After Rumsfeld's re-authorization, interrogators resumed the use of enhanced techniques at Guantanamo.[486] In June 2003, the Department of Defense issued a statement to Senator Patrick Leahy asserting that all interrogations, "wherever they may occur," are consistent with the U.S. Constitution.[487]

In the first several months of 2003, detention facilities in Iraq and Afghanistan also began developing interrogation policies that incorporated many of the enhanced techniques first approved for use at Guantanamo.[488] In August, a team from the Guantanamo Joint Task Force visited Iraq to conduct an assessment of the interrogation operations within Central Command's area of responsibility. Although the Iraq Survey Group, charged with conducting the search for weapons of mass destruction in Iraq, did not fully accept the "hard line approach" recommended by the assessment team, the Combined Joint Task Force-7, charged with coordinating all military operations in Iraq, did incorporate some of the techniques recommended by the Guantanamo assessment team into its policies and procedures.[489] In September 2003, JPRA also sent a delegation to Iraq to provide "offensive" SERE training to the Special Mission Unit Task Force, which conducted interrogations of detainees deemed to be high value targets.[490] While in Iraq, the JPRA team was authorized to participate directly in interrogations and to use the full range of SERE school physical pressures.[491] When friction began to develop between the JPRA team and the Task Force staff regarding whether SERE techniques complied with the Geneva Conventions, the decision was made to pull the JPRA delegation out.[492] However, the visit of the JPRA team, in combination with the dissemination of the working group report and the visit of the team from the Guantanamo Joint Task Force, was sufficient to introduce many of the enhanced tactics to interrogation operations in Iraq.

H. Continued Involvement of Mitchell and Jessen

During 2002 and 2003, as Mitchell and Jessen continued to facilitate interrogations at CIA black sites, concerns related to their dual roles as interrogators and psychological evaluators emerged. Mitchell stated that neither he nor Jessen ever performed a fitness for assessment evaluation on a detainee that they subsequently interrogated.[493] However, the Senate Select Committee on Intelligence found evidence suggesting otherwise. In January 2003, Jessen traveled to a CIA black site to assess the suitability of continuing to use enhanced interrogations against Abd al-Rahim al-Nashiri, whom two interrogators had deemed cooperative.[494] At least one person raised concerns about Jessen both conducting the psychological interrogation

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[486] SASC Report at 138, 143–46.

[487] Mora Memorandum.

[488] SASC Report at 154–58.

[489] DODIG Report at 27.

[490] SASC Report at 170.

[491] *Id.* at 174.

[492] DODIG Report at 28.

[493] Email from Mitchell to Sidley (May 31, 2015).

[494] SSCI Report at 71.

Timeline Provided by Senate Armed Services Committee Report in a Passage Hoffman Fails to Report

The SASC Report to which Mr. Hoffman refers extensively (p. 138, fn 486) provides the correct timeline of events affecting interrogation policies. Mr. Hoffman refers to pages immediately before the key pages, and after them, but not to those pages. The correct timeline is provided on pp. 146-147 of the SASC report. The most relevant passages are provided below.

X. DOJ Office of Legal Counsel Withdraws March 14, 2003 Legal Opinion Governing DoD Interrogations (U)

(U) In the final week of 2003, the OLC notified the Department of Defense that the March 14, 2003 OLC legal opinion, upon which DoD had been relying for interrogations, was being withdrawn.[1136] According to the then-Assistant Attorney General for the OLC Jack Goldsmith, the March 2003 memo was one of a "short stack" of OLC opinions that his OLC colleague Patrick Philbin had identified, shortly after Mr. Goldsmith arrived at DoJ, as problematic and possibly containing "serious errors."[1137] Also included in that "short stack" were the two August 1, 2002 "Bybee" memos – the "First Bybee" memo, which presented OLC's narrow interpretation of what constituted torture under U.S. law and the "Second Bybee" memo, which included OLC's "advice to the CIA regarding potential interrogation methods."[1138]

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(U) Mr. Goldsmith told the Committee that he called Jim Haynes in December 2003 and told him the March 14, 2003 OLC opinion was under review and could not be relied on by the Department.[1140] That opinion had been presented to the Working Group as the controlling authority for all questions of domestic and international law and was the legal foundation for the Secretary's April 2003 authorization of techniques for GTMO. Mr. Goldsmith told the Committee that he informed Mr. Haynes in December 2003 that he had determined that only 20 of the 24 techniques authorized by Secretary Rumsfeld were lawful, and that the remaining four techniques were under review.[1141] Mr. Goldsmith also advised Mr. Haynes in December that the Department should come back to OLC for additional legal guidance before approving any technique not among those 24 specifically identified in the Secretary's April 2003 memo.[1142] Mr. Goldsmith told the Committee that Mr. Haynes did not inquire about the use of additional techniques during his tenure at OLC, which ended in June 2004.[1143]

Timeline Cited by Hoffman from The Terror Presidency of the Rescission of Policies (see highlighted passages)

> Of mental torture, however, an interrogator could show he acted in good faith by "taking such steps as surveying professional literature, consulting with experts or reviewing evidence gained in past experience" to show he or she did not intend to cause severe mental pain and that the conduct, therefore, "would not amount to the acts prohibited by the statute."[578]

On June 13, the *Washington Post* published copies of the memoranda. Shortly after, Assistant Attorney General for the Office of Legal Counsel Jack Goldsmith, withdrew the 2002 and 2003 memoranda at issue.[579]

II. APA'S INITIAL COUNTERTERRORISM RESPONSE: SEPTEMBER 2001–NOVEMBER 2001

A. The Board of Directors' Response

Sidley heard from numerous witnesses that, immediately after 9/11, APA staff and governance began to identify ways that psychologists and psychological science could contribute to efforts to cope with the aftermath of the attacks and the nation's efforts to combat terrorism. On September 19, 2001, the Board of Directors organized a conference call for the chairs of the various APA committees to discuss "psychology's role in addressing the trauma of the terrorist's [sic] attacks" and "to help identify experts who can address the research and knowledge that we have to offer in response to the decisions and actions that face our nation."[580]

Shortly after the conference call, the Board of Directors created a Subcommittee on Psychology's Response to Terrorism, with the mission of identifying the role of psychology in addressing both the threat and the impact of terrorism. The Science, Practice, and Education Directorates staffed the Subcommittee, with Science Directorate taking the lead.[581] Initial efforts in the Practice Directorate focused on the formation of a Disaster Relief Network to provide counseling services and "emotional first-aid" to families of victims, rescue workers, and others who experienced loss as a result of the terrorist attacks.[582]

The Subcommittee also began assembling lists of psychological experts who might contribute research on relevant topics and networking with government policymakers to

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[578] Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post (June 8, 2004), *available at* http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html.

[579] The memoranda were brought to Goldsmith's attention in December 2003, shortly after he took office. He decided at that time that they should be rescinded, but his hope was to produce a replacement document before withdrawing the guidance. Amidst growing political pressure, Goldsmith rescinded the memoranda on June 14 without any replacement guidance, and submitted his resignation on June 16. Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration, 159-161 (2009). The OLC would not provide new guidance to the White House until December 30, under acting Assistant Attorney General Daniel Levin.

[580] APA_0033960.

[581] APA_0234428.

[582] APA_0033736.

The correct timeline is provided on pages of the book near the pages the Report cites. The relevant passages are highlighted in the pages below.

THE *NEW YORK TIMES* BESTSELLER

"Brave and important . . . a book that anyone concerned about civil liberties in the war on terror must read." —Neal Katyal, *New Republic*

THE TERROR PRESIDENCY

LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION



JACK GOLDSMITH

former Assistant Attorney General, Office of Legal Counsel

WITH A NEW PREFACE

could have received an even more accommodating military commission system if they had made the push in Congress in 2002–2003 instead of the fall of 2006.

I am not suggesting that the Military Commission Act was a bad development. To the contrary, it was an important first step in the right direction of putting counterterrorism policy on a more secure and sensible legal foundation. For a White House trying to minimize restrictions on the presidency, though, the new law was, from the 2002–2003 baseline, unfortunate. But most unfortunate of all was the effect on the status and reputation of executive power generally. It was said hundreds of times in the White House that the President and Vice President wanted to leave the presidency stronger than they found it. In fact they seemed to have achieved the opposite. They borrowed against the power of future presidencies—presidencies that, at least until the next attack, and probably even following one, will be viewed by Congress and the courts, whose assistance they need, with a harmful suspicion and mistrust because of the unnecessary unilateralism of the Bush years.

CHAPTER 5

Torture and the Dilemmas of Presidential Lawyering

I learned about the Abu Ghraib abuses for the first time in late April of 2004 from a television news program playing, volume down, in the back corner of Alberto Gonzales's White House office. "This is going to kill us," Gonzales quietly muttered, as I and a few other lawyers were assembling to discuss an unrelated matter. While I stared in astonishment at the photos of sadistic violence on the television screen, my mind began to race. Was I indirectly responsible for the abuses? Could I have done something to stop them?

I had begun worrying about the possibility of excessive interrogations about eight weeks after I arrived in the Justice Department in October 2003. During October and November of that year I spent a lot of time in SCIFs—supersecret Sensitive Compartmented Information Facilities that are immune from bugging—being briefed by somber officials from the White House, CIA, and National Security

Agency about some of the government's highly classified counterterrorism programs. Each of the programs, I learned, had been approved by OLC and backed by an OLC opinion.

At first, I was too busy answering a stream of questions from the White House, and getting to know the OLC staff and other lawyers in the Justice Department and around the government, to read these opinions. But then about six weeks into the job, Patrick Philbin, the deputy in OLC who had been responsible for legal advice on the classified programs after John Yoo's departure and until my arrival, told me about an OLC opinion that was "out there," that may contain serious errors, and that he had been working to correct. Coming from Philbin this news was alarming. Philbin is a careful lawyer, but he was not squeamish about pushing the President's power to its limits. He was a longtime friend of Yoo and had worked closely with Yoo on counterterrorism issues since 9/11. Any worries he had about flaws in OLC's post-9/11 national security opinions were informed and credible.

I began to read the opinion Philbin worried about, and I asked him to bring me any other opinions that he believed might have similar problems. After reading a short stack of opinions, two stood out. The first—entitled "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A"—was the infamous "torture memo" of August 1, 2002.[1] This opinion was addressed to Alberto Gonzales from my predecessor, Jay Bybee, but according to press reports and John Yoo's public comments, it was drafted by Yoo himself. The opinion formed part of the legal basis for what President Bush later confirmed were "alternative" interrogation procedures used at secret locations on Abu Zubaydah, a top al Qaeda operative; Khalid Sheikh Mohammed, the al Qaeda mastermind behind the 9/11

attacks; and other "key architects of the September 11th" and other terrorist attacks.[2] The second opinion, from Yoo to Jim Haynes (my former boss in the Pentagon) and dated March 14, 2003, was entitled "Military Interrogation of Alien Unlawful Combatants Held outside the United States." This opinion remains classified, but it has been publicly confirmed that it was the "controlling authority" for a subsequent April 2003 Department of Defense interrogation "Working Group" report that contained much of the same analysis as the August 1, 2002, OLC opinion.[3]

The primary legal issue in both opinions was the effect of a 1994 law that implemented a global treaty banning torture and that made it a crime, potentially punishable by death, to commit torture.[4] Congress defined the prohibition on torture very narrowly to ban only the most extreme of acts and to preserve many loopholes. It did not criminalize "cruel, inhuman, and degrading treatment" (something prohibited by international law) and did not even criminalize all acts of physical or mental pain or suffering, but rather only those acts "specifically intended" to cause "severe" physical pain or suffering or "prolonged mental harm."[5] Even with these narrow definitions, uncertainties about the legal limits of torture remained. How should pain be measured? How does one draw the line between severe (and therefore prohibited) pain and nonsevere (and thus not prohibited) pain? What does "mental pain" mean? And how much mental pain can one impose before producing "prolonged" mental harm? The answers to these questions are not obvious.

"Our intent in the Justice Department's original research was to give clear legal guidance on what constituted 'torture' under the law, so that our agents would know exactly what was prohibited,

and what was not," John Yoo later said of the August 1, 2002, interrogation opinion.[6] The opinion identified torture with acts that cause the amount of pain "associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."[7] Any action that fell short of these extreme conditions could not, in OLC's view, be torture. Even if the interrogators crossed this hard-to-reach line and committed torture, OLC opined, they could still avoid criminal liability by invoking a necessity defense (on the theory that torture may be necessary to prevent a catastrophic harm) or self-defense (on the theory that the interrogators were acting to save the country and themselves). Finally, OLC concluded, the torture law violated the President's constitutional commander-in-chief powers, and thus did not bind executive branch officials, because it prevented the President "from gaining the intelligence he believes necessary to prevent attacks upon the United States."[8]

The message of the August 1, 2002, OLC opinion was indeed clear: violent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under color of presidential authority. CIA interrogators and their supervisors, under pressure to get information about the next attack, viewed the opinion as a "golden shield," as one CIA official later called it, that provided enormous comfort.[9]

ON THE SURFACE the interrogation opinions seemed like typically thorough and scholarly OLC work. But not far below the surface there were problems. One was that the opinions inter-

preted the term "torture" too narrowly. Most notorious was OLC's conclusion that in order for inflicted pain to amount to torture, it "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[10] OLC culled this definition, ironically, from a statute authorizing health benefits. That statute defined an "emergency medical condition" that warranted certain health benefits as a condition "manifesting itself by acute symptoms of sufficient severity (including severe pain)" such that the absence of immediate medical care might reasonably be thought to result in death, organ failure, or impairment of bodily function.[11] It is appropriate, when trying to figure out the meaning of words in a statute, to see how the same words are defined or used in similar contexts. But the health benefit statute's use of "severe pain" had no relationship whatsoever to the torture statute. And even if it did, the health benefit statute did not define "severe pain." Rather, it used the term "severe pain" as a sign of an emergency medical condition that, if not treated, might cause organ failure and the like. It is very hard to say in the abstract what the phrase "severe pain" means, but OLC's clumsy definitional arbitrage didn't seem even in the ballpark.

These and other questionable statutory interpretations, taken alone, were not enough to cause me to withdraw and replace the interrogation opinions. OLC has a powerful tradition of adhering to its past opinions, even when a head of the office concludes that they are wrong. The tradition is akin to the doctrine of stare decisis, which counsels a court to stand by erroneous prior decisions except in very special circumstances. Stare decisis reflects the judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right," as Justice Louis

Brandeis once said.[12] If OLC overruled every prior decision that its new leader disagreed with, its decisions would be more the whim of individuals than the command of impersonal laws. Constant reevaluation of prior OLC decisions would make it hard for OLC's many clients to rely on its decisions. A few reversals of OLC opinions had occurred when an administration of one party with one legal philosophy replaced an administration of another party with another legal philosophy. I knew of no precedent for overturning OLC opinions within a single administration. It appeared never to have been done, and certainly not on an important national security matter.

Despite the superstrong stare decisis presumption, I decided in December 2003 that opinions written nine and sixteen months earlier by my Bush administration predecessors must be withdrawn, corrected, and replaced. I reached this decision, and had begun to act on it, before I knew anything about any interrogation abuses. I did so because the opinions' errors of statutory interpretation combined with many other elements to make them unusually worrisome.

First was the subject matter, torture, a universally condemned and morally repugnant practice. The administration's aim was to go right to the edge of what the torture law prohibited, to exploit every conceivable loophole in order to do everything legally possible to uncover information that might stop an attack. At first I was anxious to learn about this. Was it right for the administration to have gone right up to the line? Was it right for OLC to have gone there? And was it right for me personally to go there, even in the process of trying to fix prior legal errors?

I quickly set aside these considerations. I was no expert on what our enemies were up to or on what it would take to stop them. The

methods of interrogating high-value al Qaeda detainees known to have information of al Qaeda plans had been fully vetted at the highest levels of the executive branch by officials who had much more information about the terrorist threat than I had, and who would be personally and politically responsible if another attack occurred as a consequence of the government declining to take these aggressive steps. I had very little basis for second-guessing my superiors' judgment that certain detainees should be questioned as aggressively as legally possible. When appropriate, I put on my counselor's hat and added my two cents about the wisdom of counterterrorism policies. But ultimately my role as the head of OLC was not to decide whether these policies were wise. It was to make sure that the policies were implemented lawfully.

Nor did I think there was anything inherently wrong with exploring the contours of the torture law. Some have argued that OLC should decline to provide legal advice about the torture law because any advice might result in humans being subject to hurtful techniques short of torture, even if they are legal. Hardly anyone would be completely immune to such concerns, but in the end a government lawyer, and especially a lawyer at OLC, must put them aside. A lot of legal advice related to war and covert action touches on morally problematic subjects, and might be relied on to harm other humans. Should the United States bomb an enemy leader hiding in a mosque, knowing it will destroy the mosque and kill a thousand innocent civilians? Should the President approve a covert operation to assassinate a foreign leader or rig a foreign election? Presidents cannot avoid making these and hundreds of other ugly calls. And in so doing, they must know whether their actions are consistent with our laws and Constitution. OLC's ultimate respon-

sibility is to provide information about legality, regardless of what morality may indicate, and even if harm may result.

Although the proper role of OLC in this context was limited to interpreting the torture law, the nature of the question informed how OLC should answer. Interpreting the torture law is not like resolving an interagency dispute about regulatory control over a merger, or commenting on the constitutionality of an appropriations bill in Congress. The stakes in the interrogation program were unusually high. On the national security side of the balance potentially stood tens of thousands of lives, economic prosperity, and perhaps our way of life. On the other side of the balance lay the United States' decades-long global campaign to end torture, relations with the Muslim world, and the nation's moral reputation and honor. In this context, it was unusually important for OLC to provide careful and sober legal advice about the meaning of torture.

Which leads to the second problem with the interrogation opinions: the unusual lack of care and sobriety in their legal analysis. Nowhere was this more evident than in the opinions' discussion of the President's commander-in-chief powers. Many prior OLC opinions had advised that the President could ignore statutes that in concrete instances conflicted with his commander-in-chief powers.[13] But none had done so quite the same way as the interrogation opinions. OLC might have limited its set-aside of the torture statute to the rare situations in which the President believed that exceeding the law was necessary in an emergency, leaving the torture law intact in the vast majority of instances. But the opinion went much further. "*Any* effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President,"

the August 2002 memo concluded.[14] This extreme conclusion has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law. And the conclusion's significance sweeps far beyond the interrogation opinion or the torture statute. It implies that many other federal laws that limit interrogation—anti-assault laws, the 1996 War Crimes Act, and the Uniform Code of Military Justice—are also unconstitutional, a conclusion that would have surprised the many prior presidents who signed or ratified those laws, or complied with them during wartime.

OLC's conclusion about presidential power was all the more inappropriate because it rested on cursory and one-sided legal arguments that failed to consider Congress's competing wartime constitutional authorities, or the many Supreme Court decisions potentially in tension with the conclusion. When I led OLC, I was not shy about pushing wartime presidential power very far. But when one concludes that Congress is disabled from controlling the President, and especially when one concludes this in secret, respect for separation of powers demands a full consideration of competing congressional and judicial prerogatives, which was lacking in the interrogation opinions.

Another problem with the opinions was their tendentious tone. "It reads like a bad defense counsel's brief, not an OLC opinion," a senior government lawyer said of the August 2002 opinion when he learned that I was withdrawing it in the summer of 2004. The opinions lacked the tenor of detachment and caution that usually characterizes OLC work, and that is so central to the legitimacy of OLC. In their redundant and one-sided effort to eliminate any hurdles posed by the torture law, and in their analysis of defenses and other ways to avoid prosecution for executive branch viola-

tion of federal laws, the opinions could be interpreted as if they were designed to confer immunity for bad acts. Its everyday job of interpreting criminal laws gives OLC the incidental power to determine what those laws mean and thus effectively to immunize officials from prosecutions for wrongdoing. This is a hazardous power for an anonymous office to possess, and it is crucial that it be exercised judiciously. But the interrogation opinions seemed to do the opposite: they seemed more an exercise of sheer power than reasoned analysis.

The final nail in the interrogation opinions' coffin was that their legal arguments were wildly broader than was necessary to support what was actually being done. When OLC is asked whether proposed government actions comply with criminal laws, it usually has precise actions in mind, and it usually conforms its analysis to these precise actions. "Even Bill Barr," a former OLC head and later Attorney General who was not shy about approving aggressive exercises of executive branch power, "would write narrow and precise opinions about particular practices and say, 'Come back to me if you go one millimeter beyond this opinion,' " a CIA lawyer told me after I left the government.[15] This is a prudent practice, especially in the context of secret government operations that bump up against criminal laws. It ensures that the government acts in the darkness of secrecy no more aggressively than necessary. And it improves the quality of OLC's legal analysis, for legal interpretation is easier, and contains fewer inadvertent mistakes, when the law is applied to particular concrete facts.

The interrogation opinions did not take this approach. The August 1, 2002, opinion analyzed the torture statute in the abstract, untied to any concrete practices. Then, in a second August 1, 2002,

opinion that still remains classified, OLC applied this abstract analysis to approve particular and still-classified interrogation techniques.[16] These separately and specifically approved techniques contained elaborate safeguards and were less worrisome than the abstract analysis in the public torture opinions themselves, which went far, far beyond what was necessary to support the precise techniques, and in effect gave interrogators a blank check. The same bifurcation occurred with the Defense Department: The March 2003 OLC opinion to the Defense Department contained abstract and overbroad legal advice, but the actual techniques approved by the department were specific and contained elaborate safeguards.

In sum, on an issue that demanded the greatest of care, OLC's analysis of the law of torture in the August 1, 2002, opinion and the March 2003 opinion was legally flawed, tendentious in substance and tone, and overbroad and thus largely unnecessary. My main concern upon absorbing the opinions was that someone might rely on their green light to justify interrogations much more aggressive than ones specifically approved and then maintain, not without justification, that they were acting on the basis of OLC's view of the law. And so in December 2003 I concluded that I must withdraw and replace OLC's analysis.

But how? There were no precedents to guide me. I knew that withdrawing the opinions would have serious reverberations. My bosses considered interrogation of detainees with knowledge of al Qaeda's plans to be the most effective way to prevent the next attack. The program "is worth more than [what] the FBI, the Central Intelligence Agency and the National Security Agency put together have been able to tell us," George Tenet would later claim,

expressing the view that permeated the executive branch during my time in office.[17] The program had been approved by the National Security Council, legally blessed by the Attorney General, and briefed to congressional leadership.[18] But the entire interrogation edifice was built on the OLC opinions, and might collapse if I withdrew them. I then would be responsible for the increased vulnerability of the country that resulted from these pullbacks. More broadly, withdrawing the opinions would be unfair to the men and women who had engaged in dangerous and controversial actions in reliance on OLC's blessing, and who might view withdrawal of the opinions as a treacherous first step in a Justice Department effort to hold them legally responsible for past acts. Withdrawal would also dissuade operatives from viewing OLC opinions as reliable authorization when they were asked to perform controversial acts in the future. On top of this, I worried that withdrawing the opinions drafted by my friend John Yoo would be a painful stab in his back, even if it was the right thing to do.

After many conversations with Philbin, I decided that I should not withdraw the opinions until I could affirmatively inform the Defense Department and CIA precisely what interrogation practices were legally available under a proper analysis. Although I was worried by what the sloppy interrogation opinions might be used to justify, I had not concluded that the actual interrogation techniques approved by the Justice Department were illegal. I hoped that providing replacement guidance when I withdrew the opinions would minimize the expected panic throughout the government about the consequences of the withdrawal.

The plan worked well with respect to the OLC opinion issued to the Department of Defense in March 2003. In April 2003, the

Secretary of Defense had relied on the March OLC opinion to approve twenty-four interrogation techniques.[19] Most of these techniques had long been in the military manual and viewed by military lawyers to be consistent with the Geneva Conventions.[20] None involved anything rough. Philbin, I, and others in OLC had a relatively easy time concluding that these twenty-four precisely defined and procedurally restricted techniques did not violate the torture statute or any other applicable law.[21]

During a meeting in December 2003, I told Ashcroft that I intended to withdraw the March 2003 OLC opinion but allow the Defense Department to continue to employ the twenty-four techniques. Ashcroft was not terribly surprised and did not resist. He knew that OLC had discovered some significant problems in its prior analyses, and he supported my and Philbin's efforts to straighten things out, especially since in this instance we wouldn't (at least to the best of our knowledge) be telling the Pentagon to stop doing anything. I didn't inform the White House about my decision. The March 2003 opinion was addressed to the Department of Defense, and although its withdrawal would have enormous implications later for matters the White House cared a lot about, I knew that running the matter by Gonzales and especially Addington would make it much harder to fix the opinions. I technically didn't need White House approval, so I didn't seek it.

I called Jim Haynes—my friend, and former boss—during the quiet week between Christmas 2003 and the New Year. I knew that my withdrawal of the March 2003 OLC opinion would be painful for him. Ever since 9/11, Haynes had been in the middle of a struggle between a White House and Department of Justice bent on pushing the President's war powers to their limits, and

the armed forces bent on upholding what Haynes once admiringly described as a "tradition of restraint" on interrogation and detainee treatment.[22] This clash came to a head in the spring of 2003 when Haynes convened a Defense Department civilian-military Working Group to determine the military's interrogation policy in the war against al Qaeda and the Taliban. In this connection, Haynes properly sought OLC's legal views on the law of interrogation—views that resulted in the 2003 opinion I was about to withdraw. When military lawyers strenuously objected to the OLC legal analysis, Haynes correctly insisted that the Defense Department, like the rest of the executive branch, was bound by OLC's legal rulings. Despite OLC's legal ruling, Haynes acted within his discretion and, invoking the traditions of the military and other policy considerations, recommended that Rumsfeld approve only the twenty-four uncontroversial techniques.[23] Nonetheless, Haynes's acceptance of Yoo's March 2003 analysis resulted in a bruising battle with military lawyers, and would later be the basis for misleading and unfair attacks by the press and others on his motives and judgment. My withdrawal of the Yoo opinion less than a year after this battle would, I feared, weaken him within the department and harm his reputation.

"Jim, I've got bad news," I began. "We've discovered some errors in the March 2003 opinion that John wrote you on interrogation. The opinion is under review and should not be relied upon for any reason. The twenty-four techniques you approved are legal, but please come back for additional legal guidance before approving any other technique, and do not rely on the March 2003 opinion for any reason."

There was a long silence. "OK, Jack," Haynes eventually replied.

After another silence, he asked, quite fairly, what was wrong with the opinion.

"There are many potential problems with it," I told him, and briefly explained my concerns with the interpretation of the torture statute and other statutes, the overbroad commander-in-chief analysis, and the criminal defense analysis.

The conversation lasted less than five minutes. Haynes never pushed back, he and I never spoke at length about the issue again, and he never told me how he implemented the withdrawal within the Defense Department. I later learned, however, that he acted promptly on my request. "We were asked not to rely upon [the March 2003 memo] going back to December of 2003. I have not relied upon it since," Haynes's deputy Dan Dell'Orto testified in the summer of 2005.[24] And the department later informed OLC that "to the extent that the March 2003 Memorandum was relied on from March 2003 to December 2003, policies based on the substance of that Memorandum have been reviewed and, as appropriate, modified to exclude such reliance."[25]

Fixing the March 2003 opinion was easy compared to the challenges of fixing the August 2002 opinion to the White House that underlay the CIA interrogation program. I couldn't simply withdraw the opinion but reapprove the interrogation techniques, as I had done with the Defense Department. The 2002 opinion and the attendant CIA techniques, unlike the ones approved by the Pentagon, had been vetted in the highest circles of government. And in contrast to my sense of the Defense Department techniques, I wasn't as confident that the CIA techniques could be approved under a proper legal analysis. I didn't affirmatively believe they were illegal either, or else I would have stopped them. I just

didn't yet know. And I wouldn't know until we had figured out the proper interpretation of the torture statute, and whether the CIA techniques were consistent with that proper legal analysis.

Reaching this conclusion took much longer than I expected. In the early months of 2004, I didn't have the time or the resources to devote to the problem, which despite its obvious importance wasn't the highest priority for me or my office. The August 2002 opinion wasn't the most difficult or consequential of the flawed legal opinions that needed fixing at the time. Other matters that remain classified, but that everyone in the government agreed were a higher priority, preoccupied my time, day and night and weekends, during the first four and a half months of 2004. And these responsibilities came on top of OLC's normal business, including the daily deluge of very hard terrorism-related questions to which the White House, CIA, Defense Department, and other agencies needed quick answers.

Just as these other matters were reaching partial resolution in the spring of 2004, the Abu Ghraib scandal broke. When those horrible pictures began to be published, everyone in the government scrambled for cover. My first reaction was to wonder whether any of my decisions in OLC were connected to the abuses. My October 2003 decision (described in chapter 1) that all Iraqis, including Iraqi citizens who were members of al Qaeda, were "protected persons" under the Fourth Geneva Convention included an exception for members of al Qaeda in Iraq who were not Iraqi citizens. I was confident that this conclusion, which was supported by experienced law-of-war attorneys in the State and Defense Departments and in OLC, was legally correct. But I still wondered whether anyone had exploited this loophole as a justification for abusing

non-Iraqi al Qaeda members found in Iraq. I also worried about OLC's flawed March 2003 opinion and the legal analyisis by the Department of Defense Working Group that was based on it, both of which blew through a number of legal restrictions on interrogation. These legal analyses were designed, I knew, for GTMO detainees. But had they somehow had influence beyond the Cuban naval base? And had my direction to Haynes five months earlier not to rely on the March 2003 OLC opinion been too late?

The White House and Justice Department were pretty successful in distancing themselves from the Abu Ghraib abuses during May of 2003. But then in early June, the interrogation opinions began to leak to the press. On June 7, the *Wall Street Journal* reported on a draft of the April 2003 Department of Defense Working Group Report that had relied on the March 2003 OLC opinion. "Bush administration lawyers contended last year that the president wasn't bound by laws prohibiting torture and that government agents who might torture prisoners at his direction couldn't be prosecuted by the Justice Department," it said.[26] The next day, the *Washington Post* reported on the August 2002 opinion: "In August 2002, the Justice Department advised the White House that torturing al Qaeda terrorists in captivity abroad 'may be justified,' and that international laws against torture 'may be unconstitutional if applied to interrogations' conducted in President Bush's war on terrorism, according to a newly obtained memo."[27]

Both the August 2002 OLC opinion and the Defense Department Working Group Report that relied on the March 2003 OLC opinion were now on the Internet and flying around the world. The August 2002 opinion, OLC's original effort at defining torture, received the most scrutiny, and the reviews were, to put it

mildly, not favorable. There were no defenders of the interrogation opinions inside the administration either, save Addington. Many people vehemently argued, however, that it would be unfair to those who had relied on OLC to withdraw the opinion now. I was keenly aware of this. That was why I had hesitated to withdraw the August 2002 opinion until I could provide a replacement opinion that specified exactly what was legal. But now I was in a bind. I was under pressure from all quarters in the administration to stand by and reaffirm the August 2002 opinion. But five months earlier I had withdrawn the March 2003 OLC opinion after concluding that the identical legal analysis of torture contained in the August 2002 opinion was flawed beyond repair. I couldn't unwind my fundamental decision about the flaws in OLC's interrogation analysis, and had no desire to. But I also hadn't done the independent analysis of the torture law that would allow me to say with certainty whether and which of the CIA's special interrogation techniques were legal, and thus my reasons for delaying withdrawal of the August 2002 opinion still held.

For a week I struggled with what to do. In the end I withdrew the August 2002 opinion even though I had not yet been able to prepare a replacement. I simply could not defend the opinion. I had rejected its reasoning in the March 2003 opinion, and I knew that the August 2002 opinion would eventually suffer the same fate. Delaying the inevitable was only making matters worse, especially since it had become apparent that every day the OLC failed to rectify its egregious and now-public error was a day that its institutional reputation, and the reputation of the entire Justice Department, would sink lower yet.

The White House, the CIA, and many others believed I "buckled" under the pressure of public outcry, someone in the CIA later told me. John Yoo has charged that I and others in the Justice Department "panicked when the Abu Ghraib scandal erupted," that my decision to withdraw was "really just about politics," and that the department was "too worried about the public perceptions of its work."[28] Obviously, the public release of the opinions and the resulting outcry precipitated my decision. But the fact was that I had made my decision six months earlier under a veil of ignorance about government abuses or public perception.

The decision to withdraw the August 2002 opinion was mine alone, but during that crucial week I received indispensable advice from Philbin and from the Deputy Attorney General, Jim Comey. Ever since Comey had come on board in December of 2003, he had been my most powerful ally, not only in correcting the flawed interrogation opinions but also in many other significant and difficult matters as well. Comey is a seasoned prosecutor and one of the quickest and shrewdest lawyers I have ever met. He thinks clearly in times of crisis and possesses a keen sense of proportion that is the mark of good judgment. And he always acted with a sensitivity to upholding the integrity of the Justice Department.

Comey was out of town during the week I deliberated about what to do with the August 1, 2002, opinion. But I telephoned him twice that week in the late evening, and in both conversations he helped me think through the implications of withdrawing the opinion. When I finally informed John Ashcroft and David Ayres about my decision on Tuesday morning, June 15, 2004, they were understandably shaken. The opinion had been issued

under Ashcroft's delegated authority. And just the week before, the Attorney General had taken dozens of spears in the chest for the administration on the interrogation issue in testimony before Congress. I had helped prepare Ashcroft for that testimony. Although he knew (and approved) of my withdrawal of the problematic legal advice about the torture law contained in the March 2003 opinion to the Department of Defense, and although he knew the August 2002 opinion had the identical problems, I had not previously told him that I would also withdraw the August 2002 opinion. And yet here I was less than a week after his testimony telling him that I believed that he, and the Justice Department, would have to confess error. My timing was unfair to the Attorney General, and I wished then and wish now that I had made my decision a week earlier in order to spare him this additional embarrassment. Ashcroft was, in context, extraordinarily magnanimous and, as always, supportive. But I sensed for the first time that he might be questioning my judgment, and I wondered when I left his office whether he would agree with my decision or exercise his prerogative to overrule me.

That evening Ashcroft spoke with Comey. I later learned that Comey backed me fully. He told Ashcroft that the August 2002 interrogation opinion was "deeply flawed" and argued to Ashcroft that my decision was "the right thing" for OLC, for the Department of Justice, and for the government.[29] The next morning, Wednesday, June 16, I met again with the Attorney General and Ayres. It was immediately clear that the Attorney General had accepted my decision to withdraw the August 2002 opinion and had made the decision the department's official position.

In that same meeting I handed the Attorney General my letter

of resignation. I had been thinking for a while about resigning, but my timing was driven by a desire to ensure that my withdrawal of the interrogation opinion would stick. Comey and I agreed that this timing would make it hard for the White House to reverse my decision without making it seem like I had resigned in protest.

As for the reasons for my resignation, there were many. I had an offer for a tenured position at Harvard Law School, and I had had enough of government. The interrogation opinions were not the only or even the most difficult problem I had faced at OLC. I had fought other much more contested battles, and I was physically and mentally drained. I missed my wife and two young sons, whom I rarely saw, and whom I never saw when I wasn't exhausted and distracted.

But the main reason I resigned was that important people inside the administration had come to question my fortitude for the job, and my reliability. The White House put up no resistance, at least in my presence, to my withdrawal of the August 2002 interrogation opinion. And after I submitted my resignation letter, Gonzales and his deputy, David Leitch, several times asked me to stay. But a week or so earlier, David Addington had pulled a 3-by-5-inch card out of his jacket pocket in Alberto Gonzales's office, in the presence of many top administration lawyers. The card contained his handwritten list of OLC opinions that I had rescinded or modified. "Since you've withdrawn so many legal opinions that the President and others have been relying on," Addington said sarcastically, "we need you to go through all of OLC's opinions and let us know which ones you still stand by." It was a biting point, and not entirely unfair. No one except Addington disputed that the opinions I had withdrawn and redone (or started to redo) were deeply flawed. But the fact was that in a mere nine months in office I had reversed or rescinded more OLC opinions than any

of my predecessors. Many of the men and women who were asked to act on the edges of the law had lost faith in me. What else might I withdraw, and when? In light of all I had been through and done, I did not see how I could get that faith back. And so I quit.

MY MAIN GOAL after tendering my resignation, I told Ashcroft and Comey, was to write replacements for the August 2002 and March 2003 interrogation opinions before my departure, which was scheduled for six weeks later. This proved to be a naive ambition. I and many others in my office worked hard on the opinions during that time, but for many reasons it was impossible to finish them.

During those last few weeks in government, my relations with the CIA, and especially with CIA lawyers, were, to put it mildly, strained. I had done something I had tried very hard to avoid: I had changed the rules in the middle of the game in a way that potentially jeopardized national security and that certainly harmed an institution I had come to admire, the CIA. The lawyers I worked with in the CIA were among the best in government: smart, careful, resourceful, and cool under pressure. Every day, they and their clients were exposed to a buzzsaw of contradictory commands: stay within the confines of the law, even when the law is maddeningly vague, or you will be investigated and severely punished; but be proactive and aggressive and imaginative, push the law to its limit, don't be cautious, and prevent another attack at all costs, or you will also be investigated and punished. The agency had been asked to go out on a limb in 2002, and it had demanded and received absolute legal assurances from the Department of Justice and the White House. I had done the unthinkable in withdrawing its golden shield.

And I had done so at a time that George Tenet would later describe as one of the most threatening since 9/11.[30] The agency was understandably angry and anxious, and quite predictably disinclined to continue with aggressive interrogations despite the increasing threats. "Confusion about the legal limits of interrogation has begun to slow government efforts to obtain information from suspected terrorists," even though it was the "start of a critical summer period when counterterrorism officials fear that Al Qaeda might attack the United States," reported the *New York Times* in late June.[31]

My actions in June 2004 contributed to a problem that has bedeviled the intelligence community since the 1960s. The executive branch and Congress pressure the community to engage in controversial action at the edges of the law, and then fail to protect it from recriminations when things go awry. This leads the community to retrench and become risk averse, which invites complaints by politicians that the community is fecklessly timid. Intelligence excesses of the 1960s led to the Church committee reproaches and reforms of the 1970s, which led to complaints that the community had become too risk averse, which led to the aggressive behavior under William Casey in the 1980s that resulted in the Iran-Contra and related scandals, which led to another round of intelligence purges and restrictions in the 1990s that deepened the culture of risk aversion and once again led (both before and after 9/11) to complaints about excessive timidity, which after 9/11 led to renewed aggressive action, which once again (following the interrogation and rendition and terrorist surveillance controversies) is leading to retrenchment by the intelligence community in the face of complaints that it has gone too far.

These cycles of timidity and aggression are the bane of the

intelligence community, and are a terrible problem for our national security. They flow from the confluence of three related Washington pathologies: the criminalization of warfare, the blame game, and the cover-your-ass syndrome. Everyone agrees that risks must be taken to confront the terrorist threats. But no one wants to be blamed when the inevitable errors occur. Everyone wants cover. The President wants plausible deniability, or blames bad intelligence. Congressional intelligence committees demand to be informed, but not in a way that will prevent them from being critical when things go badly. Intelligence agencies want explicit instructions from the White House and Congress, which are rarely forthcoming. The agencies thus increasingly demand cover from their lawyers. Their lawyers, in turn, increasingly seek cover from OLC. And, as my actions demonstrate, OLC opinions are not always reliable.

Some of these pathologies could have been avoided with respect to interrogation. It took my temporary successor, Dan Levin, a former prosecutor and very experienced executive branch lawyer, almost six months of hard work to complete, vet, and publish the replacement for the flawed August 2002 opinion.[32] The Levin opinion gave the torture law a much more rigorous and balanced interpretation, correcting the errors and exaggerations of the original opinion. The new opinion declined to address the presidential override issue analyzed in the earlier memo, reasoning that consideration of these matters "would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture." And then, in an important footnote, the Levin opinion stated that "[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this

Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."[33] In other words, no approved interrogation technique would be affected by this more careful and nuanced analysis. The opinion that had done such enormous harm was completely unnecessary to the tasks at hand.

HOW COULD THIS have happened? How could OLC have written opinions that, when revealed to the world weeks after the Abu Ghraib scandal broke, made it seem as though the administration was giving official sanction to torture, and brought such dishonor on the United States, the Bush administration, the Department of Justice, and the CIA? How could its opinions reflect such bad judgment, be so poorly reasoned, and have such a terrible tone? And why would OLC write an opinion that was so unnecessary and overbroad? I was not in government when the original August 1, 2002, opinion was written, but I can hazard some informed guesses.

The main explanation is fear. When the original opinion was written in the weeks before the first anniversary of 9/11, threat reports were pulsing as they hadn't since 9/11. Newspapers reported increases in intelligence chatter in August 2002. But inside the administration the "end-of-summer threat," as it was called, seemed much worse. "We were sure there would be bodies in the streets" on September 11, 2002, a high-level Justice Department official later told me. Counterterrorism officials were terrified by a possible follow-up attack on the 9/11 anniversary,

and desperate to stop it. The administration had in its custody Abu Zubaydah, "a senior terrorist leader and a trusted associate of Osama bin Laden" who, as President Bush later explained, possessed "unparalleled knowledge about terrorist networks and their plans for new attacks."[34] The President believed that "the security of our nation and the lives of our citizens" depended on our ability to get this information from Zubaydah.[35] So did George Tenet. "I've got reports of nuclear weapons in New York City, apartment buildings that are gonna be blown up, planes that are gonna fly into airports all over again . . . Plot lines that I don't know—I don't know what's going on inside the United States," Tenet later said of the context in which the initial aggressive interrogations took place. "And I'm struggling to find out where the next disaster is going to occur. Everybody forgets one central context of what we lived through. The palpable fear that we felt on the basis of the fact that there was so much we did not know."[36] I'm sure that when the CIA's interrogation techniques came for approval to OLC in 2002, the lawyers felt the same pressure as everyone else to do everything possible to get information related to the expected attack.

Fear explains why OLC pushed the envelope. And in pushing the envelope, OLC took shortcuts in its opinion-writing procedures. On the theory that expert criticism improves the quality of opinions, OLC normally circulates its draft opinions to government agencies with relevant expertise. The State Department, for example, would normally be consulted on the questions of international law implicated by the interrogation opinions. But the August 2002 opinion, though it contained no classified information, was treated as an unusually "close hold" within the administration. Before I arrived at OLC, Gonzales made it a practice to limit readership of controversial legal opinions to a very small group of lawyers. And so, under directions from the White House, OLC did not show the opinion to the State Department, which would have strenuously objected. This was ostensibly done to prevent leaks. But in this and other contexts, I eventually came to believe that it was done to control outcomes in the opinions and minimize resistance to them.

There is something to be said for this approach in times of genuine emergency. But I did not follow the practice when I was head of OLC in 2003–2004. I always insisted that the State Department chime in on issues of international law, even if the issues were highly classified. And though the process was often painful, it always improved my work. I also insisted, sometimes in the face of White House resistance, that more lawyers in the Justice Department be given access to classified programs so that we had the manpower to do a proper legal analysis. In August 2002, however, only a small handful of lawyers in the White House, Justice Department, and CIA were involved in drafting and reviewing the interrogation opinion, and few of them had a critical stance toward the opinion's interpretation of torture or the President's power.

All of these men wanted to push the law as far as it would allow. But none, I believe, thought he was violating the law. John Yoo certainly didn't. He has defended every element of the opinion to this day, and I believe he has done so in good faith. Yoo was indispensable after 9/11; few people had the knowledge, intelligence,

and energy to craft the dozens of terrorism-related opinions he wrote. The poor quality of a handful of very important opinions is probably attributable to some combination of the fear that pervaded the executive branch, pressure from the White House, and Yoo's unusually expansive and self-confident conception of presidential power.

Yoo is not the first Justice Department lawyer to write a legal opinion in a time of crisis that was later widely repudiated. The same was true of the unconvincing opinion that Attorney General Edward Bates wrote for Abraham Lincoln justifying Lincoln's suspension of the writ of habeas corpus. Historian Nancy Baker said the Bates opinion was a product of "military utility" and "political exigencies,"[37] and historian Arthur M. Schlesinger, Jr., described it as "exculpatory."[38] Similar judgments were leveled against the opinion that the revered Attorney General Robert Jackson wrote to authorize, in the face of several congressional statutes to the contrary, Franklin Roosevelt's destroyers-for-bases deal in the tense summer of 1940. The Jackson opinion was "an endorsement of unrestrained autocracy in the field of our foreign relations" that was the most "dangerous opinion . . . ever before penned by an Attorney General of the United States," according to the esteemed Princeton constitutional scholar Edward Corwin.[39] Fifty years later Senator Daniel Patrick Moynihan claimed that Jackson "subverted the law" and rendered Roosevelt "clearly subject to impeachment."[40] Bates and Jackson, like Yoo, acted under enormous pressure to help the President avoid what he saw as a disaster in time of crisis.

Whatever explains how Yoo came to write the interrogation opinions, it is wrong to lay the blame for the interrogation opinion

fiasco entirely at his feet. Yoo was, after all, only a Deputy Assistant Attorney General, a position that requires neither nomination by the President nor confirmation by the Senate. The ultimate responsibility for giving Yoo such power and influence, and for failing to better supervise his activities, must lie with the Assistant Attorney General in charge of OLC, the Attorney General in whose name OLC exercises authority, and the White House.

Yoo's superiors probably failed to supervise him adequately for two reasons: under pressure to push the envelope, they liked the answers he gave; and lacking relevant expertise, they deferred to his judgment. Yoo was a war powers scholar at a prestigious law school. He also had enormous personal charm, and he was extremely persuasive in explaining his views. On the surface the interrogation opinions appeared thorough and scholarly. It was thus not easy for the men under pressure in the summer of 2002 to critically analyze Yoo's opinion. Jay Bybee, who actually signed the August 2002 opinion, is a fine lawyer and judge. But he had no training in issues of war or interrogation, and he tended to approve Yoo's draft opinions on these topics with minimal critical input. Nor were Yoo's boss, Attorney General John Ashcroft, or the nominal recipient of the opinion, White House Counsel Alberto Gonzales, in positions to raise informed questions. Ashcroft had come to the Justice Department from thirty years in politics, and Gonzales had been a corporate lawyer and state judge before coming to the White House. Addington, of course, was a very informed observer. But he possessed nearly the same characteristics that led Yoo to be so incautious and aggressive in the interrogation context.

I used to think that another reason why Gonzales and Addington never perceived problems in the interrogation opinions (and other problematic opinions) was that they didn't think it their role to question the merits of OLC's legal analysis. Robert Jackson once famously said of the Supreme Court's authority, "We are not final because we are infallible, but we are infallible only because we are final."[41] Early in my tenure at OLC, Gonzales and Addington expressed the similar view that OLC's legal reasoning was irrelevant to the authority of an OLC opinion. All that mattered, they believed, was OLC's bottom line approval. My earliest disagreement with both men was about whether this was the right way to view OLC. I maintained that the correctness and quality of the OLC opinions mattered. OLC's getting it right was important to making sure the government acted legally. Revelation of a flawed opinion could be politically damaging. And one might not necessarily receive "immunity" from future Justice Department prosecution—an issue they were obsessed with—if one relied on an obviously flawed legal opinion.

I eventually came to believe that Gonzales's and Addington's charitable hands-off attitude toward OLC's authority extended only to opinions that gave them answers they liked. They acquiesced in my withdrawal of the OLC interrogation opinions, but they did not always acquiesce in OLC opinions that reached uncongenial conclusions. Addington in particular had a reputation for ensuring that those who crossed swords with him never received White House approval for advancement, even when it was widely believed that approval was deserved. I was immune to this pressure because the Senate had confirmed me, because I loved my "real" job as an

academic, and because I had no higher government ambition. But others were not. At the beginning of President Bush's second term, Solicitor General Paul Clement wanted to hire Patrick Philbin, the brilliant conservative lawyer who helped me correct some of OLC's prior errors, as his principal deputy to argue cases before the Supreme Court. Addington, presumably acting with the implicit blessing of the Vice President, expressed opposition to the promotion, and newly minted Attorney General Gonzales demurred. Others suffered a similar fate for similar reasons.

Alberto Gonzales went along with Addington's strict enforcement of the party line on promotions in the Justice Department. But in the end he was much less rigid than Addington about the flawed OLC opinions I had struggled to correct. In Gonzales's mind, he had taken all the proper steps in coordinating the government's legal policy decisions related to interrogation. He had surrounded himself in the White House with two very experienced national security lawyers, David Addington and Tim Flanigan, and had heeded their advice; he had taken great care to secure the Department of Justice's blessing for the interrogation policy; and he could take comfort from the fact that the department's lawyer doing the analysis, John Yoo, was an academic expert on war and national security. Gonzales was, I think, genuinely stunned when the legal foundation for the interrogation policy imploded in the spring and summer of 2004. After the devastating revelations and bruising reverberations in that period, and after I had announced my resignation and was about to leave government, Gonzales and I had a friendly chat—he was always very friendly toward me, no matter how difficult I made his life—about our time working

together. "I guess those opinions really were as bad as you said," he told me near the end of our talk.

IN DECEMBER 2004, four months after I left OLC and a few weeks after I started work at Harvard Law School, the front page of the *Boston Globe* reported on an "angry debate" among my new colleagues in connection with my alleged role in working on the "torture memos" while in government.[42] A few weeks earlier the *Washington Post* wrote about a draft opinion I had circulated in March 2004 advising Alberto Gonzales that the Fourth Geneva Convention permitted the United States to temporarily remove Iraqis from Iraq for purposes of interrogation.[43] The *Post* reported that the CIA and White House pressured me into writing the draft, that Iraqis were taken out of Iraq in reliance on the draft, and that the draft was a part of the CIA's rendition policy of taking suspected terrorists from one country to another where they would have "no access to any recognized legal process or rights."[44]

Most of this was inaccurate. I was often pressured by many people to do many things in government. But for this draft opinion, which was not a high priority in my office, I was not. The question about taking Iraqis temporarily out of Iraq for questioning arose in the fall of 2003 after I ruled that even Iraqi terrorists were "protected persons" under the Fourth Geneva Convention. I believe the draft opinion reached the right conclusions, but for the reasons I stated in the draft, the issue was not clear.[45] In any event, I never finalized the draft, it never became operational, and it was never relied on to take anyone outside of Iraq.[46] I do not know whether the request for legal advice about relocating Iraqi prisoners outside Iraq for questioning was associated with a broader rendition program. But I do know that the draft opinion could not have been relied upon to abuse anyone, not only because it was never finalized, but more importantly because it stated that the suspect's Geneva Convention protections must travel with him outside Iraq.[47]

The *Post* story missed most of these points, and instead emphasized that my opinion was written by the same office (OLC) that wrote the torture opinions. This gave a handful of my new Harvard colleagues—who disliked my scholarship and the Bush administration, and who opposed my appointment to the faculty—an opportunity to speculate publicly about my role in facilitating torture. "I believe that the faculty was seriously at fault for not inquiring more deeply, prior to making this appointment, into any role Jack Goldsmith may have played in providing legal advice facilitating and justifying torture," one new colleague told the *Boston Globe*.[48] Another suggested that even if I weren't directly involved in the "torture memos," those memos nonetheless "reflected ideas developed by a group of academic lawyers in and out of government in which Jack has played an active role."[49] Although many of my new colleagues publicly stood by me, the *Globe* story still stung, for it gave public credence to the suggestion, contrary to the painful reality of what I had been through during the year before, that I was an architect of what many saw as the administration's torture policy. The *Globe* story was not the greatest of introductions to the new neighbors my family and I were just beginning to meet. But I was too timid to defend myself at the time, and while I publicly denied drafting the interrogation opinions, I said nothing about my role in withdrawing them and trying to fix them.

A little over a year later, *Newsweek* ran a story that painted me as "the opposite of what [my] detractors imagined," namely, "the central figure in a secret but intense rebellion of a small coterie of Bush administration lawyers." *Newsweek* recounted my withdrawal of the two interrogation opinions and also reported that I had raised "serious questions" about the NSA Terrorist Surveillance Program, which resulted in a dramatic confrontation with the White House and "tougher legal standards" for the program. *Newsweek* said that in my "frequent face-to-face confrontations" with David Addington over these matters, the Vice President's Counsel was "beside himself" with anger and accused me of "putting brave men at risk." And it quoted Jim Comey praising me and others at his 2005 Department of Justice farewell speech for being "committed to getting it right—and to doing the right thing—whatever the price."[50]

I must confess that I liked the *Newsweek* story better than the *Boston Globe* story. And yet I laughed in agreement when my conservative Harvard colleague Charles Fried said of the reaction to the *Newsweek* story that "the only thing worse than being demonized by the left is being lionized by the left." I didn't see myself as a Bush administration opponent, and I still had many friends working in government. It was unsettling and somewhat embarrassing that so many people who detested the administration, and until the *Newsweek* article didn't much like me, were calling me a "hero" and suggesting that my actions in government confirmed their views of the administration. I worried that praise from administration opponents would make it appear, incorrectly, that I had been currying favor in my new environment at the expense of my old colleagues.

But more than anything else I felt uncomfortable with the Manichean tone of the *Newsweek* story, a tone one sees so often when the press and intellectuals criticize the Bush administration's attempts to balance security and liberty. My fights with David Addington and others were not struggles between the forces of good and evil. Our sharp disagreement over the requirements of national security law and the meaning of the imponderable phrases of the U.S. Constitution was not a fight between one who loves the Constitution and one who wants to shred it. Whether and how aggressively to check the terrorist threat, and whether and how far to push the law in so doing, are rarely obvious, especially during blizzards of frightening threat reports, when one is blinded by ignorance and desperately worried about not doing enough. Addington and I had different experiences, different perspectives, different roles, and different responsibilities. Despite our many fights, and despite what I view as his many errors of judgment, large and small, I believe he acted in good faith to protect the country.

I have been critical of my predecessors' actions in writing the interrogation opinions. But I was not there when they made the hard calls during the frightening summer of 2002. Instead, I surveyed the scene from the politically changed and always-more-lucid after-the-fact perspective. When I made tough calls in crisis situations under pressure and uncertainty, I realized that my decisions too would not be judged from the perspective of threat and danger in which they were taken. They would instead be judged, as Jim Comey once said, "in a quiet, dignified, well-lit room, where they can be viewed with the perfect, and brutally unfair, vision of hindsight," and "where it is impossible to capture even a piece of the urgency and exigency felt during a crisis."[51] Recognizing this, I

often found myself praying that I would predict the future correctly. Some people have praised my part in withdrawing and starting to fix the interrogation opinions. But it is very easy to imagine a different world in which my withdrawal of the opinions led to a cessation of interrogations that future investigations made clear could have stopped an attack that killed thousands. In this possible world my actions would have looked pusillanimous and stupid, not brave.

CHAPTER 6

The Terror Presidency

On Friday, April 27, 2007, after a morning spent working on this book, I left my office and walked in the rain to meet FBI Special Agents Ronald Doe and Tim Smith (aliases) in the Au Bon Pain café in Harvard Square in Cambridge, Massachusetts. Doe and Smith looked like archetypal FBI G-men: they had short hair and wore white shirts, dark suits, and black lace-up shoes. As we sat down among the swirl of scruffy Harvard students playing chess and studying for exams, the out-of-place FBI agents cracked uneasy smiles when I joked that if their identities were revealed the FBI-hating lefties around us would tear them limb from limb.

I had met Doe and Smith twice before in a small windowless room in the FBI building in Washington, D.C. They were leading the criminal investigation into the leaks to James Risen and Eric Lichtblau that resulted in stories in the *New York Times* and a subsequent book about the National Security Agency's secret program of warrantless monitoring of international communications