

Statement of

# **The Honorable Richard J. Durbin**

United States Senator  
Illinois  
February 26, 2010

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Hearing of the Senate Judiciary Committee  
"The Office of Professional Responsibility Investigation  
into the Office of Legal Counsel Memoranda"

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Thank you Mr. Chairman for this hearing and for your leadership on this issue.

It is worth reminding ourselves why we're here today.

Mr. Bybee and Mr. Yoo authored the infamous torture memo, which redefined torture as limited only to abuse that causes pain equivalent to organ failure or death. They concluded that the President has the authority to ignore the law that makes torture a crime. That memo provided legal cover for the Bush Administration to authorize waterboarding, a torture technique that our country has always repudiated as torture and prosecuted as a war crime.

The late historian Arthur Schlesinger said this about the Bush Administration's legal defense of torture: "No position taken has done more damage to the American reputation in the world--ever."

In February 2008, I asked then Attorney General Mukasey to investigate whether the Bush Administration's use of waterboarding violated any laws. He refused. Since then, for the past two years, Senator Whitehouse and I have pressed for this OPR report to be completed and made public so that the American people can judge for themselves what was done in their name.

Now, thanks to Attorney General Holder, this report has finally seen the light of day. I want to commend Attorney General Holder for the transparent and apolitical way he has handled this investigation.

Some claim that David Margolis has vindicated Mr. Yoo's and Mr. Bybee's conduct because he concluded that they did not engage in professional misconduct. But Mr. Margolis did not vindicate Jay Bybee and John Yoo. Far from it. Here is what he said:

"I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client. ... my

decision not to adopt OPR's misconduct findings should not be misread as an endorsement of the subject's efforts."

It should also be clear that this is not the end of the road when it comes to investigating the torture scandal. There is strong evidence in the OPR report that other Bush Administration officials worked closely with Mr. Bybee and Mr. Yoo to make sure that the Justice Department signed off on the legality of torture techniques like waterboarding. According to the OPR report, there was extensive discussion of granting "advance pardons" to allow the CIA to engage in illegal conduct. John Yoo said that former Attorney General Ashcroft was "sympathetic" to this idea.

After other Justice Department officials rejected the concept of "advance pardons," Mr. Yoo added the section to the torture memo which stated that the President, as Commander-in-Chief, could override criminal laws prohibiting torture. This would allow Administration officials to engage in illegal conduct, safe in the knowledge that the President could simply set aside the laws they were violating.

When one of John Yoo's colleagues objected to the Commander-in-Chief override, Mr. Yoo told him, "They want it in there." Who were they? Mr. Yoo doesn't tell us, but the OPR report documents repeated meetings between Mr. Yoo and top White House officials, including then-White House Counsel Alberto Gonzales, and David Addington, Vice President Cheney's chief of staff. And Mr. Gonzales said that Mr. Addington was "an active player" in drafting the memo.

The Attorney General has made it clear that the Justice Department will not prosecute interrogators who relied in good faith on legal advice provided by the Office of Legal Counsel. But that would not apply to senior political appointees who were involved in authorizing the use of torture.

In the end, what have we learned? We have learned that even when America is fearful and concerned about terrorism, we should never forget our basic values. The time will come when those who do have to answer for it. If we stand true to our values and to our history as a nation, we will be stronger and we will be respected in the world.