

Reconciling Liberal Theory with American Torture*

Winston Chou[†]

May 2, 2013

Abstract Despite the incorporation of international antitorture law into the federal criminal code, the United States was responsible for the violently abusive treatment of prisoners suspected of terrorism, amounting in many observers' eyes to torture. This case contradicts liberal theories of international law, which predict a mutually reinforcing relationship between liberal democracy and human rights. Through a historical analysis of this apparently deviant case, this article reaffirms the core assumptions of a liberal theory of human rights, but productively extends theory by showing how members of the George W. Bush administration legalized the abusive treatment of prisoners in spite of the United State's treaty commitments.

1 Introduction

In spring of 1988, Ronald Reagan sent word to the Senate that he had signed the United Nations Convention Against Torture. Reagan boasted of the United States' active and effective leadership in negotiating the Convention, but might have gone further: an American stateswoman, Eleanor Roosevelt, had paved the way for the treaty by championing the first international human rights agreement, the 1948 Universal Declaration of Human Rights. Forty years later, Reagan wrote, the US had the opportunity to help realize her vision of a more humane society by affirming its inflexible stance against the "abhorrent practice" of torture.

Although the Senate ratified the Convention in 1994, subsequently incorporating the treaty into the federal criminal code, there is at present "overwhelming" evidence that mem-

*Draft prepared for presentation at the Ninth Annual Graduate Student Conference, Center for the Study of Democracy, University of California – Irvine. Please do not share or cite without author's permission – it's in a rough state.

[†]Department of Sociology, 106 Wallace Hall, Princeton University, Princeton, NJ. Comments are welcome via [email](#).

bers of the George W. Bush administration approved the violently abusive interrogation of suspected terrorists, amounting in many observers' eyes to torture (Human Rights Watch 2012).

This article explains why the incorporation of international treaties criminalizing the use of torture and other forms of cruel treatment failed to prevent the systematic use of “Enhanced Interrogation Techniques” (EITs) under the Bush administration. Importantly, I do not address the legal question of whether these techniques actually constituted torture. Rather, I conceptualize the use of EITs under the Bush administration as failure to comply with the US’s internalized human rights commitments. For strictly analytical purposes, I define torture as the systematic use of coercive physical violence for state purposes (Rejali 2001). Again, under this definition, legally colorable distinctions between torture and simply cruel or humiliating treatment are treated as analytically irrelevant, since both are prohibited under treaties the US has incorporated.

The use of EITs presents an important point of analysis because it contradicts, at least prima facie, received wisdom on the influence of human rights. Theoretically, human rights laws are most influential in democracies, where they can be incorporated into domestic institutions which already promote basic civil and political rights (Moravcsik 1995, Simmons 2009). This is bad news for human rights advocates, as the worst offenders are also the least likely to be able and willing to protect human rights (Englehart 2007, Hafner-Burton 2012). But it is good news for prisoners of the United States who, at least in theory, can rely on the mores of a vibrantly liberal democracy. “Nowhere in the world are civil liberties more robustly debated and defended in public and in court (Moravcsik 2005, 147).” Nowhere are people so ordinarily well-versed in a discourse of personal rights (Glendon 1991). The failure of human rights to matter in one of the most liberal democratic countries in the world is an invitation to revisit what we know about human rights abuse.

The article continues in four parts. In Section 2, I examine the literature on human rights, focusing especially on “Liberal” theories of international law, which posit that the

fundamental determinants of compliance with human rights lie in the capacity of national institutions to promote them (Moravcsik 1995, 2012; Simmons 2009). Liberal predictions receive robust empirical support, but are seemingly contradicted by the case under present analysis. Rather than “falsifying” liberal theory, I show that a careful analysis of this apparently deviant case can help specify the conditions of systemic failures to protect human rights. I discuss my methodological approach in Section 3. In Section 4, I provide an explanation of the legalization of torture, drawing on concepts from the sociology of organizational deviance to show how attorneys in the Bush administration distorted formally organized mechanisms to legalize the use of EITs (Vaughan 1999). In Section 5, I reconstruct the case from a liberal perspective. A careful case study of the legalization of torture reaffirms, rather than invalidates the core tenets of a liberal theory of human rights. Importantly, the mechanisms enabling change in favor of compliance with human rights will not be found in international law, but in the institutional hallmarks of democratic societies (Moravcsik 1995, 178-182).

2 Democracy and Human Rights

2.1 How Do Human Rights Laws Influence Human Rights Abuse?

Essentially every government in the world has pledged to protect human rights, whether through the core agreements of the UN or the growing flocks of human rights treaties, commissions, and courts (Hafner-Burton 2012). Unfortunately, large-n studies repeatedly show that states seldom translate these promises into tangible improvements in human rights practices (Poe, Tate, and Keith 1999; Hathaway 2002; Neumayer 2005; Hafner-Burton and Tsutsui 2005). As one leading scholar writes, empirical research on the influence of human rights laws has converged on the finding that “treaties do not universally or broadly correlate with actual human rights protections” (Hafner-Burton 2012).

Within a literature that is increasingly grim about the prospects of international humanitarian law, there is one cause for optimism: human rights treaties seem to noticeably improve

human rights practices when they are integrated into the institutional structures of liberal democracies (Neumayer 2005; Poe, Tate, and Keith 1999). For instance, Helfer and Voeten find that the European Court of Human Rights (ECHR) wielded a promising influence on the policy choices of the member states of the Council of Europe; an ECHR judgment which favored equal rights for lesbian, gay, bisexual, and transgendered individuals increased the annual probability of a progressive policy reform by about eight percent (2011, 2). In another recent study, Cole (2012) finds that, for three of the four treaties he analyzes, democracy is the only control variable which has a consistently positive and statistically significant effect across different levels of treaty commitment. Hafner-Burton and Tsutsui (2005) find similar evidence in their sample of 153 countries from the years 1976 to 1999, although in their models a measure of the number of international non-governmental organizations is also consistently positive and significant.

What accounts for this relationship? Although the literature on human rights has blossomed on recent years, most of it attempts to answer the *opposite* question, that is, why non-democracies fail to deliver on their promises to protect human rights. Indeed, the dominant theoretical paradigm in the field takes failure as a given: world polity theory argues that states ratify human rights treaties as a matter of window dressing, taking advantage of the global legitimacy of human rights to signal that they are not deviant actors without actually intending to modify their underlying behaviors or preferences (Hafner-Burton and Tsutsui 2005). From this perspective, states ratify human rights treaties as a matter of ceremony, that is, without being convinced of its value or purpose (Hafner-Burton, Tsutsui, and Meyer 2008). Hence, like the structural realists of yore, world polity theory predicts that, when states' material interests diverge from the letter of treaty law, their behavior will become decoupled from their formal commitments to protect human rights (cf. Cole 2012, 1136; Cole 2005; Hafner-Burton and Tsutsui 2005; Wotipka and Ramirez 2008).

Although world polity theory provides a compelling explanation for why states sign human rights treaties when they have no intention or capacity to honor them, it does not explain

how and why variation in the political structure of states mediates the incorporation and enforcement of human rights law. In emphasizing conformity to universal codes and scripts, world polity theory oversimplifies the genuine institutional differences between states that necessarily precede and interact with elements of global culture (cf. Simmons 2010). In other words, we require a different theoretical perspective to understand why democracies honor their commitments to protect human rights better than non-democracies, and why a democracy should break the pattern.

2.2 Liberal Theories of International Law

Liberal international relations theory reframes principles of Liberal political philosophy into positive assumptions about what states are and how they act (Slaughter 2000, 243). Specifically, liberals assume that states are not actors capable of having interests, but socially-embedded institutions which represent the interests of the fundamental actors in world politics: individuals, organizations, and substate actors (Moravcsik 1997, 518). This does not mean that states must be broadly representative, for example, autocracies are states which are captured by narrow segments of the population and consequently express only the interests of a few. Nor do liberals rule out the possibility that states can behave as if they were motivated by purely instrumental reasons. Rather, liberals insist that how states act depends on the analytically prior question: who governs? (Moravcsik 2012). In other words, from the perspective of liberal theory, the fundamental source of variation in international behavior has to do with the underlying interests held by individuals embedded in society, *in addition to* the different ways these are aggregated and expressed by national institutions (Ibid.). Like the chemical bonds between atoms of different composition, whether states choose to be “cooperative or conflictual [depends] on their internal structure” (Slaughter 2000, 241).

Liberal explanations of why democracies are more likely to honor their commitments to protect human rights take two forms: first, democratic institutions directly facilitate the enforcement of human rights law; second, democratic institutions harmonize the underlying

preferences held by members of society with the values expressed in human rights treaties. Simmons (2009) provides a magisterial example of the former explanation. She argues that ratification results in improvements only in countries with domestic institutions that facilitate three mechanisms of enforcement. First, treaties potentially influence national politics by focusing legislative agendas and fostering lawmaker coalitions around human rights. Second, they influence jurisprudence by inspiring and supporting human rights litigation in national courts. Third, they invigorate non-elites to mobilize around human rights reform (see also Tsutsui 2006; Tsutsui and Shin 2008). Each of these mechanisms can noticeably improve domestic practices, but all presuppose national institutions which already imply basic civil and political rights. Thus, Simmons concludes, human rights treaties are most influential where they already have some “domestic political and legal traction” (2009, 12).

Moravcsik’s textured case studies of the European Convention on Human Rights provide examples of the second explanation (1995, 2000). Whereas Simmons adopts a comparative lens, Moravcsik emphasizes the singularity of the European human rights regime, the “world’s most extensive and effective system of international institutions” designed for the promotion of human rights (1995, 157, Helfer and Slaughter 1997). Anchored in the advanced democracies of Western Europe, the success of the European regime does not consist of the forceful liberalization of illiberal states, but rather the subtle “harmonization” and “perfection” of rights protections in already democratic states. Its mechanisms of fostering compliance work from within; that is, by altering the preferences of domestic social groups, legislatures, and judiciaries: “shaming” focuses criticism on state practices, sharpening domestic preferences for policy reform, while “cooptation” encourages national legislatures and courts to incorporate international laws into their jurisprudence, while incrementally ceding jurisdiction to regional human rights courts (1995, 168, 176). Changing preferences at the national level are then expressed in state policies which are increasingly consonant with international norms.

The value of these explanations is that they direct us to middle-range observations of the mechanisms that mediate between individual and state behavior (Merton 1949). For both

authors, the promotion of human rights depends on intermediate mechanisms embedded in domestic democratic institutions; for Simmons, when they permit elite and non-elite actors to fluidly organize around and promote human rights claims; for Moravcsik, when they reinforce an existing convergence between national and international norms. However – let us keep with Merton – much of the value in observing intermediate mechanisms lies in the fact that the initial purposes of formally organized actions do not always determine their consequences, that is, that mechanisms sometimes fail (1936, 1940).

While the concept of failure is not new in the human rights literature, it is usually used descriptively, for example to describe the lack of change in states which ratify human rights treaties (Hafner-Burton and Tsutsui 2007). This article defines failure more narrowly, as a subtype of organizational deviance in which a formally organized process produces a sub-optimal outcome which deviates from both formal design goals and normative expectations (Vaughan 1999, 273). The difference is that the absence of change is not necessarily associated with failure, rather, failure means that some identifiable mechanism has not produced its desired outcome.

Incorporating the possibility of failure into a liberal theoretical approach, I hypothesize that the US failed to honor its commitment against torture because formal organizations meant to ensure technically rational results – in this case, the objective and candid application of law to concrete problems – instead produced outcomes that were inscrutable, unanticipated, and undesirable (Vaughan 1999). There are two derivable implications of this hypothesis: first, participants in these organizations should have deviated from procedural and normative expectations, whether in error or malfeasance; second, just as the formal organization of a mechanism implies possibility of error, malfeasance, and failure, the failure of a mechanism implies that it sometimes works (Granovetter 1984, Stinchcombe 2001). In other words, the researcher should be able to point to outcomes where democratic institutions did actually result in the protection of prisoners' rights.

3 Case, Method, and Data

This article looks to strengthen liberal theories of human rights by resolving an apparently deviant case: the systematic abuse of human rights by a robustly liberal democratic state. However, the systematic use of EITs under the Bush administration is more than a puzzling development which could not have been predicted on the basis of existing theory. It squares with the prediction of liberalism's foil: world polity theory. From that perspective, the ratification of human rights treaties is best explained in terms of the external legitimacy of human rights, and therefore the strategic interest of states in posturing themselves as legitimate actors while not actually modifying their structural interests. Thus, when the interests of states diverge from the values expressed in human rights, world polity theory expects that states will violate their purely nominal commitments.

By contrast, liberal theory assumes that the incorporation of human rights law cannot be understood without reference to its substance. States generally "ratify treaties because they support them and anticipate that they will be able and willing to comply with them under most circumstances" (Simmons 2009, 65). Additionally, when states comply, it is because underlying preferences and institutional structures at the national level are already convergent with the values expressed in human rights treaties. Not only does this imply that noncompliance is a genuine puzzle, rather than a fact of life, it suggests that the locus of noncompliance lies in the failure of institutions to adequately enforce international law commitments.

Which view is correct? To answer this question, this article employs process tracing in a case study research design. Process tracing involves the linking of cause and effect through the temporal ordering of intervening processes and outcomes (mechanisms). It is theoretically motivated, in the sense that it continually assesses how well competing theoretical explanations anticipate new evidence of these mechanisms. From a standard statistical perspective, process tracing is prudently associated with theory construction rather than theory testing, since it involves the careful analysis of few cases which may not be representative

of the phenomenon as a whole. However, the use of process tracing to test deterministic theories is more closely analogous to Bayesian statistical methods, which consist of the constant updating of probabilities in light of new knowledge (Bennett 2009). In process tracing, researchers collect evidence of independent variables, intervening mechanisms, and auxiliary outcomes, and continually revise the likelihood of competing theoretical explanations based on whether they anticipate or are contradicted by this evidence (Ibid., Mahoney 2010). The last of these are analogous to empirical statements implied by the same theory under different scope conditions, whose confirmation lends additional support to the theory (Stinchcombe 18, 19).

To prefigure my argument, I show that liberal theory anticipates key independent variables and intervening mechanisms, specifically, the failure of formal mechanisms designed to protect the rule of law against the exigencies and interests of policy, caused by malfeasance and error on the part of policy elites in the Bush administration. Decisively, liberal theory also anticipates two auxiliary outcomes: first, the renunciation of torture as competing preferences and institutions intruded on counterterrorism decision making, resulting in the compression of presidential discretion after 2004; second, the pushback of the Supreme Court against the indefinite detention of prisoners in Guantanamo Bay, a previously lawless zone under the sole discretion of the Bush administration. Specifically, after the Court ruled against the Bush administration in the 2004 case *Rasul v. Bush*, hundreds of captured foreign nationals were repatriated to their home countries.

I substantiate my argument using a mix of primary and secondary sources: declassified legal memoranda circulated within the executive branch, memoirs of lawyers, investigative reports, transcripts and recordings of oral arguments before the Supreme Court, newspaper articles, and secondary accounts. In researching specifically organizational malfeasance and error, I relied especially on internal reviews performed by the Department of Justice's Office of Professional Responsibility (OPR) and the Central Intelligence Agency's Office of the Inspector General (respectively, CIA and OIG). I read the primary sources not as expressions

of purely logical reasoning, but as remnants of social practices which reflect the intentions of actors inhabiting particular historical, political, and organizational settings (May 2001, 157). Although the use of documents poses well-known epistemological problems, in particular cross-validation, I leaned heavily on other interpretations of these documents in the construction of my own, and try to incorporate these (and the primary texts) where possible.

4 Legalizing Enhanced Interrogations

4.1 The Program

Although there is substantial controversy over how the CIA's interrogation program (hereafter, the Program) should be interpreted and evaluated, considerably less controversy surrounds the facts of its emergence. For example, both the Department of Justice's Office of Professional Responsibility (respectively, DOJ and OPR), which concluded that the attorneys responsible for setting the legal parameters of the Program had committed professional misconduct, and the DOJ's Office of the Deputy Attorney General, which did not find that the attorneys had committed misconduct, trace the beginnings of the Program to the capture of Abu Zubayda, a Saudi militant and alleged high-level member of al Qaeda, in March of 2002 (OPR 2009; Margolis 2010, 2).

To be sure, the CIA had been mulling the possibility of developing an aggressive interrogation program *before* Zubayda's capture; in late 2001, the Agency had contracted two psychologists to develop a list of Enhanced Interrogation Techniques (EITs) which would go beyond the non-violent, rapport-building techniques traditionally deployed in US criminal investigations (OIG 2004, 13). Initially, the CIA jointly conducted overseas interrogations with the Federal Bureau of Investigation (FBI), which insisted on the latter set of techniques. "The CIA operatives soon became convinced, however, that conventional interrogation methods and prison conditions were inadequate to deal with hardened terrorists and that more aggressive techniques would have to be developed and applied" (OPR 2009, 32).

Although the CIA had virtually no trained interrogators on staff, having suspended its interrogation program in 1986 due to alleged human rights abuses in Latin America, its plans to implement the more aggressive EIT program accelerated with the capture of Zubayda following a thrilling chase across the rooftops of Faisalabad (CIA OIG 2004, 12). Zubayda left behind a voluminous diary along with the “remnants of a bomb [and] plans for what appeared to be an attack on a British school in Lahor” (Mayer 2009, 141). Sensing an opportunity, CIA operatives took charge of questioning Zubayda and “began using techniques that [struck the FBI as] ‘borderline torture’” (OPR 2009, 33). Zubayda’s FBI handlers reported these techniques to their superiors, who instructed them not to participate in the CIA interrogations and to return to the US (Ibid.).

Sensing that some of the EITs ventured close to the statutory line, the CIA sought a clearer explication of the limits on Zubayda’s interrogation set by §§2340-2340A of the federal criminal code, the “torture statute” (Margolis 2010, 53). The Department of Homeland Security referred the Agency to the DOJ, which further assigned the task of defining “torture” to the Office of Legal Counsel (OLC), the office responsible for furnishing legal advice to the agencies of the executive branch. Within the OLC, the project was ultimately delegated to Deputy Assistant Attorney General John Yoo, the OLC’s main expert on foreign affairs issues. On August 1st, 2002, the CIA received a formal memorandum signed by OLC department head Jay Bybee (although substantially written by Yoo), which reached, inter alia, the following conclusions:

1. Under federal law, “torture” describes only the most intense acts of mental or physical violence.

Under the torture statute, [p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death (Greenberg and Dratel 2005, 172). Moreover, the infliction of severe pain or suffering must be the defendants precise objective. Even if a defendant knows that severe pain will result from his actions, he may lack

specific intent if causing such harm is not his objective (OPR 2009, 67).

2. Under the US's treaty obligations, "torture" prohibits only the most extreme acts.

The Convention Against Tortures text prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for cruel, inhuman, or degrading treatment and punishment. [T]he treaty was intended to reach only the most extreme conduct (Ibid., 172).

3. Acts undertaken pursuant to the President's Constitutional authority cannot properly be prosecuted under the torture statute.

In order to respect the Presidents inherent constitutional authority to manage a military campaign against al Qaeda and its allies, [the torture statute] must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority (Ibid., 203).

In addition to the "Bybee memo," the CIA received a second, classified memorandum, which formalized the use of ten EITs:

(1) attention grasp, (2) walling¹, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement [lasting up to eighteen hours], (6) wall standing, (7) stress positions, (8) sleep deprivation [lasting up to eleven consecutive days], (9) insects placed in a confinement box², and (10) the waterboard³. (Bybee 2002b, 2)

¹"For walling, a flexible false wall will be constructed. The individual is placed with his heels touching the wall. The interrogator pulls the individual forward and then quickly and firmly pushes the individual into the wall. It is the individual's shoulder blades that hit the wall. During this motion, the head and neck are supported with a rolled hood or towel that provides a c-collar effect to help prevent whiplash" (Bybee 2002b, 2)

²Zubayda appeared to have a "fear of insects" (Ibid., 3)

³"In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth . . . This effort plus the cloth produces the perception of 'suffocation and incipient panic,' i.e., the perception of drowning" (Ibid., 2)

In June of 2004, a Wall Street Journal article reported that Bush administration lawyers had offered “a series of legal justifications for limiting or disregarding antitorture laws and proposed legal defenses that government officials could use if they were accused of torture” (Braven 2004; Margolis 2010, 3). Soon after, the Bybee memoranda were made available by numerous news outlets and nonprofit organizations, including the Washington Post, the New York Times, and the American Civil Liberties Union.

Interpretations of the Bybee memoranda have been sharply opposed. On the one hand, there is the view – rooted in civil society, legal scholarship, and broad segments of the legal profession – that the Bybee memorandum, through its extremely narrow construction of the torture statute, made the crime “all but impossible to commit” (Mayer 2009, 151). In doing so, the OLC sought to accommodate the wishes of policymakers, to the neglect of their professional responsibility to provide candid, independent, and principled legal advice (Dellinger et al., 2004). For example, Holmes equates the work of Yoo and Bybee to that of legal experts who, in “ancient times, . . . made themselves available, for a fee, to provide technically refined justifications for the carefully dosed infliction of pain as a method for extracting information” (2007, 259). Similarly, Dratel argues that,

The memos . . . reflect what might be termed the “corporatization” of government lawyering: a wholly result-oriented system in which policy makers start with an objective and work backward, in the process enlisting the aid of intelligent and well-credentialed lawyers who, for whatever reason . . . all too willingly failed to act as a constitution or moral compass that could break their client’s descent into unconscionable behavior constituting torture by any definition, legal or colloquial. (Greenberg and Dratel 2005, xxii)

Related criticisms of the Bybee memoranda find a similar problems – that is, an excessive desire to please – in their interpretations of treaty and Constitutional law. For example, in its discussion of the “Commander-in-Chief” section of the first Bybee memorandum, the Office of Professional Responsibility observed that other OLC attorneys found their colleague’s

conclusion to be “not a mainstream view,” inappropriate, “overly broad and unnecessary,” and coming dangerously close to an “advance pardon” for interrogators in case they went over the statutory line (2009, 199, internal quotes omitted; Goldsmith 2009).

On the other hand, there is the view that the Bybee memoranda, although technically flawed, should be understood against the backdrop of September 11th. In general, 9/11 had enshrouded Washington with an “atmosphere of enabled, heroic improvisation,” as government officials sought to resolve unprecedented questions by developing new, unorthodox, and inevitably reactionary institutions (Zelikow 2012, 16). Within the OLC, as one of Yoo’s colleagues recalled, “there was a sense that this is urgent . . . because a lot of people are going to die if we don’t prevent this attack. And so I think not just for this, but generally in the war on terrorism the view was . . . don’t be building in a buffer of [‘W]ell, we’d rather not actually go to the sort of black letter where it limits the law[’]” (quoted in Margolis 2010, 20). Certain that Zubayda was withholding information that could potentially avert another attack, the CIA pressured the DOJ to provide the most robust legal framework for his successful interrogation (Ibid., 23-24; OPR 2009, 226). Unsure of the what “right” or “correct” approach was, OLC lawyers chose to avoid rigid constraints on policy where the law did not explicitly demand it. In this view, the Bybee memoranda can be explained, though maybe not excused, as the result of genuine ambiguity in the letter of the law, mixed with the intense, cross-cutting pressure to prevent a second attack.⁴

⁴Examples of this view include Associated Deputy Attorney General David Margolis’s decision to overrule OPR’s finding of professional misconduct, e.g., “the facts of this case do not fit a traditional misconduct analysis and do not demonstrate a violation of a known and unambiguous obligation” (2010, 8); the Ninth Circuit Court’s decision to grant Yoo qualified immunity because the definition of “torture was not . . . ‘beyond debate’ in 2001-03. There was at that time considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques. In light of that debate . . . we cannot say that any reasonable official in 2001-03 would have known that [specific interrogation techniques], however appalling, necessarily amounted to torture” (2012, 4540-4541); and, in less apologetic form, Yoo’s own private opinions (2005, ch. 7).

4.2 The Bybee Memoranda as Organizational Deviance

Taking its cues from organizational sociology, this article outlines a third view. It conceptualizes the Bybee memoranda as organizational deviance (Vaughan 1999, 273). Following Greve et al., I define organizational deviance as “behavior in or by an organization that a social-control agent judges to transgress a line separating right from wrong; where such a line can separate legal, ethical, and socially responsible behavior from their antitheses” (Greve et al. 2010, 56). Because it is sensitive to the contingent and socially constructed distinction between “right” and “wrong” behavior, this definition permits the classification of the Bybee memoranda as organizational deviance without reproducing the normative and subjective judgments of the previous two views. That is, the Bybee memoranda can be profitably understood as organizational deviance insofar as they are *widely understood to have been* erroneous, irresponsible, even dishonest:

1. From a legal and professional perspective, the Bybee memo had the effect of “authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture” (OPR 2009, 255).⁵ Today, the use of EITs is indisputably, and in the broadest sense, illegal (Goldsmith 2013). In June 2004, a subsequent OLC chief, finding the “torture memoranda” to be “legally flawed, tendentious in substance and tone, and overbroad,” withdrew them before resigning from his post in disgust (Goldsmith 2009, 151, Rosen 2007). In 2005, Congress passed the Detainee Treatment Act (DTA), which amended

⁵A May 2005 OLC memorandum gives us a sense of a typical interrogation. A detainee would first be given a medical examination, then flown to an interrogation site somewhere outside the US. During transport, he would be shackled and deprived of sight and sound using blindfolds, earmuffs, and hoods. At the interrogation site, the detainee would be subjected to “precise, quiet, and almost clinical procedures” designed to heighten the sense of enormity and dread attached to US custody (Bradbury 2005, 4). If, in the course of an initial interview, the detainee did not meet the “very high standard” of divulging actionable information on imminent threats or on the location of other “High-Value Targets at large,” the interrogation would move to the next phase (4-5). A number of conditions would be set to reduce the detainee to a dependent state: nudity, sleep deprivation, and dietary manipulation. Then interrogators would use EITs designed to induce physical and psychological stress, such as sudden facial and abdominal slapping and walling. On rare occasions, particularly important or uncooperative prisoners would be waterboarded. A prototypical interrogation, consisting of multiple sessions of intense questioning punctuated by long periods of sleep deprivation, could last up to thirty days (8).

the US Code to prohibit the cruel, inhuman, or degrading treatment of prisoners under US custody (thereby closing the definitional loophole exploited by the Bybee memorandum). In 2009, President Barack Obama issued Executive Order 13491, “Ensuring Lawful Interrogations,” which upheld, as a “Minimum Baseline,” the protections against violence to life and person and outrages upon personal dignity enshrined in the Geneva Conventions.

2. From a policy perspective – that is, even if one considers the formal contours of the CIA interrogation program to have been consistent with American statutory and treaty law – the Agency’s own organizational failures resulted in unambiguously criminal abuses, such as the use of death threats, smoke, cold, and potentially injurious stress positions (OIG 2004, 42-44), the application of the waterboard technique to a prisoner 183 times (45), and murder of a prisoner in June 2003 (Ibid., 102, 78-79).

Arguably, these failures could have been predicted, given the Agency’s lack of any organizational infrastructure or institutional experience in the conduct of interrogations before September 11th. The CIA’s own misgivings about about the legal basis for the Program intensified, as the Bush administration increasingly withdrew its support for coercive interrogations,

A number of Agency officers of various grade levels who are involved with detention and interrogation activities are concerned that they may be vulnerable to legal action in the United States or abroad and that the US Government will not stand behind them. Although the current detention and interrogation Program has been subject to DOJ legal review and Administration political approval, it diverges sharply from public statements by very senior US officials, including the President, as well as policies expressed by Members of Congress. (OIG 2004, 101-102)

4.2.1 Malfeasance and Informality

How did the OLC fail so badly in its responsibility to provide principled and candid advice? This section illustrates a classic insight of organizational sociology: that actions which look unintended at the organizational level often appear to be quite ordinary, and even desirable, at the individual level (Fox and Harding 2005; Greve et al. 2010; Vaughan 1999). I show how the formal organization of the OLC contributed to an informal culture of self-regulation, which was easily avoided by OLC attorneys and other policy entrepreneurs who sought to “push the envelope” on the War on Terror (Zelikow 2012).

With a staff of about twenty-two attorneys, the OLC is a fairly small office in the Department of Justice. However, its size betrays its “exalted status” as the authoritative voice in the executive branch on legal issues which have not been resolved, or are in some sense irresolvable, by the ordinary court process (Goldsmith 2009). Although the OLC is delegated this responsibility by the Attorney General, and is in theory supervised by the Attorney General and the President, in practice, the OLC is regulated less by rigidly enforced rules than by informal norms of its own making (Koh 1993).

Part of the reason for the OLC’s autonomy is intrinsic to its function of helping the President *faithfully* execute the laws. As this modifier implies, the OLC is not only obligated to assist a particular, democratically-elected administration in achieving its desired policy goals, it is also responsible for ensuring that contemplated executive branch actions remain within the bounds of law (Moss 2000). Hence, the dual responsibility of OLC implies that, in the course of evaluating the legal issues relevant to a contemplated executive branch action, the OLC will occasionally issue determinations that frustrate the immediate interests of policymakers. The very nature of this function – to issue advice which is “independent of the policy and political pressures associated with a particular question” (McGinnis 1993, 422) – would be ill-served by intensive external surveillance and control.

In the absence of strong hierarchical controls, OLC attorneys have developed a variety of informal procedural norms to help the Office maintain its principled distance from policy

(Koh 1993). For example, OLC attorneys are expected to “rarely [meet] with lawyers from the other agencies and never . . . with policymaking officials, choosing instead to rely on written submissions and its own research” (McGinnis 1993, 428). To encourage consistency, every OLC opinion is reviewed by a second lawyer before it is finalized (OPR 2009, 39). To uphold the appearance of neutral, deliberative reasoning, the OLC elects to publish a number of its opinions (Koh 1993, 515).

In practice, however, whether and how closely OLC attorneys adhere to these procedures is a matter of wide personal discretion. One reason, again, is because the formal organization of the OLC assumes loose hierarchical controls. Other reasons are practical; for example, OLC attorneys are able to adjust the formality and permanence of their advice by switching up the mode of delivery, i.e., from written to oral to electronic advice (McGinnis 1993, 429; Morrison 2010).

More fundamentally, the dualist nature of the Office subjects its attorneys to two ambivalent pressures which, in practice, are difficult to weigh: OLC attorneys have an obligation to accommodate the wishes of a particular incumbent, democratically-elected administration, and an equally compelling obligation to provide an objective, candid view of the law, even if that view is inconsistent with the administration’s policy objectives. In a paper presented at a 1993 conference on executive branch legal interpretation, Lund commented on this contradiction,

Discussions of the Attorney General’s advisory function . . . are carried out in the intellectual shadows cast by two contrasting images. At one extreme, we imagine someone like the man Edward Bates conjured when he said that ‘the office I hold is not properly *political*, but strictly *legal*; and it is my duty, above all ministers of state, to uphold the law and resist all encroachment, from whatever quarter, of mere will and power.’ At the other extreme, we think of someone like John Mitchell, who went to prison as a result of efforts that began when he was Attorney General to advance the political interests of his President. (Lund 1993, 438)

Another paper at the same conference contrasted court-like models of the OLC, where attorneys would strive to approximate the transparency and consistency of judicial determinations, with the “situational lawyer” model, where OLC would simply “write opinions in the situational interest of [its] client without any obligation to preserve legal principles” (McGinnis 1993, 402). Within a democratic framework, the latter model could be justified on the premise that the “popular will is represented simply by pursuit of the President’s particular political interest on a case-by-case basis” (Ibid.). While most legal scholars rejected this model of OLC deliberation, and while the OLC had informally adopted a number of procedural mechanisms designed to cultivate its court-like appearance (Koh 1993, McGinnis 1993, Moss 2000), it was not, at the time of Zubayda’s capture, unambiguous whether the interpretive stance of the OLC should more closely approximate the autonomous position of the courts, or the accommodating attitude of a legal advocate (cf. Margolis 2012).

In practice, the informal, ambiguous organization of the OLC means that the most effective checks on OLC opinions must be initiated by the Office itself. *However, in numerous instances, the OLC deliberately avoided informal checks which might have altered the content of the Bybee memoranda.* For example, when OLC opinions touch on the interpretation of international treaties, attorneys are ordinarily expected to consult with the Department of State. However, the White House instructed Yoo not to consult the State Department, ostensibly for reasons of confidentiality (Ibid., 38, Goldsmith 2009, 167). However, at least one knowledgeable attorney “eventually came to believe that it was done to control outcomes in opinions and minimize resistance to them” (Goldsmith 2009, 167). After all, the State Department had been consulted on another sensitive issue, and it would have been clear to the Bush administration that it had a more binding view of international law than Yoo, the CIA, or the White House. Two months prior to Zubaydas capture, John Yoo had co-authored a memorandum stating that the Geneva Conventions did not protect prisoners of the War on Terror. This meant that members of the US Armed Forces who committed violations of Common Article 3, including “violence to life and person, in particular, murder of all kinds,

mutilation, cruel treatment and torture,” and “outrages upon personal dignity, in particular, humiliating and degrading treatment,” in the detention and treatment of captured terrorists could not be prosecuted under the War Crimes Act (Greenberg and Dratel 2005, 44).

Although the Bush administration ultimately adopted this view, Secretary of State Colin Powell and the State Department’s legal counsel, William Taft, filed memoranda in opposition,

The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Convention (Danner 2004, 94).

Although this debate concerned the applicability of the Geneva Conventions to the armed conflict in Afghanistan, not to captured al Qaeda members per se, these memoranda indicate that the State Department would have insisted, as a matter of policy, on the more substantial protections of Article 3 against cruel, humiliating, and degrading treatment, triggering a dispute between the Departments of State and Justice that never occurred (Goldsmith 2009, 166). Instead, Powell’s outrage would be confined to a confrontation with Gonzales after the leak of the Bybee memorandum in 2004 (Mayer 2009, 292).

Another example relates to the actual content of the first Bybee memorandum, more specifically, its discussion of the “Commander-in-Chief” authority of the President. Here, Yoo argued that, even in cases of outright torture, the “Department of Justice could not enforce Section 2340A against federal officials acting pursuant to the President’s constitutional authority to wage a military campaign” (Greenberg and Dratel 2002, 204). Evident in the very “text, structure and history of the Constitution” was the Founders intention to invest the President with the “fullest range of power . . . understood at the time of the ratification of the Constitution as belonging to the military commander” (Ibid., 205). Accordingly, “[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the

Constitution's sole vesting of the Commander-in-Chief authority of the President" (207).⁶

Although these views were extreme, Yoo held them deeply; in 1996, he had published an article on the original understanding of the Presidents war powers, as they would have shaped the intuitions, and hence the purposes, of the Framers of the Constitution. At 140 pages, the article was a formidable riposte to mainstream legal scholars who, in the wake of Watergate and the catastrophic war in Vietnam, called for diminished executive branch control over the making of war. For Yoo, these arguments erred in their basic understanding of the Constitution's text and structure,

The Framers established a system which was designed to encourage presidential initiative in war, but which granted Congress an ultimate check on executive actions. Congress could expend its opposition to executive war decisions only by exercising its powers over funding and impeachment. The Framers established this system because they were not excessively worried by the prospect of unilateral executive action. The President was seen as the protector and representative of the People. In contrast, the Framers expressed a deep concern regarding the damage that Congress, and the interest groups that could dominate it, might cause in the delicate areas of war and foreign policy. (Yoo 1996, 167)

Yoo aggressively defended what he regarded as the Constitutions eminently sensible design: by limiting Congresss power to the purse, the Framers sought to maximize "executive control and initiative in the war," balanced in the final instance by "Congress's power to raise and supply the military" (290). The courts, lastly, were to have no role in this scheme, judicial review being ill-suited and "unworkable" to its complex and mutable process (175).

Even though Yoo honestly held the extreme views contained in the Commander-in-Chief discussion, the OPR concluded that he had failed to provide his client with a comprehensive understanding of the legal issues posed by their contemplated actions. As a professor of

⁶The polished presentation of these arguments should not obscure their extremity; to give two examples that Yoo has himself acknowledged, they imply that the President has the lawful authority to exterminate a village of resistants, as well as order a childs testicles to be crushed (OPR 2009, 64).

constitutional law, “Yoo knew his view of the Commander-in-Chief power was a minority view and would be disputed by many scholars” (OPR 2009, 252). Especially in the course of advising the CIA on an interrogation program which potentially verged on torture, Yoo deviated from his professional responsibility to “inform his client that his analysis was a novel and untested one,” and to include in the memoranda a caveat that “a direct presidential order [authorizing the use of outright torture] was required to trigger the Commander-in-Chief clause” (Ibid.).

The Commander-in-Chief section provides another example of malfeasance: Yoos unusually close imbrication with policymakers in the CIA and the White House. The fact that CIA interrogators had already employed some of the EITs in Zubaydas interrogation meant that, at the time of its solicitation of the OLC, the Agency was seeking maximum legal protection for its officers, and at one point even asked the [DOJ] for an advice declination of criminal prosecution (OPR 2009, 226). On July 13, well before the issuance of the Bybee memo, Yoo had already provided a potential source of legal relief by sending the CIA an exaggeratedly narrow interpretation of the specific intent clause in the torture statute: even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain. Other Department of Justice attorneys found this analysis to be flawed, e.g., it sort of suggested that if I hit you on the head with a, you know, steel hammer, even though I know its going to cause specific pain, if the reason Im doing it is to get you to talk rather than to cause pain, Im not violating the statute (OPR 2009, 168).

This is because a well-known, informal effect of OLC opinions is to provide the rubber stamp of legality to contemplated executive agency actions (McGinnis 1993, 422). That is, because the OLC’s everyday responsibility to interpret the law confers the incidental power to determine what these laws mean, its opinions can effectively immunize officials from prosecutions from wrongdoing, since those officials can simply claim that they were

acting pursuant to an ostensibly principled view of the law (Goldsmith 2009, 149-150). By providing a redundant defense against criminal prosecution for torture, the Commander-in-Chief section had in effect provided a potential source of legal relief for CIA interrogators who crossed the line.

4.2.2 Error

In 2004, as political and social forces progressively dismantled the legal foundations of the Program, a CIA internal review showed evidence of building anxiety: “[t]he Agency faces potentially serious long-term political and legal challenges as a result of the Interrogation Program, particularly its use of EITs” (CIA OIG 2004, 105). Arguably, these challenges were foreseeable: not only did the CIA assume the unprecedented responsibility of coordinating the conduct of violent interrogations across a global network of secret prisons, they did so “against the backdrop of pre-September 11, 2001 CIA avoidance of interrogations and repeated U.S. policy statements condemning torture and advocating the humane treatment of political prisoners and detainees in the international community” (Ibid., 3; Zelikow 2012). Aware that some of the proposed EITs could potentially inculcate its interrogators, the CIA turned to the Department of Justice for legal guidance,

“The only practical way to provide the CIA with maximum legal protection it sought was to objectively interpret the torture statute . . . and apply the law to the various enhanced interrogation techniques. If CIA had asked the Department to provide anything other than an objective analysis of the law . . . we would have undercut the very protections we sought for our officers” (quoted in Margolis 2010, 52)

Far from an objective analysis, the advice that the CIA received was – to quote two sympathetic and authoritative commentators⁷ – “deeply flawed,” “riddled with error” (Goldsmith,

⁷Jack Goldsmith succeeded Bybee as head of the OLC and withdrew the memoranda in June of 2004; David Margolis, as the DOJ official responsible for reviewing OPR reports, decided to overrule OPR’s finding of professional misconducting 2010.

quoted in OPR 2009, 112), “devoid of nuance,” and short of the standard the Department of Justice “reasonably expects from its attorneys” (Margolis 2010, 68). Based on these interpretations, a fair conclusion is that the CIA erred in expecting the DOJ to deliver an objective analysis of the legal issues at stake.

An organizational view shows how the structure of the OLC, and particularly its concrete grounding in relationships of trust, made this erroneous expectation possible, and indeed reasonable to have (Granovetter 1985). First, at the interorganizational level, the function of the OLC to answer questions which are in some sense irresolvable by the ordinary court process means that it has accumulated a reputation for addressing only the most difficult and arcane questions. Moreover, because of the dual responsibility of the OLC to facilitate the aims of the President while restraining her to the “faithful” execution of law, OLC attorneys must strive to “uphold the reputation of the office as an elite institution which is independent of the policy and political pressures associated with a particular question” (McGinnis 1993, 422). Over time, this reputation has become self-reinforcing: because of the OLC’s status, it has become an attractive destination for outstanding young attorneys, whose involvement further amplifies its prestige.

Second, although the OLC is in theory supervised by the DOJ and White House, an effect of the OLC’s design is that expertise is concentrated at the bottom of the organizational hierarchy. That is, the young and brilliant lawyers recruited by the OLC to answer the most difficult and arcane questions are supervised by people who are progressively less capable of evaluating their work. The reasons for this inhere in the very logic of delegation. OLC attorneys are assumed to have a grasp of the relevant substantive and methodological issues which is superior to that of the President or Attorney General. Additionally, it would defeat the purpose of delegating an opinion to a putatively independent office if it could simply be withdrawn on the basis of political considerations (Moss 2000). In practice, these factors mean that OLC supervisors have few incentives to closely scrutinize, let alone withdraw first-line determinations.

The internal structure of the OLC replicates this dynamic. The OLC is a small office, consisting of only about two dozen lawyers, meaning that on peripheral questions the number of experts is likely to be small.⁸ Moreover, lawyers are appointed to the OLC, rather than confirmed by the Senate. These factors meant that, at least in 2001,⁹ it was entirely possible for an attorney with “extreme, albeit sincerely held, views of executive power” to supply the controlling opinions in the OLC on the legal contours of the War on Terror (Margolis 2010, 67). Although Bybee may have been a “fine lawyer and judge . . . he had no training in issues of war or interrogation, and he tended to approve Yoo’s draft opinions on these topics with minimal critical input” (Goldsmith 2009, 169).

Layered on top of these structural disincentives were pragmatic reasons not to second-guess Yoo’s opinions. First, the entire process was taking place against the urgent backdrop of Zubayda’s interrogation. The Bybee memorandum had taken six months to draft, and during that time Yoo had authorized the use of six EITs on a provisional basis (OPR 2009, 53). If the memoranda were withdrawn, interrogations conducted pursuant to Yoo’s advice would have to be halted; a second expert on war powers would have to be found; another memorandum would have to be drawn up and scrutinized. Additionally, the fact that Zubayda’s CIA captors had already deployed EITs meant that they had a legitimate concern that they would face prosecution under the torture statute (OPR 2009, 37). By outlining multiple justifications for the use of EITs, and even defenses for outright torture, Yoo’s opinion provided an “enormous source of comfort,” a “golden shield” against prosecutors (Mayer 2009).

“Policy entrepreneurs” outside the DOJ applied more direct pressure (Zelikow 2012). Obviously, the CIA had an interest in having its entire list of EITs approved. Moreover, the President and a committee of his closest advisors had been briefed on the use of EITs, and at least two of them, Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld, were adamant in their support of the Program (Mayer 2009, 143-144). The policy

⁸In practice, OLC lawyers are expected to neutralize this problem by consulting other agencies on certain questions, i.e., the State Department on the interpretation of treaties or the Criminal Division of the DOJ on criminal justice issues.

⁹The process of staffing the OLC has since become much more politicized (Goldsmith 2012).

entrepreneurs found a ready and polished advocate in Yoo,

... a war scholar at a prestigious law school. He also had enormous personal charm, and he was extremely persuasive in explaining his views. On the surface the interrogation opinions appeared thorough and scholarly. It was thus not easy for the men under pressure in the summer of 2002 to critically analyze Yoo's opinion. (Goldsmith 2009, 169)

However, the fact that Yoo's supervisors did not even try to critically analyze the memoranda testifies to the importance of trust; Yoo's clients and supervisors simply trusted that they were receiving candid and accurate legal advice. Given Yoo's credentials, there was no reason for Attorney General Ashcroft or his legal aide to read the unabbreviated Bybee memoranda before they were faxed to the CIA; they did not (2009, 60, 62). Comments from Jay Bybee did not appear to "materially change the substance of the final opinion" (Ibid., 60). It is unclear whether the memoranda were read by their nominal recipient, White Counsel Alberto Gonzales, although Bybee's successor as head of the OLC finds it unlikely: "Early in my tenure at OLC, Gonzalez [expressed the] view that OLC's legal reasoning was irrelevant to the authority of an OLC's opinion. All that mattered, [he] believed, was OLC's bottom line approval" (Goldsmith 2009, 169). After the leak of the Bybee memoranda, Gonzales seemed to be "genuinely stunned when the legal foundation for the interrogation policy imploded 'I guess those opinions really were as bad as you said,' [Gonzales] told me" (Ibid., 171).

The rest of this draft is still being written – please email any comments or requests for citations to emailwinston@gmail.com