

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Hearing on 'The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda'
Senate Judiciary Committee
Friday, February 26, 2010
As Submitted to the Record

"The Office of Professional Responsibility (OPR) report reminds us in no uncertain terms that John Yoo and Jay Bybee engaged in disgraceful conduct by writing and signing legal memos authorizing torture.

"While much of the information in the OPR report has previously been declassified and discussed in various places, the report is stunning in its recounting of the history of these torture memos. The Department of Justice deserves credit for making available so many documents relating to this report. The report reminds us of the pressure coming from the White House, and particularly the Office of the Vice President, on the CIA's interrogation program; the extreme legal theories and one-sided presentation of the law that Yoo provided in response; and the extraordinary secrecy with which these issues were handled. Even after the memos signed by Bybee and Yoo in 2002 and 2003 were withdrawn in 2004, subsequent memos went on to authorize what can only be described as acts of torture, including one drafted in 2005 by Steven Bradbury over the objection of Deputy Attorney General James Comey, who also raised concerns that Bradbury was susceptible to pressure because he was hoping to be nominated by the President to be an Assistant Attorney General.

"Those later memos have now been withdrawn, although it's worth noting that other controversial memos governing wiretapping remain in effect. The job of reversing the mistaken Bush Administration-era theories of executive power is still not complete.

"As we suspected all along, the OPR report also confirms that the administration pushed to include certain provisions in the Military Commissions Act of 2006 precisely to 'remove the legal barriers to the CIA program that had been created by the DTA [Detainee Treatment Act of 2005] and Hamdan [v. Rumsfeld, 548 U.S. 557 (2006)].' OPR Final Report at 154. Indeed, in 2007, Bradbury issued yet another OLC memo concluding that six 'enhanced' interrogation techniques the CIA still wanted to use did not violate domestic or international law. It took a new President and a new Attorney General to repudiate both the use of torture and the tortured legal reasoning justifying it.

"I am deeply troubled that one of the architects of this perversion of the law is now sitting on the federal bench. I agree with you that Jay Bybee should step down from his lifetime appointment. I do not see how he can serve as a credible federal judge - someone who is supposed to be an independent decision-maker whose judgment and integrity are beyond question - under these circumstances. His name is now synonymous with an extreme legal analysis that has been repudiated by almost everyone except the few people involved in writing it. I opposed Judge Bybee's nomination in 2003 because the administration refused to make his OLC opinions available to the committee. He claimed he would uphold the law and follow Supreme Court precedent, but legal memos that would have given this committee a very good window into whether he would fulfill that commitment were withheld. Little did I know at the time what a difference it would have made to see those memos. I have no doubt that had this committee been given access to the OLC opinions it asked for when Judge Bybee was nominated to the Ninth Circuit, he would never have been confirmed.

"I ask that a copy of my floor statement in opposition to Judge Bybee's nomination dated March 13, 2003, be included in the record of this hearing.

"That brings me to the other issue the OPR report raises: the ongoing problem of secret law. The legal theories in the Bybee and Yoo memos offered the most extreme possible interpretation of presidential power, and failed to present more mainstream views or conflicting arguments. Tragically, there was no judicial or congressional oversight of these interpretations. This is an ongoing problem. We have an executive branch office writing binding legal opinions on issues that often are never adjudicated by any court. Not only that, but that same office treats its own decisions as precedent that can then be cited in future opinions. And many of these decisions remain not only outside the public eye, but also unavailable to congressional oversight committees. When you have an executive branch institution with an inherent bias in favor of executive power and authority to issue binding legal opinions, and little if any opportunity for congressional, judicial or public oversight of its opinions, is it surprising that something like the Bybee and Yoo memos were the result?

"This is exactly why I have pushed for more congressional reporting to Congress on OLC opinions, including the bill that Senator Feinstein and I introduced last Congress, the OLC Reporting Act.

"I want to make one final point. The history of what happened in the Office of Legal Counsel during the Bush Administration is exactly why we need to confirm Dawn Johnsen to head that office. She understands the crucial role of the OLC in upholding the rule of law and has championed institutional reforms to make sure that nothing like the Bybee/Yoo memos ever happens again."