

Testimony of Michael Stokes Paulsen
Distinguished University Chair & Professor of Law
The University of St. Thomas

before the
Subcommittee on Administrative Oversight and the Courts
of the U.S. Senate Committee on the Judiciary
May 13, 2009

The Lawfulness of the Interrogation Memos

Dear Mr. Chairman and Members of the Committee:

My name is Michael Stokes Paulsen. I have been asked to provide written testimony concerning the lawfulness and propriety of the legal analysis and advice provided by attorneys in the Office of Legal Counsel of the U.S. Department of Justice, to the administration of President George W. Bush, concerning lawful interrogation methods and procedures used against certain high-level al Qaeda terrorists, captured by United States forces, at the direction of President Bush as Commander in Chief, in the course of the war authorized by Congress by the resolution of September 18, 2001. I apologize that I am not able to be there in person to present live testimony, because of scheduling conflicts. I would be happy to provide answers to any written questions that members of this subcommittee (or committee) may have.

I currently hold the position of Distinguished University Chair and Professor of Law at the University of St. Thomas, in Minneapolis - St. Paul, Minnesota, where I have taught for two years. Prior to that, I was McKnight Presidential Professor of Law and Public Policy, Law Alumni Distinguished Professor, and Associate Dean for Faculty Research and Scholarship at the University of Minnesota Law School, where I taught for sixteen years. My areas of primary legal scholarship include Constitutional Law, Separation of Powers, War, National Security, and the Constitution, and Legal Ethics and Professional Responsibility. My academic c.v. is attached.

I have written over sixty academic articles in these fields. Of possible particular interest and relevance are several articles concerning the Constitution's allocation of war and foreign affairs powers: *The Constitutional Power to Interpret International Law*, 118 Yale L. J. 1774 (2009); *The Emancipation Proclamation and the Commander in Chief Power*, 40 Georgia L.

Rev. 807 (2006); *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004); *Youngstown Goes to War*, 19 Const. Comm. 215 (2002). In addition, I note that much of my scholarship concerns more generally the separation of powers and the independent province and duty of the executive branch with respect to constitutional, statutory, and treaty interpretation: *Lincoln and Judicial Authority*, 83 Notre Dame L. Rev. 1227 (2008); *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003); *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337 (1999); *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L. J. 217 (1994); *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 Georgetown L.J. 385 (1994); *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81 (1993). Finally, also of relevance, I have written several articles in the field of legal ethics and professional responsibility, including especially articles concerning the role of attorneys representing the executive branch of the U.S. government, the structure of attorney-client privilege and confidentiality with respect to representation of the U.S. government, and the ethical and professional responsibility duties of government attorneys: *A Constitutional Independent Counsel Statute*, 5 Widener L. Symposium J. 111 (2000); *Nixon Now, supra*; *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 Fordham L. Rev. 807 (1999); *Who "Owns" the Government's Attorney-Client Privilege?* 83 Minn. L. Rev. 473 (1998); *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits*, 61 Law & Contemp. Prob. 83 (1998).

Prior to becoming a law professor, I served in the United States as an Attorney-Advisor in the Office of Legal Counsel of the U.S. Department of Justice, from 1989-1991, in the administration of President George H.W. Bush. In that capacity, I had the occasion to participate in the research and preparation of dozens of legal opinions, analyses, legislative comments, and other memoranda concerning matters of presidential constitutional power, separation of powers (including war and national security matters), foreign affairs powers, and other matters of constitutional, statutory, and treaty law involving the United States government. At the time, I possessed a Top Secret security clearance. I have not worked for the United States government in any capacity since fall of 1991. While I can state generally that I worked on matters of national security, foreign affairs, war powers, and actions concerning war criminals and terrorists, I retain an ongoing duty of confidentiality and attorney-client privilege with respect to matters in which I was engaged during those years. I am thoroughly familiar with the operations and role of the Office of Legal Counsel as legal counsel to the executive branch of the U.S. government, its customary practices and jurisprudence, its traditions, and its distinctive perspective on matters of constitutional law as attorney for the United States government's executive branch.

In addition to my time as an attorney in the Office of Legal Counsel, I have worked in the Department of Justice as a prosecutor and appellate attorney in the Criminal Division, including an assignment as Special Assistant U.S. Attorney for the Eastern District of Virginia (1985-1986).

I provide this testimony in my personal capacity as a scholar in these areas, and not as a representative of any university institution or on behalf of any client or other organization. The views expressed are my own.

I have attached a copy of my recent article, forthcoming in *The Yale Law Journal*, entitled **“The Constitutional Power to Interpret International Law,”** which in some respects contains more extended discussion and documentation of certain points that I make in more abbreviated form here.

* * * * *

I understand that the premise of these hearings, as suggested by the title selected by the subcommittee majority, is that there exists a need to examine “what went wrong” in the provision of legal advice by attorneys of the Office of Legal Counsel (OLC) of the Department of Justice, in the administration of President George W. Bush, concerning the legal bounds governing the use of certain interrogation methods on captured unlawful (and thus legally “unprivileged”) terrorist enemy combatants. In my view, this premise is seriously mistaken. I have studied the legal memoranda in question, drawing on my expertise as a legal scholar whose work over much of the past decade has embraced these types of issues as a major area of research and writing, and on my experience as a government attorney in OLC in the late 1980s and early 1990s. The analysis contained in the memoranda in question is analysis with which, in certain respects, persons of good will can reasonably disagree, but it is well within the range of customary, legitimate, proper, and entirely ethical legal advice that may be provided by confidential legal advisors to the president and his administration. The notion that something “went wrong” in the provision of such legal advice – in any sense other than that some persons now disagree vigorously with the legal analysis and advice in question – is unsound.

In this testimony, I will sketch four brief points.

1. First and most fundamentally, the core legal analysis set forth in the OLC memoranda in question is, in my opinion, not only within the range of legitimate legal analysis and advice but is in fact *substantively correct on the merits*. There exists a basic distinction in the law between what constitutes actual, legal “torture,” under applicable standards, and what may be harsh, aggressive, unpleasant interrogation tactics but not, legally, “torture.” Reasonable people will come to different conclusions as to where precisely that line is, but the Bush administration’s lawyers’ ultimate conclusions are certainly defensible. Indeed, I believe they are ultimately correct, both as an abstract, general matter and in their specific application (matters addressed in a variety of separate OLC memoranda).¹ I do not necessarily agree with every particular point, or

¹ The memoranda to which I refer in this testimony are as follows: Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to John Rizzo, Acting

argument, made in support of OLC’s specific statutory-interpretation conclusion. Some sub-issues I would have addressed differently; on some points I would have said more, and on others less. (I say this with some reticence, acutely aware that I speak from a retrospective vantage point that perhaps too easily permits Monday-morning-legal-quarterbacking.) Nonetheless, I believe that OLC’s essential statutory conclusion that “torture” refers to a narrow, highly specific subcategory of coercive interrogation techniques, is correct. As a *legal* matter – that is, as a matter of the objective meaning of a particular statutory term-of-art – the term “torture” may differ from, and be more specific than, commonplace or public political usage. That is the distinction that the memoranda draw; and they draw that distinction on the basis of specifically legal analysis.

Moreover, as a matter of constitutional law, the OLC memoranda’s most sweeping, categorical, and controversial conclusion – that at all events no statute or treaty may limit the President’s sole *constitutional* powers as military” Commander in Chief” to direct and conduct the use of U.S. force – is in my opinion *unquestionably correct*. The Office of Legal Counsel has long and consistently defended the view, both in Republican and in Democratic administrations, that the President’s constitutional powers under Article II of the Constitution, as chief executive and as Commander in Chief of the nation’s military, afford the President substantial autonomy of action in the areas of the conduct of the nation’s foreign affairs and the conduct of war and military actions. These powers, as *constitutional* powers of the President, cannot constitutionally be subject to congressional regulation or control. An act of Congress, or a treaty of the United States, that infringes upon the constitutional powers of the President of the United States is, by definition, unconstitutional, under the straightforward reasoning of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Accordingly, it has long been the view of the Office of Legal Counsel that any such enactments cannot legitimately constrain the actions of the President pursuant to his independent constitutional powers; and, further, that such enactments should be interpreted and understood, where fairly possible, to avoid such conflict with the constitutional powers of the President. See, e.g., Memorandum of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel to Abner Mikva, Counsel to the President, *Presidential Authority to Decline to Execute Unconstitutional Statutes* (Nov. 2, 1994).

These are views that should command the respect of all presidential administrations, including the incumbent administration. The Constitution itself prescribes that all presidents

General Counsel of the Central Intelligence Agency (Aug. 1, 2002); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 30, 2005). In addition, I am familiar with two other memoranda relevant to these issues. Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General (Dec. 30, 2004) and Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to the Files (January 15, 2009). I am familiar with further memoranda of the Office of Legal Counsel relevant to various issues of war, national security, military force, international law, and treaties that are not directly implicated here.

swear the oath to “preserve, protect and defend” the Constitution. U.S. Const. art. VI, cl.3. It is therefore the duty of all presidents to protect the constitutional powers of the office of President of the United States. It follows that it is likewise the duty of all attorneys representing the executive branch to defend the constitutional powers and prerogatives of the President of the United States.

The constitutional arguments put forward in the OLC memoranda addressing legal standards applicable to interrogation methods are fully in accord with these views, and with the duty of executive branch attorneys to advance them, *and they are in my opinion legally correct*. My most recent academic scholarship includes a lengthy examination of precisely this genus of constitutional issues. See Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 Yale L.J. 1774 (2009) (forthcoming, June 2009). That article sets forth more detailed supporting analysis than is possible to provide here, and I incorporate it by reference for purposes of this testimony. I have provided a copy of that manuscript to the committee to accompany this testimony. I call the committee’s attention specifically to pages 1777-1779, 1782-1799, 1824-1828, and 1834-1854, which address both at the general level of constitutional principle and in certain instances at the specific level of contemporary illustration, the points I have outlined in the preceding few paragraphs.

Certain points and arguments advanced in earlier-dated confidential (in fact, classified) OLC memoranda subsequently were withdrawn by Bush administration attorneys in later memoranda intended for public consumption. However, none of the most important, material legal conclusions – and none of the specific legal advice as to the application of such conclusions – was repudiated. Rather, arguments were withdrawn (once memoranda had been leaked publicly) where they were judged unnecessary to the ultimate legal conclusion, politically inappropriate, contrary to subsequently-stated public presidential determinations or proclamations, or for some other unstated reason. In particular, later memoranda declined to rely on the argument that the president retains the constitutional power to make orders to U.S. forces, in the exercise of his sole constitutional power as Commander in Chief, that are (or may be) inconsistent with statutory requirements. This is not because that argument was or is incorrect, but probably because it was unnecessary (and thus impolitic) to rely on such a legal position, given President Bush’s stated policy position that the United States had not engaged, and would not engage, in interrogation tactics inconsistent with the statutory prohibition of torture. None of this, in my view, affects the propriety of the constitutional argument as advanced in the earlier memoranda.

2. Second, even if one disagreed with the statutory and constitutional analysis in the OLC memoranda in question, or with the application of that analysis to specific facts, the OLC legal analysis and advice *clearly falls within the range of legitimate legal analysis and the range of reasonable disagreement common to legal analysis of important statutory and constitutional issues*.

Not all lawyers agree on all legal questions. This observation is so obviously true as to be

almost trite. Nothing is more common than for lawyers, each acting in entire good faith and employing sophisticated analysis, to reach differing conclusions. (To a certain extent, our entire adversary system of justice is predicated on this commonplace observation, and on the premise that the vigorous debate over the meaning and application of the law, by parties possessing different views and representing different interests, is the best way to provide the dynamic tension that best approximates systemic justice.) One may disagree (as I do) with certain conclusions or arguments contained in some of these memoranda; indeed, one may disagree with the analysis in its entirety. This is not surprising. Quite the contrary, I would be greatly surprised if, on some of these questions, reasonably lawyers did *not* disagree. There is evidence of disagreement within the Bush administration on these legal questions, and the vigorous expression of competing views.

This is probably as it should be. What is *not* legitimate is to assert that every view and legal analysis contrary to one's own is therefore somehow outside the range of appropriate, competent, good-faith analysis. Such an assertion is, in my opinion, simply foolishness – the arrogant projection of one's own political or legal opinions as being so indisputably and universally correct as to brook no dissent. I believe that such a view is dangerous to American political and legal traditions. People disagree. Lawyers disagree on legal questions. With all due respect: to ratchet-up simple disagreement with the legal analysis of a prior administration into the claim that such analysis was beyond the pale of legitimate legal analysis, and therefore should be investigated and punished, is to engage in a mild form of legal neo-McCarthyism.

To be sure, some legal arguments and some “legal” analysis is so far below the standards of competence, plausibility, and good faith as not to be legitimate. But the OLC memoranda in question do not come anywhere near that standard. As noted above, I believe the memoranda's conclusions to be in nearly every respect essentially *correct* as a matter of statutory and constitutional analysis. The quality of the analysis (despite my quarrels with certain points) is clearly well within professional standards. This is not even a close question. There is simply no plausible, objective basis on which it could be said that the legal opinions expressed were illegitimate or unprofessional. There is no plausible basis upon which one could fairly – objectively – conclude that the views expressed are outside the bounds of reasonable professional judgment and legal analysis. If anything, the suggestion that these memoranda lie outside the range of legal advice is *itself* a view of the applicable substantive law, and of the lawyer's professional role, so extreme and unreasonable as not to fall within the range of good-faith, objective, competent legal analysis.

Such views probably more reflect an intense political, *ideological* commitment than true legal analysis. It cannot be doubted that the issues in question raise important questions of morality about which people, quite legitimately, have passionate feelings. But one should never confuse the intensity of one's political passions and commitments with dispassionate analysis of difficult questions of law. If this distinction is observed, it is not possible fairly to assert that the views expressed in the OLC memoranda are outside the range of reasonable, professional legal analysis and advice on the statutory and constitutional questions presented.

3. Third (and in some respects building on the observations just made), it is important to recognize the clear distinction between a lawyer's opinion on questions of *legality* and *endorsement* of a client's actions themselves. The former in no way implies the latter. This is a rudimentary principle of legal ethics, recognized in every bar code of professional responsibility. ABA Model Rule of Professional Conduct 1.2(a) clearly provides that "*a lawyer shall abide by a client's decisions concerning the objectives of representation . . .*". ABA Model Rule 1.2(b) provides that "*[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.*" And ABA Model Rule 1.2(d) further provides that, while lawyers may not counsel clients to engage in conduct they know is illegal, a lawyer "*may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*" It is plain from reading the memos involved that this is exactly what the OLC lawyers were doing – discussing with their clients the legal consequences of what they proposed to do and endeavoring to assist them to ascertain the meaning and scope of the laws and constitutional provisions involved.

Not everything that is legal is a good idea, or good policy, or just, or moral. While a lawyer may in most circumstances add his or her views on such matters as well – matters of policy, propriety, morality, see ABA Model Rule 2.1 – the core of the lawyer's role is to provide objective legal advice that assists a client in understanding the legal options available.

To ignore the distinction between legal advice and moral or political advice is to make an enormous and fundamental category mistake. With respect, the suggestion implied by the subcommittee's stated theme for these hearings – "What Went Wrong" – is precisely such a category mistake. From the standpoint of competing views of policy, propriety, and morality, it may be fair to make an argument that something was "wrong" with the Bush administration's policies in certain respects. From the standpoint of the *lawyering* involved, nothing "went wrong." In my opinion, based on the public record available to me at this date, there is simply no objective basis for any claim that the OLC lawyers in the prior administration engaged in any professional impropriety or unethical conduct whatsoever. They provided fair legal advice to their client, the United States government's executive branch, on important, difficult, and sensitive matters. Disagreement with the underlying *policies* to which that legal analysis was directed is not a fair or legitimate ground upon which to criticize, or impugn the integrity of, the lawyers' analysis.

Indeed, as a matter of legal ethics and a lawyer's professional role, this has matters precisely backwards. A lawyer is not responsible for the policies of his or her client that fall within the bounds of the law. If the objection is in fact really to the policies and practices themselves, the inquiry should be directed to the ultimate policy-makers and decision-makers with respect to interrogation practices. To target Department of Justice legal advisors – and not the ultimately accountable political decision-makers – is to engage in an odd form of political scapegoating that targets the persons whose professional role actually makes them the *least* responsible for the policies or practices at issue.

4. Fourth and finally, as a practical matter, I believe it is both shortsighted and foolish to seek to punish lawyers of a prior administration because of disagreement with the content of their legal advice. In addition to reflecting a basic misunderstanding of lawyers' roles, such an approach unquestionably would have the effect (and probably already has had the effect) of chilling both valuable government service by talented attorneys and the candor, quality, and vigor of the legal advice provided by those who agree to serve as government lawyers in important roles. If a government attorney's legal advice in the service of one administration is subject not only to being reversed in a subsequent administration of different views (as is common, reasonable, and sometimes to be expected), but, further, also made the subject of retrospective investigation, punishment (in various forms), and personal attacks, there is *no question* that the attorney's advice will become more guarded, tepid, inhibited, over-cautious and – in many cases – ultimately unsound. This will be true of Democratic administrations as well as Republican administrations.

The result will be that presidents and administrations of both parties *will not obtain candid, vigorous legal advice reflecting the full range of views*, on sensitive matters of war, foreign affairs and national security. I believe that this will actually be, in subtle but material ways, over the long run, harmful to the national security of the United States. No one in the room (so to speak) will take the hard position – and certainly not commit it to writing. The product will be watered-down legal advice, offered more with a view to how future second-guessers might second-guess it, than with a view to serving the President of the United States, and the nation, as an objective legal advisor.

As noted earlier, I was a line attorney (career civil service) in the Office of Legal Counsel, from 1989-1991. I can state unequivocally, based on my experience, that this phenomenon will occur and will occur quickly. To investigate, and seek to impose political, personal, or other punishment on government attorneys who provide good-faith but controversial legal advice, whenever that advice might become out-of-favor politically, will damage the Office of Legal Counsel, the Department of Justice, and ultimately, the office of President of the United States. And, of course, ultimately, this would damage the interests of the nation that these men and women serve.

Respectfully submitted,

Michael Stokes Paulsen
University Chair & Professor of Law
The University of St. Thomas