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United States Senate Committee on the Judiciary

"The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda"

February 26, 2010

Written Testimony for the Record

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We commend the Committee for holding this timely hearing on the Department of Justice Office of Professional Responsibility's (OPR) recently released report, and we thank you for the opportunity to submit written testimony.

To date, Jesselyn Radack is the only Justice Department attorney referred by OPR for advice given in a terrorism case. Ms. Radack, Government Accountability Project (GAP) Homeland Security Director, is a legal ethicist, recognized by the American Bar Association (ABA), who has served on the D.C. Bar Legal Ethics Committee and teaches professional responsibility. She is also a whistleblower. As the former Justice Department ethics advisor in the case of "American Taliban" John Walker Lindh, Ms. Radack blew the whistle when her advice to provide Lindh counsel was disregarded and evidence of that advice "disappeared" in contravention of a federal court order.[1] Among other retaliatory acts, the Justice Department hastily and vindictively referred Ms. Radack to the state bars in which she is licensed as an attorney based on a secret report.[2] Although the Maryland Bar dismissed the charges, the District of Columbia Bar investigation is still pending after nearly seven years. A recent interview with Ms. Radack published in *Harper's Magazine* is attached to this testimony.

Founded in 1977, GAP is the nation's leading whistleblower protection and advocacy organization. Since 9/11, a steady stream of national security whistleblowers have come to GAP with tales of wild and rampant wrongdoing at several levels of our government. Unfortunately,

[1] *See generally*, The Canary In the Coalmine, Home Page, http://www.patriotictruthteller.net/; JANE MAYER, THE DARK SIDE 95-97 (Random House, Inc. 2008); ERIC LICHTBLAU, BUSH'S LAW 35 (Random House, Inc. 2008); CHARLIE SAVAGE, TAKEOVER 107-10 (Little, Brown and Co. 2007).
[2] *See* James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 726-32 (2005).

due to the nature of their work, these whistleblowers can often face a terrible agency culture and weak or nonexistent protections when they attempt to speak out about illegal activity, waste, fraud or abuse. GAP's Homeland Security Program acts as both legal counsel to these whistleblowers, and as an advocate for necessary changes to the system – both to better protect such innocent employees, and to speak out in favor of greater overall transparency and against wrongful government behavior. GAP's advocacy stems from the principle that adherence to the rule of law, even in times of great crisis, is the best mechanism for securing our homeland. When our government officials ignore the rule of law, especially in times of great crisis, the need for accountability is paramount.

On February 19, 2010 the Justice Department released OPR's July 29. 2009 report, "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists" (OPR Report).[3] OPR's investigation focused on memos Mr. John Yoo and Judge Jay Bybee penned while serving in Justice Department's Office of Legal Counsel (OLC). The OPR Report found that former Deputy Assistant Attorney General John Yoo "committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice," and that former Assistant Attorney General Jay Bybee "committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."[4] The OPR report also states that "[p]ursuant to Department policy, we will notify bar counsel in the states in which Yoo and Bybee are licensed."[5] However, a memorandum from Associate Deputy Attorney General David Margolis (Margolis Memo), also released on February 19, 2010, rejected OPR's conclusions, downgraded the finding to one of "poor judgment," and specifically did not "authorize OPR to refer its findings to the state bar disciplinary authorities in the jurisdictions where Yoo and Bybee are licensed."[6]

The Justice Department's refusal to refer Mr. Yoo and Judge Bybee to their respective bar associations, even in the face of an OPR conclusion five years in the making and overwhelming evidence of professional misconduct, teaches an important lesson about Executive Branch agencies' ability to self-regulate and demonstrates the growing need for real transparency and accountability.

The Vast Majority of the Legal Community Has Condemned the Memoranda

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[3] OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF 'ENHANCED INTERROGATION TECHNIQUES' ON SUSPECTED TERRORISTS (July 2009) [hereinafter OPR Report], *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf.

[4] OPR Report, *supra* note 3, at 11 (footnote omitted).

[5] OPR Report, *supra* note 3, at 11 n.10.

[6] David Margolis, Associate Deputy Attorney General, Office of the Deputy Attorney General, U.S. Dep't of Justice, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigations into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists," 2, 68, January 5, 2010 [hereinafter Margolis Memo], *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

The OPR report references the plethora of journalists, government officials, and legal scholars who have almost universally discredited the memos under investigation, including past chairman of the international human rights committee of the New York City Bar Association, Scott Horton, University of Chicago law professor, Cass Sunstein, and international human rights law expert at Fordham University, Martin Flaherty.[7] Additionally, during confirmation hearings for former Attorney General Alberto Gonzales, Harold Koh, who at the time was the dean of Yale Law School and is now serving as Legal Adviser to the United States Department of State, repudiated Mr. Bybee's August 1, 2002 memo, and noted the possible ethical violations associated with it:

> [I]n my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read…[t]he August 1, 2002 OLC memorandum cannot be justified as a case of lawyers doing their job and setting out options for their client If a client asks a lawyer how to break the law and escape liability, the lawyer's ethical duty is to say no. A lawyer has no obligation to aid, support, or justify the commission of an illegal act…the August 1, 2002 OLC memorandum is a stain upon our law and national reputation.[8]

The significance of flaws in the memoranda is magnified considering OLC's lofty purpose of providing the President and all Executive Branch agencies with authoritative legal advice particularly on constitutional questions or especially complex legal issues, often in the form of opinions binding on Executive Branch employees.[9] Conservative scholars have agreed the memos abandoned OLC's mission. Prominent conservative thinker and former Reagan

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[7] *See* OPR Report, *supra* note 3, at 2-3.

[8] *The Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing before the S. Comm. on the Judiciary* 109th Cong. 526 (2005) (statement of Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School), *available at* http://frwebgate4.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=097776474172+0+1+0&WAISaction=retrieve.

[9] The Department of Justice website describes OLC's role within the Executive branch:

> "[b]y delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all the Executive branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The Office also is responsible for providing legal advice to the Executive branch on all constitutional questions and reviewing pending legislation for constitutionality."

See United States Department of Justice, Office of Legal Counsel homepage (Last visited June 22, 2009), http://www.usdoj.gov/olc/. A best practices memo dated May 16, 2005, authored by Principal Deputy Assistant Attorney General Steven Bradbury, further articulates the important role OLC attorneys play in the Executive Branch:

> [I]t is imperative that [OLC] opinions be clear, accurate, thoroughly researched, and soundly reasoned. The value of an OLC opinion depends on the strength of its analysis. Over the years, OLC has earned a reputation for giving candid, independent, and principled advice–even when that advice may be inconsistent with the desires of policymakers.

Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, Memorandum for Attorneys of the Office Re: Best Practices for OLC Opinions, May 16, 2005, *available at* http://www.usdoj.gov/olc/best-practices-memo.pdf.

administration Associate Attorney General, Bruce Fein, has said that, "OLC is supposed to be a check on overzealousness…The reason why you have OLC is to say, 'Here we draw the line.'"[10] Even in refusing to refer the authors to bar counsel, Mr. Margolis maintains that "these memos contained some serious mistakes," and "represent an unfortunate chapter in the history of the Office of Legal Counsel."[11] Similarly, even in criticizing a draft of the OPR Report, former Attorney General Michael Mukasey called the August 1, 2002 Bybee Memo a "slovenly mistake," a trivial assessment of the horrible techniques the memo authorized, but hardly a commendation of the memo's legal reasoning.[12]

OPR Cannot Fully Investigate Wrongdoing Relating to the OLC Memoranda

The broad consensus that the memos under investigation were a quality of legal work far below the high standards expected of Justice Department attorneys makes it more mind-boggling that the Margolis Memo refused to accept OPR's findings of professional misconduct. The internal Justice Department investigation failed to fully examine its attorneys' conduct and hold them accountable for their actions.

The Margolis Memo Demonstrates the Institutional Limitations of OPR as an Internal Watchdog

To the extent that OPR holds itself out as an internal watchdog of the Justice Department, that is belied by the fact that Mr. Margolis, a single senior career attorney who has been with the Department for more than 40 years, has the unilateral power to override OPR's conclusions. Like most career bureaucrats, Mr. Margolis obviously has a vested institutional interest in legitimizing the Justice Department's conduct. The Margolis Memo is more a distracting attack on OPR than it is a well-reasoned review of whether OPR correctly concluded that Mr. Yoo and Judge Bybee committed professional misconduct. Worse, Mr. Margolis's approach in attacking OPR is alarmingly underhanded. Having himself suggested that OPR "solicit and review" responses to OPR's draft reports from the subjects of the investigation, Mr. Margolis lampoons OPR for editing their drafts in light of the subjects' responses and primarily relies upon the responses to attack OPR's analysis.[13]

More specifically, woven through the Margolis Memo are two excuses incredibly destructive to legal ethics standards and the rule of law, which Mr. Margolis uses to immunize Mr. Yoo and Judge Bybee from professional responsibility for their, as the Margolis Memo understates, "poor judgment." First, Mr. Margolis insistently references the "context" in which the memos were drafted, relying upon assertions of the very officials under investigation that the context is relevant, and, effectively, carves out some sort of "national security emergency exception" to the ethics rules.

The Margolis Memo sets the stage for this manufactured exception:

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[10] *See* Vanessa Blum, *Culture of Yes: Signing Off on a Strategy,* LEGAL TIMES, June 14, 2004, at 1 (quoting Bruce Fein).
[11] Margolis Memo, *supra* note 6, at 67.
[12] OPR Report, *supra* note 3, at 9.
[13] Margolis Memo, *supra* note 6, at 10 ("…considering subjects' responses that I recommended that they solicit and review").

> [I]n hindsight, the concerns underlying the classified Bybee memo *may have been* overblown, but I certainly am not willing to conclude that, less than one year after 9/11, the officials responsible for preventing another attack took the threat *too* seriously. (Emphasis in original).[14]

This statement is particularly unsound as it implies that authorizing torture and cruel, inhuman, and degrading treatment of detainees is somehow necessary to take the threat of terrorist attacks seriously. Nonetheless, Margolis uses this paradigm to conclude:

> People of substantial intellect and integrity advocated that OPR's "review of the Bybee and Yoo OLC opinions for professional competence must be informed by this context" …and that OPR "exercise great caution when assessing the professional responsibility of executive branch lawyers who act in time of national security crisis"…Yet OPR dismissed this issue in a paragraph with no discussion of those positions, no attempt to address those historic events that the challenge their conclusion including the Jackson and Bates examples to which Goldsmith directed them, and no mention that Philbin had explained the belief at the time that "people are going to die if we don't prevent this attack."[15] [Internal citations omitted].

These "people of substantial intellect and integrity," upon which the Margolis Memo relies are largely former Justice Department officials who also possess a substantial bias in finding against professional misconduct of OLC attorneys, such as former Deputy Assistant Attorney General Patrick Philbin, who served in OLC when the memos under investigation were issued, and Assistant Attorney General Jack Goldsmith III, the head of OLC from October 2003 to July 2004.

Mr. Margolis also frequently excuses the memos' obvious flaws in legal reasoning and blatant omissions of relevant precedent because the memos were not intended for public release:

> Although Yoo and Bybee's errors were more than minor, I do not believe that they evidence serious deficiencies that could have prejudiced the client. This conclusion is largely supported by the reality that the memos were written for a limited audience and were but a part of the dialogue with the CIA.[16]

This is an especially dangerous proposition considering that OLC opinions, though they may not be intended for a broad audience when drafted, are, in fact, binding on the entire Executive Branch, and future Executive Branches. The fact that a small number of oligarchic officials - some of whom should not have been so closely interfering with OLC's activities - were involved in the drafting of the memos in no way excuses the authors from having to abide by legal ethics rules.

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[14] Margolis Memo, *supra* note 6, at 53.
[15] Margolis Memo, *supra* note 6, at 21.
[16] Margolis Memo, *supra* note 6, at 65. *See also, id.* at 33 ("Unlike the unclassified Bybee memo, the Levin memo was expressly written for public release"); *id.* at 45 ("…the memo was intended for high level officials within the White House, the CIA, and, with respect to the Yoo, memo, the Department of Defense…They were most likely aware that Yoo's assessment of the Commander-in-Chief authority represented the most aggressive view on the topic").

These two excuses are prevalent throughout Mr. Margolis's analysis, but are perhaps most obvious in the rejection of the OPR Report's valid criticism that the memos under investigation failed to address relevant precedent interpreting the Convention Against Torture:

> This criticism is particularly harsh for a memo intended for a limited audience and crafted in a finite amount of time during a national security emergency. While the standard OPR applies might work as a matter of Department expectations when there are no time constraints and no pending national security emergencies resolution of which may depend on the memo, it is not realistic to suggest that a memo for a small group of sophisticated attorneys in a time of national crisis fell short of professional obligations for failure to cite additional supportive cases.[17]

By excusing Mr. Yoo and Judge Bybee from the ethics rules because of the fear the country felt after September 11th, the Margolis Memo sends a tragic message for the future of legal ethics at the Justice Department: that it is acceptable to ignore the rules of professional conduct when attorneys are under immense pressure in times of national emergency and only a few officials are going to be taking the advice.

OPR Struggled to Obtain Crucial Information Relevant to the Investigation

The inadequacy of OPR as an internal oversight mechanism is further evidenced by the vast array of problems that OPR encountered in obtaining information throughout the course of its investigation, frequently being resigned to learning information from public press reports.[18]

Due to its jurisdictional limits – only current Justice Department officials are required to cooperate with an OPR investigation – and lack of ability to compel testimony, OPR was unable to interview key officials, such as former Counsel to the Vice President David Addington, former Deputy White House Counsel Timothy Flanigan, and former Attorney General John Ashcroft, who headed the Justice Department at the time OLC released the memos being investigated.[19]

The OPR report also contains indicia of outright obstruction of the investigation. For example, Principal Deputy Assistant Attorney General Steven Bradbury "provided OPR with a copy of the Bybee Memo, but asked [OPR] not to pursue [its] request for additional material."[20] Most disturbingly, OPR also reported "most of Yoo's email records had been deleted and were not recoverable," a felony, and that former Deputy Assistant Attorney General Patrick Philbin's "email records from July 2002 through August 5, 2002 – the time period in which the Bybee Memo was completed and the Classified Bybee Memo…was created – had also been deleted and were reportedly not recoverable."[21] OPR expressed frustration with the difficulty of obtaining a full record and had to qualify its findings based on the lack of information:

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[17] Margolis Memo, *supra* note 6, at 36.
[18] *See* OPR Report, *supra* note 3, at 8.
[19] OPR Report, *supra* note 3, at 7.
[20] OPR Report, *supra* note 3, at 5.
[21] OPR Report, *supra* note 3, at 5 n.3; *See also* 18 U.S.C. §§641, 2071 (federal statutes governing the destruction of public property).

> During the course of our investigation significant pieces of information were brought to light by the news media and, more recently, by congressional investigation. Although we believe our findings regarding the legal advice contained in the Bybee Memo and related, subsequent memoranda are complete, given the difficulty OPR experienced in obtaining information over the past five years, it remains possible that additional information eventually will surface regarding the CIA program and the military's interrogation programs that might bear upon our conclusions.[22]

These shortcomings are not necessarily the fault of OPR, but of the institutional structures which permit single attorney in the Deputy Attorney General's office to overrule the OPR Report's recommendations after five years of investigatory work. This is particularly true considering that there were two other iterations of the report, both of which OPR took the time to edit in light of responses from the subjects of the investigation and from former Attorney General Michael Mukasey and former Deputy Attorney General Mark Filip.

OPR's Investigation is a Narrow Inquiry Into Expansive Misconduct at OLC

As incomplete as OPR's inquiry was as a result of institutional limitations, the scope of the investigation was also incomplete because it barely scratched the surface of the faulty memoranda issued by OLC during the George W. Bush Administration, many of which were authored by Mr. Yoo and Judge Bybee and could constitute professional misconduct warranting bar referrals. For example, on November 2, 2001, Mr. Yoo signed a still-secret memo to Attorney General John D. Ashcroft in support of a secret, and highly scrutinized, domestic surveillance program later dubbed the "President's Surveillance Program" (PSP).[23] The November 2, 2001 memo contended that the Foreign Intelligence Surveillance Act (FISA), despite its purporting "to be the exclusive statutory means for conducting electronic surveillance for foreign intelligence…cannot restrict the President's ability to engage in warrantless searches that protect the national security."[24] A joint report from several Inspectors General called into question the integrity and independence of Mr. Yoo and his analysis in the November 2, 2001 memo, noting that Mr. Yoo "became the White House's guy," that the DOJ Inspector General (DOJ IG) discovered "serious factual and legal flaws in Yoo's early analysis" of the surveillance program, and that the analysis was "at a minimum factually flawed."[25]

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[22] OPR Report, *supra* note 3, at 10.

[23] OFFICES OF INSPECTORS GENERAL OF THE DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, CENTRAL INTELLIGENCE AGENCY, NATIONAL SECURITY AGENCY, AND OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 11 (Jul. 10, 2009), *available at,* http://www.fas.org/irp/eprint/psp.pdf; *See also* James Risen and Eric Lichtblau, Bush Let's U.S. Spy on Callers Without Courts, N.Y. TIMES, Dec. 16, 2005, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html.

[24] OFFICES OF INSPECTORS GENERAL OF THE DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, CENTRAL INTELLIGENCE AGENCY, NATIONAL SECURITY AGENCY, AND OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 11 (Jul. 10, 2009), *available at* http://www.fas.org/irp/eprint/psp.pdf.

[25] *Id.* at 11, 16, 30.

When read together, the full body of post-September 11th OLC memos – that the public has seen – show a shocking disregard for widely-accepted constitutional theories of separation of powers and a favoritism towards the theory that the President occupies a constitutionally superior position as Commander-in-Chief. The November 2, 2001 memo is one small piece of the body of law developed at OLC using this fringe unitary executive theory. Mr. Yoo's unitary executive theory appears harmless as a theoretical matter, however, reading all of the publicly-available memos as a whole, the actions OLC advises that the President can unilaterally undertake result in an Executive Branch that can routinely overpower Congress and the Courts, disregarding federal statues and ratified treaties.[26] Without examining the full body of "law" OLC produced in the aftermath of September 11th, any investigation cannot fully assess the magnitude of the professional misconduct committed.

Conclusion

The Justice Department's refusal to hold accountable Mr. Yoo and Judge Bybee in the face of the OPR Report's finding of professional misconduct calls into question the ability of the Justice Department's internal watchdog mechanisms to aggressively investigate alleged professional misconduct and respond appropriately. The fact that Ms. Radack is still under bar referral only underscores the Justice Department's inability to conduct politically-independent investigations.

While the Justice Department has proven incapable of self-policing its attorneys, only an independent body with a wide-range of hard-hitting investigatory tools, such as subpoena power and the ability to investigate allegations for both criminal conduct and professional misconduct, can ensure government legal professionals are held accountable for authorizing illegal and morally reprehensible conduct. We urge the Committee to continue its inquiry into the OPR Report and launch an inquiry into all of the questionable OLC memos issued post-September 11th, and to subpoena current and former Justice Department officials who refuse to appear before Congress. The Justice Department should also expand the scope of the Special Prosecutor's current investigation into the CIA's interrogation program to include the legal justification for and authorization of abusive tactics.[27]

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[26] *See e.g.* Memo from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel to Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, Authority for Use of Military Force To Combat Terrorist Activities Within the United States, Oct. 23, 2001, at 2, *available at* http://www.usdoj.gov/opa/documents/memomilitaryforcecombatus10232001.pdf (arguing, *inter alia,* that the Fourth Amendment does not apply to domestic military operations); Memo from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice to Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, Applicability of 18 U.S.C. §4001(a) to Military Detention of U.S. Citizens, June 27, 2002, at 10, *available at* http://www.usdoj.gov/opa/documents/memodetentionuscitizens06272002.pdf (arguing, *inter alia,* that Congress has cannot interfere with the President's authority to can detain enemy combatants); Memo from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees, Jan. 22, 2002, at 15, *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf (arguing, *inter alia,* that the President can unilaterally suspend U.S. treaty obligations, particularly the Geneva Conventions).

[27] *See generally,* Carrie Johnson, *Prosecutor to Probe CIA Interrogations,* WASH. POST, Aug. 25, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/08/24/AR2009082401743_2.html?sid=ST2009082401068.

In the absence of aggressive oversight and accountability, future generations of Justice Department attorneys will be able to authorize the same abusive techniques without consequences. The *New York Times* summed-up the absolute necessity of real accountability in its February 25, 2010 editorial: "The quest for real accountability must continue. The alternative is to leave torture open as a policy option for future administrations."[28] Holding accountable the officials who breached their duties as lawyers and as public servants during the past nine years is not a political attack on the previous administration but rather a prerequisite to putting this sad chapter in American history behind us and truly moving forward.

[28] Editorial, *The Torture Lawyers*, N.Y. TIMES, Feb. 25, 2010, at A32, *available at* http://www.nytimes.com/2010/02/25/opinion/25thur1.html.

HARPER'S MAGAZINE

No Comment

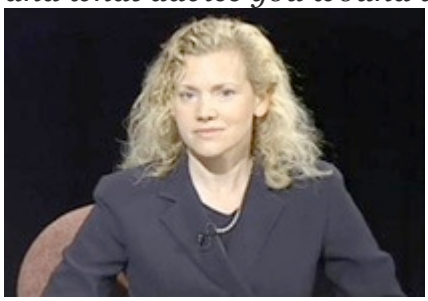
By Scott Horton

February 23, 5:30 PM

Justice's Vendetta Against a Whistleblower: Six Questions for Jesselyn Radack

The current controversy surrounding the velvet glove treatment the Justice Department gave to torture memo authors John Yoo, Jay Bybee, and Steven Bradbury led me to an interview with Jesselyn Radack, a former Justice Department lawyer who "did the right thing." Not only did she dispense indubitably accurate advice, she caught the Justice Department in the middle of acts of what might have been criminal obstruction and insisted that they be corrected. What happened? Radack found herself facing trumped up criminal charges, had frivolous complaints filed against her before two bar associations, and was subjected to repeated petty harassment, including being placed on the "No-Fly" List. I put six questions to Jesselyn Radack about her nightmarish experience in the hands of so-called Justice Department ethics staffers.

1. When an American citizen, John Walker Lindh, was captured in northern Afghanistan, FBI agents sought guidance on whether and how he could be questioned and the request was sent to you for an opinion. Can you explain what your job was, and what advice you wound up giving?



Jesselyn Radack

I was a legal advisor to the Justice Department on matters of ethics. On December 7, 2001, I fielded a call from a Criminal Division attorney named John DePue. He wanted to know about the ethical propriety of interrogating "American Taliban" John Walker Lindh without a lawyer being present. DePue told me unambiguously that Lindh's father had retained counsel for his son. I advised him that Lindh should not be questioned without his lawyer.

2. Was your advice followed?

I gave my advice on a Friday. Over the weekend, the FBI interrogated Lindh anyway. DePue called back on Monday asking what to do now. I advised that the interview might

have to be sealed and used only for intelligence-gathering or national security purposes, not criminal prosecution. Again, my advice was ignored.

Three weeks later, on January 15, 2002, then-Attorney General John Ashcroft announced that a criminal complaint was being filed against Lindh. "The subject here is entitled to choose his own lawyer," Ashcroft said, "and to our knowledge, has not chosen a lawyer at this time." I knew that wasn't true.

Three weeks later, Ashcroft announced Lindh's indictment, saying Lindh's rights "have been carefully, scrupulously honored." Again, I knew that wasn't true.

3. Later, when the Bush Administration decided to try Lindh on criminal charges in a federal court in Virginia, the judge issued a discovery order. How did you find out about it? What did you learn about the Justice Department's compliance with discovery requests? What did you do about that?

On March 7, I inadvertently learned that the judge presiding over the Lindh case had ordered that all Justice Department correspondence related to Lindh's interrogation be submitted to the court. Such orders routinely are disseminated to everyone with even a remote connection to the case in question, but I heard about it only because the Lindh prosecutor contacted me directly.

There was more. The prosecutor said he had only two of my e-mails. I knew I had written more than a dozen. When I went to check the hard copy file, the e-mails containing my assessment that the FBI had committed an ethical violation in Lindh's interrogation were missing.

With the help of technical support, I resurrected the missing e-mails from my computer archives. I documented and included them in a memo to my boss and took home a copy for safekeeping in case they "disappeared" again. Then I resigned.

4. Once the "disappeared" e-mails resurfaced, what did the Justice Department do to you?

As the prosecution proceeded rapidly, and the Justice Department continued to claim that it never believed at the time of his interrogation that Lindh had a lawyer, I disclosed the e-mails to *Newsweek* in accordance with the Whistleblower Protection Act and the crime-fraud exception to confidentiality.

A few weeks later, the Lindh case ended in a surprise plea bargain on the eve of a suppression hearing regarding whether statements Lindh made while in custody in Afghanistan–the ones I had advised against–could be used against him at trial–which I also advised against.

Afterwards, I was forced out of my job, fired from my subsequent private sector job at the government's behest, placed under criminal investigation without any charges ever being brought, referred for disciplinary action to the state bars where I'm licensed as a lawyer, and put on the "No-Fly" List.

5. I understand the Maryland ethics board concluded that the Justice Department's accusations were meritless in 2005, but now, seven years later, the same charges are still pending with the D.C. Bar Counsel—with which the Justice Department claims a "special relationship." What's going on there?

You would have to ask Bar Counsel Wallace E. "Gene" Shipp, Jr. He personally took over the handling of my case a year and a half ago. The Maryland Bar dismissed the charges against me in 2005. My referral to the D.C. Bar (the same Bar to which Yoo and Bybee would have been referred) is still pending after almost seven years. A number of legal scholars, including Jim Moliterno, have written about politically-motivated bar

discipline. The referral was certainly retaliatory. I am disappointed, though, that the D.C. Bar would allow itself to be used as a tool of the Bush Justice Department. Ironically, from 2005-07, I was elected by the D.C. Bar Board of Governors to serve on the D.C. Bar Legal Ethics Committee, which is separate from the disciplinary arm of the bar. Obviously, the right hand doesn't speak to the left.

6. How can your case be compared with the cases of John Yoo, Jay Bybee, and Steven Bradbury?

I am now the only Justice Department attorney that OPR referred for bar disciplinary action stemming from advice I gave in a terrorism case–and my advice was to permit an American terrorism suspect to have counsel.

Contrary to OPR's own policies, it hastily and vindictively forwarded my case to the state bars in which I'm licensed, absent a finding of "professional misconduct," much less a finding of "intentional misconduct or reckless disregard of an applicable standard or obligation"–the benchmark that OPR uses. Instead, OPR referred me to the bar disciplinary authorities for "possible misconduct." Moreover, I was referred based on a secret report to which I did not have access. Finally, I was referred for conduct I engaged in as a private citizen, not as a public servant, after I had left the employ of the Justice Department.

To the extent that OPR holds itself out as an internal watchdog of the Justice Department, that is belied by the fact that David Margolis, a single senior career attorney who has been with the Department for more than 40 years, has the unilateral power to override anything OPR does. Like most career bureaucrats, he obviously has a vested institutional interest in legitimizing Department conduct. Margolis's take-away message is that it's okay to ignore the rules of professional conduct if you're scared or in a hurry, failing to realize, perhaps because he's a government attorney, that stress and deadlines are the *status quo* for most lawyers.

Although entirely predictable, the Justice Department's decision to give Yoo and his cohorts a pass should offend all lawyers. It is now incumbent upon the legal profession, which is entirely self-regulated, to provide oversight and accountability within its own ranks and to the public.

Source: http://www.harpers.org/subjects/NoComment