

## A Torture Report Could Spell Big Trouble For Bush Lawyers



by [Michael Isikoff \(/authors/michael-isikoff.html\)](/authors/michael-isikoff.html) February 14, 2009

An internal Justice Department report on the conduct of senior lawyers who approved waterboarding and other harsh interrogation tactics is causing anxiety among former Bush administration officials. H. Marshall Jarrett, chief of the department's ethics watchdog unit, the Office of Professional Responsibility (OPR), confirmed last year he was investigating whether the legal advice in crucial interrogation memos "was consistent with the professional standards that apply to Department of Justice attorneys." According to two knowledgeable sources who asked not to be identified discussing sensitive matters, a draft of the report was submitted in the final weeks of the Bush administration. It sharply criticized the legal work of two former top officials—Jay Bybee and John Yoo—as well as that of Steven Bradbury, who was chief of the Office of Legal Counsel (OLC) at the time the report was submitted, the sources said. (Bybee, Yoo and Bradbury did not respond to multiple requests for comment.)

But then—Attorney General Michael Mukasey and his deputy, Mark Filip, strongly objected to the draft, according to the sources. Filip wanted the report to include responses from all three principals, said one of the sources, a former top Bush administration lawyer. (Mukasey could not be reached; his former chief of staff did not respond to requests for comment. Filip also did not return a phone message.) OPR is now seeking to include the responses before a final version is presented to Attorney General Eric Holder Jr. "The matter is under review," said Justice spokesman Matthew Miller.

If Holder accepts the OPR findings, the report could be forwarded to state bar associations for possible disciplinary action. But some former Bush officials are furious about the OPR's initial findings and question the premise of the probe. "OPR is not competent to judge [the opinions by Justice attorneys]. They're not constitutional scholars," said the former Bush lawyer. Mukasey, in speeches before he left, decried the second-guessing of Justice lawyers who, acting under "almost unimaginable pressure" after 9/11, offered "their best judgment of what the law required."

But the OPR probe began after Jack Goldsmith, a Bush appointee who took over OLC in 2003, protested the legal arguments made in the memos. Goldsmith resigned the following year after withdrawing the memos, and later wrote that he was "astonished" by the "deeply flawed" and "sloppily reasoned" legal analysis in the memos by Yoo and Bybee, including their assertion (challenged by many scholars) that the president could unilaterally disregard a law passed by Congress banning torture.

OPR investigators focused on whether the memo's authors deliberately slanted their legal advice to provide the White House with the conclusions it wanted, according to three former Bush lawyers who asked not to be identified discussing an ongoing probe. One of the lawyers said he was stunned to discover how much material the investigators had gathered, including internal e-mails and multiple drafts that allowed OPR to reconstruct how the memos were crafted. In a departure from the norm, Jarrett also told members of the Senate Judiciary Committee last year he would inform them of his findings and would "consider" releasing a public version. If he does, it could be the most revealing public glimpse yet at how some of the major decisions of Bush-era counterterrorism policy were made.