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Testimony of

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Senate Judiciary Committee,
Subcommittee on Administrative Oversight and the Courts
Hearing: "What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration"
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Chairman Whitehouse and members of the subcommittee.

Thank you for inviting me to testify today. You've asked me to talk about the legal ethics of the interrogation memos written by lawyers in the Office of Legal Counsel. Based on the publicly-available sources I've studied, I believe that the memos are an ethical train wreck.

When a lawyer advises a client about what the law requires, there is one basic ethical obligation: to tell it straight, without slanting or skewing. That can be a hard thing to do, if the legal answer isn't the one the client wants. Very few lawyers ever enjoy saying "no" to a client who was hoping for "yes". But the profession's ethical standard is clear: a legal adviser must use independent judgment and give candid, unvarnished advice. In the words of the American Bar Association, "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

That is the governing standard for all lawyers, in public practice or private. But it's doubly important for lawyers in the Office of Legal Counsel. The mission of OLC is to give the President advice to guide him in fulfilling an awesome constitutional obligation: to take care that the laws are faithfully executed. Faithful execution means interpreting the law without stretching it and without looking for loopholes. OLC's job is not to rubber-stamp administration policies, and it is not to provide legal cover for illegal actions.

No lawyer's advice should do that. The rules of professional ethics forbid lawyers from counseling or assisting clients in illegal conduct; they require competence; and they demand that lawyers explain enough that the client can make an informed decision, which surely means explaining the law as it is. These are standards that the entire legal profession recognizes.

Unfortunately, the interrogation memos fall far short of professional standards of candid advice and independent judgment. They involve a selective and in places deeply eccentric reading of the law. The memos cherry-pick sources of law that back their conclusions, and leave out sources of law that do not. They read as if they were reverse engineered to reach a pre-determined outcome: approval of waterboarding and the other CIA techniques.

My written statement goes through the memos in detail, Mr. Chairman. Let me give just one example here of what I am talking about. Twenty-six years ago, President Reagan's Justice Department prosecuted law enforcement officers for waterboarding prisoners to make them confess. The case is called United States v. Lee. Four men were convicted and drew hefty sentences that the Court of Appeals upheld.
The Court of Appeals repeatedly referred to the technique as "torture." This is perhaps the single most relevant case in American law to the legality of waterboarding.

Any lawyer can find the Lee case in a few seconds on a computer just by typing the words "water torture" into a database. But the authors of the interrogation memos never mentioned it. They had no trouble finding cases where courts didn't call harsh interrogation techniques "torture." It's hard to avoid the conclusion that

Mr. Yoo, Judge Bybee, and Mr. Bradbury chose not to mention the Lee case because it casts doubt on their conclusion that waterboarding is legal.

Without getting further into technicalities that, quite frankly, only a lawyer could love, I'd like to briefly mention other ways that the interrogation memos twisted and distorted the law. The first Bybee memo advances a startlingly broad theory of executive power, according to which the President as commander-in-chief can override criminal laws. This was a theory that Jack Goldsmith, who headed the OLC after Judge Bybee's departure, described as an "extreme conclusion" that "has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law." It comes very close to President Nixon's notorious statement that "when the President does it, that means it is not illegal"—except that Mr. Nixon was speaking off the cuff in a high pressure interview, not a written opinion by the Office of Legal Counsel.

The first Bybee memo also wrenches language from a Medicare statute to explain the legal definition of torture. The Medicare statute lists "severe pain" as a symptom that might indicate a medical emergency. Mr. Yoo flips the statute and announces that only pain equivalent in intensity to "organ failure, impairment of bodily function, or even death" can be "severe." This definition was so bizarre that the OLC itself disowned it a few months after it became public. It is unusual for one OLC opinion to disown an earlier one, and it shows just how far out of the mainstream Professor Yoo and Judge Bybee had wandered. The memo's authors were obviously looking for a standard of torture so high that none of the enhanced interrogation techniques would count. But legal ethics does not permit lawyers to make frivolous arguments merely because it gets them the results they wanted. I should note that on January 15 of this year, Mr. Bradbury found it necessary to withdraw six additional OLC opinions by Professor Yoo or Judge Bybee.

Mr. Chairman, recent news reports have said that the Justice Department's internal ethics watchdog, the Office of Professional Responsibility, has completed a five-year investigation of the torture memos. OPR has the power to refer lawyers to their state bar disciplinary authorities, and news reports say they will do so.

I have no personal knowledge about what OPR has found. Presumably, investigators were looking either for evidence of incompetence, evidence that the lawyers knew their memos don't accurately reflect the law, or evidence that process was short-circuited.

This morning I have called the interrogation memos a legal train wreck. I believe it's impossible that lawyers of such great talent and intelligence could have written these memos in the good faith belief that they accurately state the law. But what I or anyone else believes is irrelevant. Ethics violations must be proved, by clear and convincing evidence, not just asserted. That sets a high bar, and it should be a high bar.

In closing, I would like to emphasize to this Committee that when OLC lawyers write opinions, especially secret opinions, the stakes are high. Their advice governs the executive branch, and officials must be told frankly when they are on legal thin ice. They and the American people deserve the highest level of professionalism and independent judgment, and I am sorry to say that they did not get it here.