
5 consulted on the memo or saw drafts?

6 A I don't know. I haven't gotten much really to
7 contribute, I'm sorry.

8 Q Do you recall as with the -- I'm sorry, let me back
9 up. We established before that according to the OPR report
10 there was a determination from the White House that there
11 should not be consultation with other agencies on the
12 interrogation memos. Do you recall whether there was a
13 similar --

14 A Embargo.

15 Q -- edict or embargo with respect to this memo?

16 A No, I don't have any recollection.

17 Q Now, turn if you would to page 34 of the memo.
18 I'll state for the record for some reason that I can't quite
19 figure out it is a bit jumbled. It is in the back pocket.

20 I want to direct your attention to the section at the
21 very bottom under "Conclusion." And you see that it says
22 there that the conclusion is that the President as Commander
23 in Chief and Chief Executive has "plenary constitutional
24 power to detain and transfer" captured terror suspects?

25 A You're talking about the first sentence?

1 Q Yes.

2 A Yes.

3 Q But if we go back to Document No. 17, which is
4 Mr. Bradbury's January 15th, 2009, memo and go to the top of
5 page 2, there is a section there that starts Congressional
6 authority over captured enemy combatants, and a number of
7 memos are listed, the very first one being this very memo,
8 the March 13th, 2002 memo.

9 Mr. Johnson. I've lost a page.

10 Mr. Mincberg. Page 2?

11 Mr. Johnson. I'm sorry, say it again because I --

12 BY MR. MINCBERG:

13 Q Looking at page 2 of Document No. 17,
14 Mr. Bradbury's memo under Congressional authority over
15 captured enemy combatants, there's a paragraph that discusses
16 in summary portion a number of memos. Am I correct that the
17 first of those memos is this same memo we've been looking at
18 the March 13th, 2002, memo?

19 A Yes.

20 Q And am I correct that Mr. Bradbury states at the
21 top of page 2 that the "broad assertion of the President's
22 Commander in Chief power that would deny Congress any role in
23 regulating the detention, interrogation, prosecution and
24 transfer of enemy combatants." As included in the
25 March 13th, among other memos, "does not reflect the current

1 views the OLC." Is that correct?

2 A Yes.

3 Mr. Johnson. As long as this does reflect the current
4 views of OLC.

5 BY MR. MINCBERG:

6 Q In light of that would you still stand by the
7 analysis, conclusions in the March 13th, 2002, memo?

8 Mr. Johnson. Let me say before you answer that, I want
9 you to answer the question. This is, Elliot, a little beyond
10 the scope of what we agreed with you about, we thought we
11 were talking about interrogation memos. So Judge Bybee can
12 give us best answer but he has not had the opportunity to be
13 prepared.

14 Mr. Mincberg. I will just state for the record that we
15 do think that it does relate because it is very clear and the
16 concerns are that the transfers to which we're referring were
17 done in large part for purposes of interrogation, but that's
18 just lawyer talk. Let's just here what Judge --

19 Mr. Johnson. I mean, just so that I'm clear, our letter
20 refers to an interrogation memo, this isn't one of them,
21 that's why I'm saying --

22 Mr. Mincberg. I understand that. I should also point
23 out that Judge Bybee himself in part, in talking about the
24 Commander in Chief section of one of the memos which he
25 talked about, as I recall said that one of the reasons they

1 didn't get into some discussions was that they had already
2 done it in this very memo. So with all that lawyer talk.

3 Mr. Johnson. My own client is trying to tell me to shut
4 up, why don't I shut up and let him answer the question?

5 Judge Bybee. I'd like to go ahead and answer the
6 question. I have not reviewed this memo in great detail
7 recently and I know that Mr. Bradbury disagreed with one
8 particular section on here, and the disagreement is really
9 over how to read the historical record and in particular
10 there is a Brown case that's a very, very old case. I have
11 not looked at the Brown case in a long, long time. And I
12 don't know whether Mr. Bradbury has the better of that
13 argument or whether Mr. Yoo has the better of that argument
14 in the way that we wrote it and the way that I signed it.

15 I will say this in the conditional, if I thought that
16 Mr. Bradbury was right, then it probably would affect my
17 analysis of other things, but I haven't undertaken an
18 assessments of who is correct in that. There's a great deal
19 of historical documentation provided in this memo.
20 Mr. Bradbury read something differently, and I haven't tried
21 to evaluate and decide whether Mr. Bradbury would persuade me
22 to think differently today.

23 Q Fair enough. Let me take just a moment, if I can,
24 to consult with my colleagues and I think we may be done and
25 will turn it over to Mr. Goodlatte.

1 [Discussion off the record.]

2 Mr. Mincberg. There are no further questions from -- on
3 behalf of the committee majority. So I'll turn the
4 questioning over to Mr. Goodlatte for committee Republicans.

5 Mr. Johnson. While you were conferring we had suggested
6 a short break.

7 Mr. Mincberg. Oh, sure, that would be fine.

8 [Recess.]

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1 RPTS DOTZLER

2 DCMN BURRELL

3 [5:35 p.m.]

4 EXAMINATION

5 BY MR. GOODLATTE:

6 Q I apologize, Judge Bybee, it has been a long time,
7 and I appreciate your patience in working through all of the
8 questions that the majority has. On the minority side, we
9 just have a few questions for you.

10 Was your confirmation proceeding the first time an
11 attorney in the executive branch had been considered for the
12 Federal bench in the Senate?

13 A No. There had been many executive officials who
14 have been nominated and confirmed.

15 Q In the wake of the September 11 attacks, Congress's
16 attention was heavily focused on the war on terror, as was
17 the administration's.

18 Is it reasonable to assume that the Senate would know
19 that the Justice Department was looking into the tools
20 necessary to adequately conduct the war on terror?

21 A I am sure they were aware of that.

22 Q Would the Senate have had common knowledge that you
23 as Assistant Attorney General for the Office of Legal Counsel
24 could be working on projects related to the war on terror?

25 A Yes.

1 Q Is it standard practice for nominees to the Federal
2 bench who happen to be attorneys within the executive branch
3 to proactively turn over all memos he or she had authored
4 while employed by the executive branch?

5 A Not to the best of my knowledge.

6 Q That could be a substantial amount of memos.

7 If the Senate had asked that the advice you had given to
8 executive agencies regarding the war on terror, including the
9 legality of interrogation methods, would you have had the
10 authority to provide that information to the Senate?

11 A No.

12 Mr. Goodlatte. Mrs. Burton, can you confirm that?

13 Ms. Burton. That is correct.

14 Mr. Goodlatte. Ms. Burton, can you also confirm that
15 you are present today to protect privileged information?

16 Ms. Burton. Well, I am here today to be as helpful as I
17 can be, and to the extent that executive branch
18 confidentiality interests are implicated, yes, I am here to
19 discuss them.

20 BY MR. GOODLATTE:

21 Q Judge Bybee, if the Senate had asked and been
22 denied access to any memos, would the Senate have had any
23 recourse?

24 A Yes. They would have. They could have declined to
25 confirm me.

[Bybee proposed change: particularly in traditionally non-justiciable areas, where there was little judicial precedent to inform our analysis.] 280

1 Q Or delay the nomination?

2 A Or delay the nomination.

3 Q Are you ethically bound to honor your clients'
4 assertions of privilege?

5 A Yes. I would have had no authority on my own to
6 turn over documents if they had been requested by the Senate.

7 Q In response to earlier questions about what you
8 described as an area of caution regarding nonjusticiable
9 issues the Office of Legal Counsel might confront, can you
10 tell us what you meant by that?

11 A I think this relates to the conversation I was
12 having with Congressman Schiff, and I described that when I
13 approach questions in an area in which there was little legal
14 guidance for us, aside from the Constitution and historical
15 practices, that I would approach those areas with reluctance.
16 And I think I used the term "caution" several times, and I
17 think Congressman Schiff may have taken that differently than
18 I intended. I would be reluctant to give away the
19 prerogatives of the President in such a situation where there
20 was some question whether a power should be exercised by the
21 President or whether it was committed to the Congress,

22 Q In Document No. 26 in the binder prepared by the
23 majority entitled "Principles to Guide the Office of Legal
24 Counsel," dated December 21, 2004, do you have that?

25 A Yes.

1 Q Are you familiar with principle number 4? It says,
2 "OLC's legal analyses, and its processes for reaching legal
3 determinations, should not simply mirror those of the Federal
4 courts, but also should reflect the institutional traditions
5 and competencies of the executive branch as well as the views
6 of the President who currently holds office."

7 Do you agree with this principle?

8 A I do agree with that principle.

9 Q Judge Bybee, is there anything else you want to say
10 before the conclusion of this interview today?

11 A It has been a long day, and I appreciate the
12 patience of all of those who have asked me questions. I have
13 tried to cooperate, and I hope I have been clear in my
14 answers. I hope I will have an opportunity to review the
15 transcript because I would like to be able to offer
16 clarifying comments if I think something was not what I
17 intended to convey.

18 Q I think that is the tradition of the committee.

19 Mr. Mincberg. More than the tradition. Chairman
20 Conyers specifically agreed in Exhibit 1 of the notebook that
21 Judge Bybee and his counsel would have 30 days to review and
22 offer any corrections before anything is made public.

23 Mr. Goodlatte. I think that is good policy.

24 There are no Democratic members present. Can I ask you,
25 Elliot, if you or other staff here have anything else you

1 want to raise while we still have Judge Bybee here?

2 Mr. Mincberg. Judge Bybee, we appreciate very much your
3 time, and based on the consultations we have had with our
4 Democratic members, a number of whom were here today, I don't
5 think we have any further questions at this point.

6 Mr. Goodlatte. Thank you. Those are all of the
7 questions that I have.

8 Mr. Mincberg. Judge Bybee, on behalf of the majority,
9 thank you again for coming here.

10 [Whereupon, at 5:45 p.m., the interview was concluded.]

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July 1, 2010

The Honorable John Conyers, Jr.
Chairman
U.S. House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

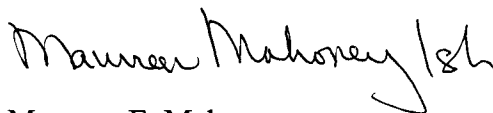
Dear Chairman Conyers:

As agreed, enclosed is an errata sheet listing Judge Bybee's corrections to the transcript of his May 26, 2010 interview with the House Judiciary Committee. The corrections include edits for transcription errors, grammatical reformulations, and other clarifying remarks. To ensure that the reader is fully informed, I propose that the transcript be annotated to reference the errata sheet attached at the end.

In addition, I note that the disagreement with John Yoo that Judge Bybee described on pages 230-231 of the interview transcript pertained to advice Judge Bybee provided informally to an agency about the application of the Establishment Clause to particular actions being considered by the agency. As Judge Bybee indicated, he recalled that in response to an off-the-cuff question from an agency attorney, Mr. Yoo gave an answer that was contrary to the advice Judge Bybee was providing. That is, Mr. Yoo thought that the Establishment Clause did not limit the agency's actions, based upon his view of presidential powers. Judge Bybee advised Mr. Yoo that he disagreed with Mr. Yoo's view, based upon his research, and he conveyed that position to the agency. No written opinion was provided by OLC. This matter did not pertain to Congressional authority, or to the interrogation, detention, or treatment of individuals detained by the federal government.

Please let me know if you have any questions.

Sincerely,



Maureen E. Mahoney
of LATHAM & WATKINS LLP

cc: The Honorable Lamar S. Smith, Ranking Member

Errata Sheet

p. 15, line 15:	Change third <you> to <Yoo>
p. 17, line 12:	Change <would be that interjected with the project> to <would have been interjected into the project>
p. 19, line 12:	Add <outside the Department of Justice> after < I don't recall having any specific conversations>
p. 31, line 25:	Change <OLC> to <OPR>
p. 37, line 18:	Change <know> to <recall>
p. 43, line 19-20:	Change <straight> to <simple>
p. 56, line 24:	Add <have to> after <not>
p. 59, lines 2-3:	Change <advise> to <advice> Change <to matter to that White House> to <to those matters to the White House>
p. 63, lines 22-23:	Change <what that --> to <.>
p. 83, lines 20-21:	Change <detainees, such as Abu Zubaydah, were going to be> to <detainee, Abu Zubaydah, could be>
p. 92, lines 10-11:	change <I don't recognize in this that those are either of those .> to <I don't recognize in this that those two techniques are either of those things you have referred to in the ICRC report.>
p. 92, line 13:	change <one of those two things> to <either an insult slap or walling>
p. 96, lines 12, 15:	Add <"> before <You have orally> and add <"> after <resulted.>
p. 97, lines 12, 17:	Add <"> before <You have also> and change <hours.> to <hours"-->
p. 98, lines 10-15:	Add <"> before <You have indicated> and add <"> after <occurred.>
p. 98, lines 18-19:	Add <"> before <In fact> Add <after one night's sleep> after <normal> Add <"> after <.>
p. 99, line 22-23:	change <suffer> to <constitute> change <must be prolonged> to <must cause prolonged mental harm>
p. 100, line 19:	Change "prolonged mental pain" to "prolonged mental harm"

p. 101, line 1:	Change <it must be prolonged> to <there must be prolonged harm>
p. 102, lines 9:	Change <have done> to <know>
p. 104, lines 8-9:	Change <on the last page> to <on both the first and the last page>
p. 105, lines 14-15:	Change answer to <That's right. If the assumptions that we were given changed, they were not authorized specifically.>
p. 107, lines 7-8:	Change <that the techniques,> to <of the techniques memo,>
p. 108, line 9:	Add <five times> after <waterboarded>
p. 108, lines 15-17:	Change <question was that we were described the SERE program> to <question. The SERE program was described to us>
p. 110, line 18:	Change <reflection> to <reflex>
p. 110, line 25:	Change <mental response found> to <mental response is found>
p. 114, lines 4-5:	Add <"> before <the waterboard>
p. 115, line 25:	Change <my> to <any>
p. 124, line 12:	Add <officials> after <Justice Department>
p. 125, lines 19-20:	Change <the OPR report says because the drafts were apparently taken to him by Mr. Yoo, my deputy?> to <the OPR report says. It says that the drafts were taken to him by Mr. Yoo, my deputy.>
p. 125, line 21:	Delete <A That is right.>
p. 127, lines 20-21:	Delete <. They were not>
p. 140, line 4:	Change <?> to <.>
p. 145, line 3:	Change <offing> to <offering>
p. 145, line 5:	Add <express> between <him> and <regret>
p. 147, lines 3-4:	Add <in order to alleviate public misunderstanding"> after <been>
p. 147, lines 12-13:	Add < As to whether> before <I> and change <.> to <?>
p. 149, line 11:	Change <some deadline> to <a deadline>
p. 151, line 16:	Change <them that> to <them -- that>
p. 152, line 1:	Add <firsthand> in between <any> and <factual>
p. 153, lines 22-23:	Change <from John Rizzo to Steven Bradbury> to <from Steven Bradbury to John Rizzo>
p. 156, line 24:	Change <answers> to <questions>

p. 159, line 2:	Change <be> to <require>
p. 161, line 13-15:	Delete everything after <our OLC opinions,> and add <but this was a question that would come up less often in a justiciable context.>
p. 163, lines 14-16:	Delete last two sentences, ending answer with <interpreting the Constitution.>
p. 164, lines 16-18:	Change <the characterization that Mr. Margolis is holding> to <your characterization of Mr. Margolis's holding>
p. 167, lines 1-2:	Change <consider> to <address> Add <in the memo> after <competing views>
p. 172, lines 12-13:	Change <I don't know the> to <historical> Add <guy> after <concepts>
p. 174, lines 21-25:	Change <Overstating the uncertainty of its conclusions, there is one other area in which, I think> to <There is one other area in which, as noted>
p. 177, line 12:	Add <often> before <non-justiciable>
p. 182, line 21:	Change <by a concurring opinion that was taken by> to <in a concurring opinion that favored the approach taken by>
p. 186, line 5:	Change <great deal of respect.> to <great deal of respect for them.>
p. 186, line 7:	Change <I've ever meet> to <we've ever met>
p. 189, line 16:	Change <Presidential> to <precedential>
p. 192, line 3:	Change <I'm not> to <OLC is not> Change <I cannot -- I cannot> to <OLC cannot>
p. 199, lines 18-19:	Change <You are asking, then, now, about the techniques memo, about those things once we applied it> to <Are you asking about the techniques memo, about how we applied it>
p. 200, line 4:	Add after <on that one.>: <That is, they reauthorized essentially the same techniques.>
p. 203, line 12-13:	Change <he made the point that simply different lawyers can agree on different things but that the Third Circuit> to <he made the point that, frequently, different lawyers will disagree with each other over different matters. Here, the Third Circuit>
p. 205, line 4:	Change <in> to <on>

p. 210, line 21:	Change <looking up> to <reading>
p. 212, line 24:	Change <the torture statute> to <the application of the torture statute>
p. 214, line 19:	Change <Any > to <ANY>
p. 216, lines 24-25, to p. 217, line 1:	Change <. And> to <and> Change <-- might have some effort to regulate, of course.> to <can regulate prisoners as captures.>
p. 218, lines 1-2:	Change <for a fact> to <from firsthand knowledge>
p. 218, line 13:	Change <He> to <Mr. Goldsmith>
p. 219, lines 13-14:	Add <...> before <Unnecessary>
p. 223, line 20:	Add <attorney> after <anonymous>
p. 230, lines 21-22:	Change <in which I believe> to <demonstrating>
p. 234, lines 21-23:	Change <My principal disagreements with John, they are I don't think> to <I do not think my principal disagreements with John>
p. 237, line 13:	Add <about> after <worried>
p. 241, line 5:	Change <for> to <or>
p. 242, line 25:	Add <from firsthand knowledge> after <I can't speak to that>
p. 243, lines 19:	Add <of> before <severe pain>
p. 244, lines 2-4:	Delete <It is the previous section that some sections were incorrect or inadequately supported.>
p. 244, line 12:	Change <?> to <.>
p. 244, line 16:	Change <?> to <.>
p. 244, line 23:	Add <what Attorney General Mukasey and Mr. Filip were thinking> after <for me to know>
p. 244, line 25:	add <they would accept or disagree with> after <what of that>
p. 246, lines 15-16:	Change <we offered example, we didn't confine ourselves to> to <we offered examples, and we didn't limit torture to>
p. 248, line 8 9-11:	Change <In fact, when the Office of Legal Counsel reviewed these and considered those matters, it did not affect their analysis and they agreed with us.> to <Mr. Margolis agreed. Also, the Office of Legal Counsel later agreed with us and reapproved waterboarding without considering those cases.>

p. 248, line 12:	Add <by anyone in the prior administration> after <withdrawn>
p. 248, line 25:	Change <The 1983 section,> to <In that case, involving 18 U.S.C. sections 241 and 242,>
p. 250, line 14:	Change “1983 case” to “case under 18 U.S.C. sections 241 and 242”
p. 250, line 16:	Add <but> before <they> and change second <,> to <.>
p. 250, line 21:	Add <,> after <case>
p. 252, line 19:	Change <indicate> to <indication>
p. 252, line 25:	Add <at the notion> after <puzzled>
p. 253, line 6:	Change <waterboard> to <water board>
p. 257, line 12:	Change <234A> to <2340>
p. 257, lines 22-23:	Move quotation marks from line 23 to end of line 22.
p. 258, line 8:	Add to the end of the sentence: <, as the Supreme Court later confirmed in the <i>Dixon</i> case in 2006>
p. 258, line 16:	Change “renewable energy” to “re:”
p. 260, lines 9-12:	Add <“> before <We will> Change <?> to <.”>
p. 260, line 21:	Change <of> to <from>
p. 262, line 15:	Change <you> to <Yoo>
p. 264, line 1:	Change <?> to <.>
p. 265, line 13:	Change <you> to <Yoo>
p. 270, line 1:	Change <out or I> to <out. Or, I>
p. 270, line 9:	Add to end of paragraph: <I do not recall considering that approach at the time. I thought the memo was correct and should be issued in time to meet the client’s deadline.>
p. 271, line 7:	Delete <It didn’t occur to me until earlier today.>
p. 272, line 12:	Change <evidence> to <recollection>
p. 280, line 21:	Delete <.> after <Congress> and add at the end of the sentence <, particularly in traditionally non-justiciable areas, where there was little judicial precedent to inform our analysis.>