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A long-awaited Department of Justice watchdog report that probed whether John Yoo and his former boss Jay Bybee violated professional standards when they provided the Bush White House with legal advice on torture has cleared both men of misconduct, [according to Newsweek](#), citing unnamed sources who have seen the document.

An earlier version of the report was prepared by H. Marshall Jarrett, head of the Office of Professional Responsibility (OPR), and completed in December 2008. It concluded that Yoo, a Berkeley law professor, and Bybee, now a federal appeals court judge on the 9th Circuit, violated professional standards when they drafted an August 2002 legal opinion that authorized CIA officers to use brutal methods when interrogating suspected terrorist detainees and recommended a referral to their state bar associations for possible sanctions, which could have resulted in their law licenses being revoked.

But [as I reported last April](#), Obama's Justice Department appointees began to water down those previous conclusions in early 2009 after OPR received responses on the report's conclusions from Yoo and Bybee, who both worked in the Justice Department's Office of Legal Counsel (OLC).

Shortly after taking charge of the Justice Department, Attorney General Eric Holder [assigned](#) Mary Patrice Brown, a veteran DC prosecutor and the new head of OPR, the task of reviewing the final report. Brown spent months scrutinizing the lengthy document and made revisions. Her conclusions were then sent to a senior prosecutor at the DOJ for a final review.

The person tasked with reviewing the final version is David Margolis, the 34-year career prosecutor at the DOJ. It was Margolis who softened OPR's earlier finding of professional misconduct and instead determined that Yoo and Bybee "showed poor judgment" when they drafted an August 1, 2002 legal opinion authorizing the CIA to employ methods such as

waterboarding against detainees during interrogations, according to Newsweek.

That means neither Yoo nor Bybee will be referred to state bar associations where they could have faced disciplinary action since poor judgment does not constitute professional misconduct, according to OPR's [post-investigation procedures](#) . For Bybee, such a referral could have also led to an impeachment inquiry before Congress.

It's unknown why Margolis downgraded the report's initial findings. Newsweek reported that he did so without any input from Holder, who has to accept the conclusions and recommendations contained in the document.

Yoo and Bybee, however, are still under scrutiny. Legal advocacy groups have filed complaints against them, and others who worked on the Bush administration's so-called "enhanced interrogation" program, with state bar associations in hopes that their law licenses will be revoked.

When the report is finally released and if its conclusions match Newsweek's story, particularly the key finding that Yoo and Bybee did not violate professional standards and won't face disciplinary action, the Obama administration will face a swift backlash from those who say the president and his appointees have gone above and beyond to cover-up war crimes committed by the Bush administration.

Newsweek noted that the OPR report is "sharply critical" of the "legal reasoning used to justify waterboarding" and other methods of torture CIA interrogators used against detainees after 9/11, a critical conclusion that raises questions about the Obama Justice Department's reasons for not holding Yoo and Bybee accountable.

Moreover, the report, which is still under a declassification review "will provide many new details about how waterboarding was adopted and the role that top White House officials played in the process, say two sources who have read the report but asked for anonymity to describe a sensitive document," Newsweek reported.

Two of the most controversial sections of the 2002 memo—including one contending that the president, as commander in chief, can override a federal law banning torture—were not in the original draft of the memo, say the sources. But when Michael Chertoff, then-chief of Justice’s criminal division, refused the CIA’s request for a blanket pledge not to prosecute its officers for torture, Yoo met at the White House with David Addington, Dick Cheney’s chief counsel, and then–White House counsel Alberto Gonzales. After that, Yoo inserted a section about the commander in chief’s wartime powers and another saying that agency officers accused of torturing Qaeda suspects could claim they were acting in “self-defense” to prevent future terror attacks, the sources say. Both legal claims have long since been rejected by Justice officials as overly broad and unsupported by legal precedent.

### **Four-Year-Long Investigation**

The OPR probe was launched in mid-2004 after a meeting in which Jack Goldsmith, then head of the OLC, got into a tense debate with White House lawyers, including Vice President Dick Cheney’s legal counsel David Addington.

That back-and-forth over the OLC’s judgments regarding George W. Bush’s powers rest at the heart of the Bush administration’s defense of its “enhanced interrogation” techniques that have been widely denounced as torture, such as waterboarding which subjects a person to the panicked gag reflex of drowning and which was used on at least three “high-value” detainees.

Bush officials insist that they were acting under the guidance of the Justice Department’s Office of Legal Counsel, which advises Presidents on the scope of their constitutional powers. For the OPR report to conclude that Yoo, Bybee and Bradbury violated their professional duties as lawyers and, in effect, gave Bush pre-cooked legal opinions to do what he already wanted to do would have shattered that line of defense.

Goldsmith ended up withdrawing some of the Yoo-Bybee opinions because he felt they were “legally flawed” and “sloppily reasoned.”

He resigned shortly thereafter and was subsequently replaced on an acting basis by Bradbury, who restored some of the controversial Yoo-Bybee opinions in May 2005, again granting Bush broad powers to inflict painful interrogations on detainees. Bradbury was also a subject of OPR's probe.

### **Yoo Failed to Cite Legal Precedent**

As [Truthout reported last week](#), an original draft of the report determined that professional misconduct was warranted because Yoo, when writing the August 2002 torture memo, failed to cite the key precedent relating to a president's war powers, *Youngstown Sheet & Tube Co. v. Sawyer*, a 1952 Supreme Court case that addressed President Harry Truman's order to seize steel mills that had been shut down in a labor dispute during the Korean War, according to DOJ officials who were knowledgeable about the contents of the draft version.

Truman said the strike threatened national defense and thus justified his actions under his Article II powers in the Constitution.

But the Supreme Court overturned Truman's order, saying, "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Since Congress hadn't delegated such authority to Truman, the Supreme Court ruled that Truman's actions were unconstitutional, with an influential concurring opinion written by Justice Robert Jackson.

Yoo's memoranda concluded that the laws governing torture violated Bush's commander-in-chief powers under the Constitution because it prevented him "from gaining the intelligence he believes necessary to prevent attacks upon the United States."

Yoo's lengthy response to the OPR expanded upon a defense he first cited in his 2006 book, ["War by Other Means,"](#)

in explaining why he didn't cite Youngstown.

Yoo wrote: "we didn't cite [Justice Robert] Jackson's individual views in Youngstown because earlier OLC opinions, reaching across several administrations, had concluded that it had no application to the president's conduct of foreign affairs and national security.

"Youngstown reached the outcome it did because the Constitution clearly gives Congress, not the President, the exclusive power to make law concerning labor disputes. It does not address the scope of Commander-in-Chief power involving military strategy or intelligence tactics in war ...

"Far from inventing some novel interpretation of the Constitution, [Office of Legal Counsel] was really doing little more than following in the footsteps of the Clinton Justice Department and all prior Justice Departments."

It now appears that Yoo made a convincing argument to OPR in defending his reasons for not citing the landmark ruling and that likely impacted Margolis's decision to water down earlier conclusions that found Yoo and Bybee in violation of professional standards.

A July 10, 2009, [report](#) by the inspectors general of the CIA, National Security Agency, DOJ and Defense Department into the Bush administration's warrantless wiretapping program, which were based on legal opinions written by Yoo, previously took Yoo to task for failing to cite Youngstown.

Yoo "omitted any discussion of Youngstown Sheet & Tube Co. v. Sawyer, a leading case on the distribution of government powers between the Executive and Legislative Branches," the report said.

"Justice [Robert] Jackson's analysis of President Truman's Article II Commander-in-Chief authority during wartime in the Youngstown case was an important factor in OLC's subsequent reevaluation of Yoo's opinions," the report said.

Additionally, the early draft of the OPR report also concluded, legal sources said, that Yoo misinterpreted an obscure 2000 health benefits statute and wrongly applied it to August 2002 and March 2003 interrogation opinions he wrote.

Again, expanding upon a defense that first appeared in his book, Yoo placed some of the responsibility on Congress for forcing him to rely upon the statute to narrow the definition of torture in a way that permitted techniques such as waterboarding.

In passing an anti-torture law, Congress only prohibited "severe physical or mental pain or suffering," Yoo wrote. "The ban on torture does not prohibit *any* pain or suffering whether physical or mental, only severe acts. Congress did not define severe ... OLC interpreted 'severe' as a level of pain 'equivalent in intensity to the pain accompanying serious physical injury, such as death, organ failure, or serious impairment of body functions.

"OLC's first 2002 definition did not make up this definition out of thin air. It applied a standard technique used to interpret ambiguous phrases in law. When Congress does not define its terms, courts commonly look in the United States Code for the use of similar language. The only other place where similar words appear is in a law defining health benefits for emergency medical conditions, which are defined as severe symptoms, including 'severe pain' where an individual's health is placed 'in serious jeopardy,' 'serious impairment to bodily functions,' or 'serious dysfunction of any bodily organ or part.'"

In his book, "The Terror Presidency," Goldsmith wrote that "the health benefits 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.... OLC's clumsily definitional arbitrage didn't seem even in the ballpark."

## **Bush Aides Secured Changes**

Last March, the Justice Department [revealed](#) that the OPR report underwent revisions after

the initial draft was rejected by former Attorney General Michael Mukasey and his deputy, Mark Filip, both of who insisted that Yoo, Bybee and Bradbury be given an opportunity to respond to its conclusions.

"Attorney General Mukasey, Deputy Attorney General Filip and OLC provided comments [after the first draft was completed in December], and OPR revised the draft report to the extent it deemed appropriate based on those comments," said acting Assistant Attorney General Faith Burton in a March 25, 2009 letter to Sens. Sheldon Whitehouse (D-Rhode Island) and Richard Durbin (D-Illinois), members of the Senate Judiciary Committee who have been closely tracking the OPR probe.

Burton also said at the time that the final OPR would likely undergo more revisions based on responses from the former OLC lawyers. Several months later, Durbin and Whitehouse received a letter from Assistant Attorney General Ronald Weich who disclosed the post investigation process.

Several months later, Assistant Attorney General Ronald Weich wrote to the senators and noted that if the appeals filed by Yoo, Bybee and Bradbury resulted in a rejection of OPR's findings by the "career official" reviewing the document then no such referral would occur.

"Department policy usually requires referral of OPR's misconduct findings to the subject's state bar disciplinary authority, but if the appeal resulted in a rejection of OPR's misconduct findings, then no referral was made," said Weich's May 4, 2009 letter to Durbin and Whitehouse. "This process afforded former employees roughly the same opportunity to contest OPR's findings that current employees were afforded through the disciplinary process."

Weich's letter to Durbin and Whitehouse was sent in response to queries by the senators last March about revelations that Bradbury oversaw OLC's review of the report in late 2008, despite the fact that he was a subject of OPR's investigation and was also acting head of OLC at the time.

Three months before Bush exited the White House, Bradbury, in a "memorandum for the files," renounced several legal opinions drafted by Yoo and Bybee.

Bradbury attempted to justify or forgive Yoo's controversial opinion by explaining that it was "the product of an extraordinary period in the history of the Nation: the immediate aftermath of the attacks of 9/11."

Bradbury wrote another memo five days before Bush left office last January, in which he once again repudiated Yoo's legal opinions. It would appear that this memo was in response to the OPR report. Bradbury said in the Jan. 15 memo that the flawed theories by Yoo in no way should be interpreted to mean that Justice Department lawyers did not "satisfy" professional standards.

Rather, Bradbury wrote, "In the wake of the atrocities of 9/11, when policy makers, fearing that additional catastrophic terrorist attacks were imminent, strived to employ all lawful means to protect the Nation."

Durbin and Whitehouse said they believed Bradbury's "memorandum for the files" made it a "conflict-of-interest" for him to participate in the formal review process.

But Weich said, "Because Mr. Bradbury's participation in that process was transparent, OPR advised that it can evaluate the OLC response with the knowledge of Mr. Bradbury's participation just as it would evaluate a response from anyone whose actions were within the scope of OPR's investigation.

"Therefore, OPR does not believe that Mr. Bradbury's participation in the OLC response was improper," Weich said

Weich added that the initial draft of the report was also [shared with the CIA](#) for a "classification review," and the agency, having reviewed the findings, "requested an opportunity to provide substantive comment on the report."

Durbin and Whitehouse, in a statement last May, said they "will be interested in the scope of the



'substantive comment' the CIA is providing, and the reasons why an outside agency would have such comment on an internal disciplinary matter."

## Report Long Overdue

Holder [testified](#) before Congress last year that the OPR report was expected be released by the end of November. In interviews over the past month, as Truthout [previousl](#)  
[y reported](#), two senior aides to Democratic lawmakers claimed the report was being held up in lieu of the passage of a health care bill.

But Tracy Schmalzer, a DOJ spokeswoman, disputed the allegations.

"That is absolutely untrue," Schmalzer said. "One thing has nothing to do with another."

[Schmalzer said](#) the review "process is ongoing and we hope to have [the report] complete and released soon."

Two DOJ officials familiar with details of the report said a delay in releasing it in the time frame Holder had promised was due, in part, to the fact that Margolis was hospitalized in December for pneumonia.

In his testimony last November, Holder said the report had not been released sooner due to "the amount of time we gave to the lawyers who represented the people who are the subject of the report an opportunity to respond. And then [OPR] had to react to those responses."

In 2008, Holder, who was a featured speaker at the American Constitution Society's annual convention, [told a packed crowd](#) that the "American people are owe[d] a reckoning" as a result of the "abusive" and "unlawful" policies of the Bush administration.

But if the initial reports about the OPR report's conclusions are accurate, that day will likely never come.