

ARE EVEN TORTURERS IMMUNE FROM SUIT? HOW  
ATTORNEY GENERAL OPINIONS SHIELD  
GOVERNMENT EMPLOYEES FROM CIVIL LITIGATION  
AND CRIMINAL PROSECUTION

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*The Attorney General, or the Office of Legal Counsel (as the Attorney General's designee), issues formal written guidance, known as an Attorney General opinion, in response to legal queries from federal government agencies. These opinions are considered binding on all government employees. Two recent Attorney General opinions have sparked considerable controversy. One opinion provided an extremely high threshold for a government activity to constitute "torture," while the other authorized an "alternative set of procedures" for the Central Intelligence Agency to utilize on high-value terrorists it had detained. Civil lawsuits have been filed regarding the matters contained in these Attorney General opinions. Some critics are clamoring for criminal prosecutions. This Article analyzes the legal protection that such Attorney General opinions provide for federal government employees who take action in reliance upon them. The Article concludes that current law completely shields government employees from both civil liability and criminal prosecution in virtually every circumstance. Such a result is appropriate. Legitimate concerns exist about flawed Attorney General opinions, as well as the possible negative impact immunity will have on government employee performance and activity. However, these concerns prove to be overstated when removed from the rhetoric. More importantly, Attorney General opinions constitute complex, binding guidance issued by the highest legal advisor in the executive branch. If such guidance proves to be incorrect, it is the federal government, not the individual government employee, who should be held responsible.*

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\* Assistant General Counsel, Office of General Counsel, Central Intelligence Agency. All statements of fact, opinion, or analysis expressed are those of the author and do not reflect the official positions or views of the Central Intelligence Agency or any other U.S. government agency. Nothing in the contents should be construed as asserting or implying U.S. government authentication of information or CIA endorsement of the author's views. This material has been reviewed by the CIA to prevent the disclosure of classified information. The author wishes to thank Michael Dorff and Robert Chesney for their exceptional assistance with this Article.

## INTRODUCTION

One of the key functions of the office of the Attorney General is to issue formal legal advice to agencies in the executive branch.<sup>1</sup> Such advice is often referred to as an “Attorney General opinion,” even when authored by the Attorney General’s designee, the Office of Legal Counsel (“OLC”) in the Department of Justice.<sup>2</sup> These Attorney General opinions, issued by or on behalf of the highest legal office in the executive branch,<sup>3</sup> are considered binding on all executive agencies and their officers.<sup>4</sup> The question arises, however, as to what legal protection Attorney General opinions provide for individual government employees. This Article will seek to answer that question, concluding that a government employee is effectively immune from both civil claims and criminal prosecution for actions undertaken in reliance upon an Attorney General opinion.<sup>5</sup>

In years past, this might have been little more than a theoretical exercise, as Attorney General opinions typically generate little interest outside the soliciting agency. Recently, however, two separate but related Attorney General opinions have raised considerable concern, bringing to the fore the issue of the impact that Attorney General opinions have on government employees.

The first of these Attorney General opinions is widely known as the “Bybee Memorandum,”<sup>6</sup> to reflect the OLC attorney (Jay S. Bybee) who signed it.<sup>7</sup> The Bybee Memorandum sought to provide legal guidance to then White House counsel Alberto Gonzales regarding the limitations on interrogating individuals detained in the Global War on Terror.<sup>8</sup> Issued on August 1, 2002, less than one year after 9/11, the fifty-page opinion contained several extremely

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1. 28 U.S.C. § 511 (2000).

2. 28 C.F.R. § 0.25(a) (2007).

3. *Marshall v. Gibson’s Prods., Inc. of Plano*, 584 F.2d 668, 676 n.11 (5th Cir. 1978) (“[T]he Attorney General is the chief legal officer of the United States.”).

4. Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1319–20 (2000).

5. This Article will not explore whether such effective immunity also extends to contractors working for the United States government. That is a complex issue, especially in the context of the legal theories described herein, and is beyond the scope of this Article.

6. See Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at [http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture\\_memo\\_aug2002.pdf](http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf) [hereinafter Bybee Memorandum].

7. See Senator Edward Kennedy, Statement of Senator Edward M. Kennedy on Nomination of Alberto Gonzales (Jan. 26, 2005), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1357&wit\\_id=1012](http://judiciary.senate.gov/member_statement.cfm?id=1357&wit_id=1012) [hereinafter Senator Kennedy Statement]; John W. Dean, *The Torture Memo by Judge Jay S. Bybee that Haunted Alberto Gonzales’s Confirmation Hearings*, FINDLAW, Jan. 14, 2005, <http://writ.news.findlaw.com/dean/20050114.html>.

8. Bybee Memorandum, *supra* note 6, at 1.

controversial legal conclusions.<sup>9</sup> It assessed that the United States' anti-torture statute<sup>10</sup> covered only "extreme acts."<sup>11</sup> According to the Bybee Memorandum, for the application of physical pain to constitute torture, it needed to be "of an intensity akin to that which accompanies serious physical injury such as death or organ failure."<sup>12</sup> Inducing mental pain rose to the level of torture if it met one of several predicate acts listed in the anti-torture statute and created "lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder."<sup>13</sup> The Bybee Memorandum further stated that the President's commander-in-chief powers may trump the anti-torture statute during the current war against al Qaeda.<sup>14</sup> Finally, the opinion concluded that, even if interrogation methods violated the anti-torture statute, an interrogator might be able to avoid criminal sanction by claiming necessity or self-defense.<sup>15</sup>

Congress, the media, and the general public have expressed considerable outrage regarding the Bybee Memorandum, asserting that it effectively condoned torture.<sup>16</sup> So severe was the concern about the Bybee Memorandum that OLC revoked and replaced it just two years after its issuance.<sup>17</sup> The new OLC opinion questioned the overall analysis of the Bybee Memorandum, as well as the "appropriateness and relevance" of the sections of the memorandum that concerned the commander-in-chief powers and the defenses of necessity and self-defense.<sup>18</sup>

The second Attorney General opinion to have piqued public

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9. See Senator Kennedy Statement, *supra* note 7 (noting the Senator's vehement disagreement with the conclusions reached in the Bybee Memorandum); Michael C. Dorf, *The Justice Department's Change of Heart Regarding Torture: A Fair-Minded and Praiseworthy Analysis That Could Have Gone Still Further*, FINDLAW, Jan. 5, 2005, <http://writ.lp.findlaw.com/dorf/20050105.html> (describing "the political heat produced by the Bybee memo").

10. 18 U.S.C. §§ 2340–2340A (2000).

11. Bybee Memorandum, *supra* note 6, at 46.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. See, e.g., Senator Kennedy Statement, *supra* note 7 (noting the Senator's disgust with the Bybee Memorandum and implying that it has helped create a "torture problem" in the United States); Dean, *supra* note 7 (describing the "widespread outrage" after the Bybee Memorandum was leaked in 2004); Dorf, *supra* note 9 (expressing considerable concern with the Bybee Memorandum's "intellectual somersaults to find loopholes and excuses for the commission of what a lay observer would surely consider torture").

17. See Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/dojrtorture123004.mem.pdf> [hereinafter Levin Memorandum].

18. *Id.* at 1–2.

interest concerns a program operated by my agency, the Central Intelligence Agency (“CIA”).<sup>19</sup> The CIA’s terrorist detention program sought critical information from high value terrorists, such as the presumed planners of the USS *Cole* bombing and the 9/11 attacks, who were held by the CIA in secret overseas facilities.<sup>20</sup> The CIA wished to employ an “alternative set of procedures” with regard to these terrorists in order to extract time-critical information from them.<sup>21</sup> Before employing those procedures, the CIA queried OLC on whether the procedures would be legal.<sup>22</sup> OLC issued a still-classified opinion, hereinafter referred to as the “CIA Detention Program Opinion,” which determined that the proposed procedures would be lawful.<sup>23</sup> CIA employees relied upon that determination and utilized the “alternative set of procedures” against at least some of the detainees in the CIA’s terrorist detention program, acquiring what the Bush administration believes to have been critical information that saved American lives.<sup>24</sup> Nonetheless, the use of these “alternative set of procedures” has evoked extensive criticism.<sup>25</sup>

The interest in the Bybee Memorandum and the CIA Detention Program Opinion has increased the focus on Attorney General opinions. Yet these Attorney General opinions are only two of the thousands of such opinions that the Attorney General or OLC have issued in the past two hundred years.<sup>26</sup> Most of those opinions are

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19. See Senator Kennedy Statement, *supra* note 7.

20. See President George W. Bush, Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1570 (Sept. 6, 2006), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2006\\_presidential\\_documents&docid=pd11se06\\_txt-15.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2006_presidential_documents&docid=pd11se06_txt-15.pdf) [hereinafter President Bush Speech].

21. *Id.* at 1571.

22. *Id.*

23. *Id.* at 1573.

24. *Id.* at 1571–72 (describing the use of the “alternative set of procedures” as providing “vital” information that led to the capture of other terrorists, the breakup of terrorist cells, the disruption of terrorist operations, and the saving of American lives).

25. See, e.g., Editorial, *Do We Use Torture?*, L.A. TIMES, June 18, 2007, at A16 (noting the concerns that Congress and the public have with the techniques used by the CIA in its detention program) [hereinafter *Do We Use Torture?*]; Josh White et al., *Report: Harsh Methods Used on 9/11 Suspect*, WASH. POST, Aug. 5, 2007, at A16 (“The CIA techniques have come under harsh criticism from human rights groups who argue that they are abusive and torturous . . .”); Editorial, *The Torture Mystery*, L.A. TIMES, July 26, 2007, at A20 (noting that the Senate has raised questions about the need for and legality of the techniques used in the CIA’s detention program) [hereinafter *The Torture Mystery*].

26. The Department of Justice’s website provides links to all Attorney General opinions issued and published since 1992. See Department of Justice, Office of Legal Counsel, Memoranda and Opinions by Year, <http://www.usdoj.gov/olc/opinionspage.htm> (last visited Jan. 26, 2008) [hereinafter Dep’t of Justice Opinions]. As of January 2008, a list of all of those opinions, which includes a brief description of each opinion, ran 146 pages.

vastly less controversial than either the Bybee Memorandum or the CIA Detention Program Opinion.<sup>27</sup> Regardless of the controversy they generate, though, Attorney General opinions play a significant role in an agency's undertakings. The agency which sought the opinion continues its activities, moderates them, or ceases them entirely depending upon the determination of the Attorney General opinion. Lawsuits<sup>28</sup> and possibly even prosecutions can ensue.<sup>29</sup> It is therefore important to evaluate what protection Attorney General opinions provide to the government employees who take action in reliance upon those opinions.

Part I of this Article will provide a background on Attorney General opinions. It will evaluate the authority of the Attorney General and OLC to provide such opinions and the methods by which such opinions are crafted. The discussion will also analyze the role that politics plays in the drafting of these opinions. Finally, this Part will assess the binding impact of Attorney General opinions. While courts have steadfastly held that they are not bound by the determinations made in Attorney General opinions, such opinions are binding on all executive agencies and their officers.

Part II will then consider the possible lawsuits and prosecutions that could be brought against federal government officials and employees by exploring civil torts, constitutional and statutory claims, federal prosecutions, and state prosecutions. Using three Attorney General opinions as test cases, including the Bybee Memorandum and the CIA Detention Program Opinion, this Article will demonstrate that, in virtually every situation, government employees who rely on an Attorney General opinion in taking action will likely be absolved from any legal sanction. This Part will also discuss two potential roadblocks—classified Attorney General opinions and the attorney-client and deliberative process privileges—that could preclude a government employee from being able to raise an Attorney General opinion as a defense. However,

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Opinions issued prior to 1992 can be found in bound volumes entitled *Opinions of the Attorneys General* (forty-two volumes) and *Opinions of the Office of Legal Counsel* (twenty volumes). These published opinions, however, represent only a sliver of Attorney General opinions, as most Attorney General opinions are never published. See *Nat'l Council of La Raza v. Dep't of Justice*, 339 F. Supp. 2d 572, 575 (S.D.N.Y. 2004) (noting the Department of Justice's acknowledgement that it "publishes only a small fraction of the OLC's opinions").

27. See *Dep't of Justice Opinions*, *supra* note 26. For a discussion of recent Attorney General opinions, see *infra* pp. 118–20.

28. Numerous lawsuits have been filed alleging participation of United States employees in torture. See *infra* note 119. At least two lawsuits allege such torture in the context of the CIA's detention program. See *infra* note 120.

29. Requests have been made for prosecutions of individuals alleged to have engaged in torture at Guantanamo Bay and in the CIA detention program. See *infra* notes 119–20.

government employees should be able to overcome such roadblocks in the vast majority of instances.

Part III will then consider the various concerns that arise from the fact that Attorney General opinions shield government employees from civil litigation and criminal prosecution. These legitimate concerns include the possibility that an Attorney General opinion might be erroneous or unreasonable. Effective immunity could also have negative consequences on government employees by undermining their work ethic, encouraging them to withhold or manipulate facts in order to acquire a beneficial Attorney General opinion, or even inducing them to conspire with the Attorney General or OLC to acquire immunity for knowingly illegal acts. This Article, however, will conclude that such concerns are overstated and that it is appropriate, as well as beneficial to American society, for government employees to be shielded from civil liability and criminal prosecution for actions undertaken in reliance on an Attorney General opinion. Any sanction should be levied against the United States government, not against an individual government employee who engaged in activities based on a binding issuance from the highest legal office in the executive branch.

#### I. BACKGROUND ON ATTORNEY GENERAL OPINIONS

When Congress created the position of the office of the Attorney General in 1789, it assigned the Attorney General only two tasks: “to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned” and “to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.”<sup>30</sup> Though the duties of the Attorney General have changed and expanded since its founding, that second role—to provide advice to the President and the executive branch departments—remains a critical role of the Attorney General’s office.<sup>31</sup>

The Attorney General’s obligation to render advice to executive branch agencies is codified at 28 U.S.C. § 512 (2000). This statute provides that “[t]he head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.”<sup>32</sup> Executive Order 12,146 expands upon this requirement, providing that agencies engaged in interagency disputes are “encouraged to submit the dispute to the

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30. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (codified at 28 U.S.C. §§ 511–12 (2000)); see also Moss, *supra* note 4, at 1306–07.

31. Moss, *supra* note 4, at 1306–07.

32. 28 U.S.C. § 512 (2000).

Attorney General.”<sup>33</sup> However, if the heads of two executive branch agencies are unable to resolve their legal dispute informally, they “shall” submit the matter to the Attorney General before proceeding to any court, unless a specific statute requires a different mechanism for resolution.<sup>34</sup>

In reality, however, it is rare for the Attorney General to personally address the legal queries submitted by executive branch agencies. Rather, such requests are almost always submitted to and resolved by OLC.<sup>35</sup> Department of Justice regulations assign OLC the task of “[p]reparing the formal opinions of the Attorney General.”<sup>36</sup> Indeed, OLC’s role in this regard has become so prevalent that one author estimates that, in the twenty-year period between 1974 and 1994, less than ten percent of the opinions issued by the Department of Justice were answered by the Attorney General, and that indeed two Attorneys General issued no opinions at all during their entire tenure.<sup>37</sup> Despite the fact that OLC and not the Attorney General prepares the vast majority of such opinions, those opinions are still issued under the auspices and authority of the office of the Attorney General and, therefore, this Article will refer to such opinions as “Attorney General opinions” regardless of who actually authored the opinion.

Attorney General opinions constitute one of the most extensive formal analyses of constitutional and statutory law outside of the judiciary branch.<sup>38</sup> However, unlike judicial opinions, Attorney General opinions are restricted exclusively to agencies in the executive branch; private parties cannot seek such opinions.<sup>39</sup> Older Attorney General opinions can generally be found in bound volumes, while newer opinions are now provided online.<sup>40</sup> As with judicial decisions, not all Attorney General opinions are published, as many

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33. Exec. Order No. 12,146, 44 Fed. Reg. 42,657, 42,658 (July 20, 1979), reprinted in 28 U.S.C. § 509 (2000).

34. *Id.*

35. Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 373 (1993); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 378, 426 (1993); Moss, *supra* note 4, at 1308 (“Today, the Office of Legal Counsel renders all but a small portion of the formal legal opinions of the Department of Justice.”).

36. 28 C.F.R. § 0.25(a) (2007). OLC’s website states that “[t]he 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 [of Justice].” Department of Justice, Office of Legal Counsel Homepage, <http://www.usdoj.gov/olc/index.html> (last visited Jan. 12, 2008).

37. Kmiec, *supra* note 35, at 374.

38. McGinnis, *supra* note 35, at 376.

39. Department of Justice, *supra* note 36 (“The Office of Legal Counsel is not authorized to give legal advice to private persons.”).

40. *See supra* note 26.

opinions concern sensitive or classified matters.<sup>41</sup> Over time, the length and complexity of Attorney General opinions has increased. Many of the older opinions are only a page or two in length.<sup>42</sup> More recent Attorney General opinions are usually considerably longer, running dozens of pages.<sup>43</sup> The Bybee Memorandum, one of the lengthier opinions, contains fifty pages of legal analysis.<sup>44</sup>

An informal procedural process guides the issuance of Attorney General opinions.<sup>45</sup> This process roughly mirrors the judiciary's appellate procedures.<sup>46</sup> Requests for formal Attorney General opinions must be in writing to ensure that all parties are clear as to what has been requested.<sup>47</sup> The responsive formal Attorney General opinion is also in writing, again to ensure clarity.<sup>48</sup> The facts at issue must be presented by the requesting agency to the Attorney General or OLC; the Attorney General and OLC will not engage in fact-finding missions before issuing their opinions.<sup>49</sup> Attorneys General and OLC also follow the judiciary's practice of not providing theoretical advice. Thus, the matter must raise a question of law based upon facts actually in dispute.<sup>50</sup> Finally, in order to preclude conflict with the judiciary, Attorney General opinions will typically avoid matters currently in litigation.<sup>51</sup>

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41. McGinnis, *supra* note 35, at 376. For example, the CIA Detention Program Opinion remains unpublished. See Senator Kennedy Statement, *supra* note 7.

42. See *supra* note 26 for a discussion of Attorney General opinions available in bound volumes.

43. For recent Attorney General opinions, see Dep't of Justice Opinions, *supra* note 26.

44. Bybee Memorandum, *supra* note 6.

45. See Harold Hongju Koh, *Protecting the Office of Legal Counsel From Itself*, 15 CARDOZO L. REV. 513, 514 (1993).

46. McGinnis, *supra* note 35, at 428.

47. Koh, *supra* note 45, at 514; McGinnis, *supra* note 35, at 426–28.

48. Koh, *supra* note 45, at 514; McGinnis, *supra* note 35, at 426–28. OLC provides informal oral guidance as well. See Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC's Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1, 27 (2006). However, it is my experience that such oral advice is typically reduced to writing later to avoid any confusion and to provide certainty for the requesting agency, especially where the advice concerns a matter of any real significance. In any case, this Article will restrict itself to formal written Attorney General opinions because we are not privy to OLC's more informal oral advice and, therefore, cannot assess its content or validity.

49. Claim for Damage Resulting from Operation of Irrigation Works, 39 Op. Att'y Gen. 425, 428 (1940) ("It has been the invariable rule to decline to give an opinion upon any question of law unless it is specifically formulated and accompanied by a statement of the facts involved.").

50. Authority of the Secretary of the Treasury under the New York City Loan Guarantee Act of 1978, 43 Op. Att'y Gen. 286, 289 n.\* (1980) (stating that Attorneys General will not issue an opinion "unless the opinion request raises a genuine issue of law").

51. Koh, *supra* note 45, at 514.

A. *Political Bias in Attorney General Opinions*

The position of the Attorney General and OLC within the executive branch raises the natural question as to whether the legal arguments made and conclusions reached in Attorney General opinions are influenced, if not outright mandated, by the political desires of the executive branch. It would be both naïve and disingenuous to assert that Attorney General opinions are not affected, at least on occasion, by the interests of the administration under which the Attorney General serves. After all, the Attorney General is appointed by, and serves at the pleasure of, the President.<sup>52</sup> It is therefore not unusual for the President to put a loyal supporter in that position.<sup>53</sup> The previous Attorney General, Alberto Gonzales, certainly fits that role.<sup>54</sup> However, he is far from unique. Richard Nixon appointed his friend John Mitchell as Attorney General, and Jimmy Carter nominated his friend Griffin Bell.<sup>55</sup> Ronald Reagan appointed William French Smith, who was Reagan's personal lawyer, and later selected Edwin Meese, an old-time compatriot.<sup>56</sup> President John F. Kennedy went a step further, appointing his own brother, Robert Kennedy, to the post.<sup>57</sup>

This loyalty to the President and lack of complete independence trickle down to the Department of Justice, as well as OLC, and certainly pervade Attorney General opinions. As one court noted in recognizing the possible impartiality of such opinions: "Legal conclusions might well be tailored to what the legal advisor understands the decision-maker's preferences to be. It is easy to imagine a scenario in which OLC was asked to find a legal basis for a course of action that the Attorney General already was interested in pursuing."<sup>58</sup> Judge, now Supreme Court Justice, Samuel Alito, Jr. expounded on this concept in the early 1990s:

[N]either the Attorney General nor OLC has been or should be truly independent. Neither the Attorney General nor OLC has independent constitutional authority; rather, they assist the President in carrying out his authority under Article II. Neither the Attorney General nor the head of OLC has the tenure that is usually thought to be necessary for real independence . . . . And neither the Attorney General nor OLC

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52. Samuel A. Alito, Jr., Comment, *Change in Continuity at the Office of Legal Counsel*, 15 CARDOZO L. REV. 507, 510 (1993).

53. Karen Tumulty & Massimo Calabresi, *Inside the Scandal at Justice*, TIME, May 21, 2007, at 44, 46 (describing the personal relationships and loyalties between Presidents and Attorneys General over the past forty years).

54. *Id.* (discussing the "intense personal bond" between President Bush and Attorney General Gonzales that has existed since Bush was Governor of Texas).

55. *Id.* at 49.

56. *Id.*

57. *Id.* at 46, 49.

58. Nat'l Council of La Raza v. Dep't of Justice, 339 F. Supp. 2d 572, 582 (S.D.N.Y. 2004).

functions 'independently' on a daily basis; on the contrary, they engage in a great deal of communication on a wide range of matters with other components of the executive branch.<sup>59</sup>

Having a loyalist as an Attorney General, however, does create considerable advantages for the office. One obvious example is ongoing access to the White House. A second critical value of loyalty is influence on the President, especially when the Attorney General is providing unwanted news. As former Attorney General Gonzales stated: "When a friend tells someone, 'No, you can't do that,' you're much more likely to listen to that and to accept it . . . I've got that kind of relationship with the President."<sup>60</sup>

The mere fact that the Attorney General and OLC may not be entirely independent from political forces, however, does not mean that Attorney General opinions are mere politically motivated propaganda. Indeed, the opposite is likely true. Numerous commentators have noted that the Attorney General, and especially OLC, traditionally provided legal analysis generally untainted by political influence.<sup>61</sup> As one former Assistant Attorney General in OLC stated in the early 1990s, "[i]t is probably fair to describe the modern experience of the heads of OLC in the last thirty years as one of remarkable independence and latitude."<sup>62</sup>

OLC has a significant incentive to maintain a reputation for independence, as well as outstanding legal advice, in order to ensure that its opinions are respected and followed.<sup>63</sup> This desire for excellence and independence allows OLC to recruit top attorneys; those attorneys, in turn, strive to maintain the perception of being unbiased, especially given that many of them remain at OLC for only a short period of time before pursuing other professions, especially academia.<sup>64</sup> The rules that OLC has created—e.g., that

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59. Alito, *supra* note 52, at 510; *see also id.* at 507 (stating that OLC's outlook is shaped by the interests of the executive branch as a continuing institution and the views of the administration).

60. Tumulty & Calabresi, *supra* note 53, at 46.

61. *See, e.g.,* Dorf, *supra* note 9 ("Moreover, although the head of OLC and the top deputies are political appointees, the office as a whole has long had a culture of independence. The dedicated and talented lawyers who work at OLC typically see themselves not as mere servants of the Administration that happens to seek their advice, but also as keepers of an inter-generational trust."). One author has even gone so far as to claim that the Constitution requires that the Attorney General and OLC provide only strictly objective advice. *See Moss, supra* note 4, at 1312–16.

62. Kmiec, *supra* note 35, at 373.

63. McGinnis, *supra* note 35, at 422–23; *see also Moss, supra* note 4, at 1311 ("Objectivity and balance in providing legal advice are the currency of the Attorney General and the Office of Legal Counsel. That is, the legal opinions of the Attorney General and the Office of Legal Counsel will likely be valued only to the extent they are viewed by others in the executive branch, the courts, the Congress, and the public as fair, neutral, and well-reasoned.").

64. One former attorney in OLC estimates that, from the 1970s to the 1990s, approximately twenty percent of attorneys who left OLC pursued

opinions be in writing and that opinions will not be issued on matters currently in litigation—were established to help OLC maintain independence from political pressures.<sup>65</sup> OLC eventually publishes many of its opinions, permitting wide public scrutiny and reducing the likelihood of political slant.<sup>66</sup> Indeed, OLC has issued several opinions that contradict the apparent political interests of the President under whom it serves.<sup>67</sup> Further, OLC's practice of relying on and making reference to past OLC opinions, regardless of the administration in place when those past OLC opinions were issued, further bolsters the claim that Attorney General opinions generally stem from independent, politically neutral analysis.<sup>68</sup>

Thus, it seems fair to conclude that Attorney General opinions generally comprise mostly independent legal analysis, though they may have some political slant or bias.<sup>69</sup> Much probably depends on the type of matter before the Attorney General or OLC.<sup>70</sup> In matters involving interagency disputes, relatively uncontroversial issues, or issues likely to come before a court of law, Attorney General opinions have a high likelihood of being purely analytical, independent evaluations of the law.<sup>71</sup> However, when an issue involves greater controversy, and perhaps a lesser likelihood of eventual judicial review, Attorney General opinions face a greater probability of influence by the political interests of the administration.<sup>72</sup>

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academia. McGinnis, *supra* note 35, at 424 n.185.

65. Koh, *supra* note 45, at 514. Harold Koh served as a line attorney in OLC in the mid 1980s. *Id.* at 513 n.\*. He is now the dean of Yale Law School. Yale Law School, Harold Hongju Koh, <http://www.law.yale.edu/HKoh.htm> (last visited Jan. 12, 2008).

66. McGinnis, *supra* note 35, at 428.

67. *Id.* at 430 (noting the existence of “several recent cases [OLC] has decided against the President’s perceived political interest”). For example, OLC recently issued an opinion regarding what constitutes a “special Government employee,” which conflicted with the current administration’s desires. Memorandum Opinion for the General Counsel, Department of Defense, from Steven G. Bradbury, Acting Assistant Attorney General, Days of Service by Special Government Employees 1 (Jan. 26, 2007), *available at* [http://www.usdoj.gov/olc/2007/sge\\_opinion\\_final.pdf](http://www.usdoj.gov/olc/2007/sge_opinion_final.pdf).

68. Dorf, *supra* note 9.

69. *See* McGinnis, *supra* note 35, at 434–35 (providing an extensive analysis of whether Attorney General opinions are politically influenced).

70. *Id.* at 434.

71. *Id.* at 434–35.

72. *See* Alito, *supra* note 52, at 509–10; McGinnis, *supra* note 35, at 434–35. It should also be recognized that no facet of American government is entirely free of politics, including the judiciary branch. *See* Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 658 (2001) (discussing the apparent “partisan break-down” of the Supreme Court decision not to recount Florida ballots in the 2000 presidential election).

B. *The Binding Impact of Attorney General Opinions*

Courts have consistently and uniformly declared that they are not bound by Attorney General opinions. The Supreme Court considered this issue in the deportation case of *Perkins v. Elg*.<sup>73</sup> In *Elg*, the Secretary of Labor asserted that his interpretation of the relevant deportation law was supported by an Attorney General opinion involving an analogous factual scenario.<sup>74</sup> The Supreme Court, however, refused to be bound by that Attorney General opinion, noting that while it was “reluctant to disagree with the opinion of the Attorney General,” it nonetheless determined the conclusions in the opinion were “not adequately supported and are opposed to the established principles which should govern the disposition of this case.”<sup>75</sup>

A district court came to the same conclusion in *United States v. Dietrich*, which concerned the indictment of a U.S. Senator for holding office while at the same time maintaining a private contract with the United States.<sup>76</sup> Senator Dietrich argued that the court should rely on an Attorney General opinion issued almost one hundred years previously which had considered a similar scenario and had concluded that no legal violation had occurred.<sup>77</sup> Senator Dietrich did not claim that he had relied on, or even knew about, this Attorney General opinion prior to taking the actions that led to his indictment.<sup>78</sup> Nonetheless, he argued that the court should be bound by the Attorney General opinion.<sup>79</sup> The court disagreed, stating that while such opinions are “always entitled to respectful consideration,” in this particular Attorney General opinion, “the reasons assigned for the conclusion stated [were] brief and unsatisfactory,” and there was no indication “that this opinion has been followed in any of the executive departments for any length of time, or at all.”<sup>80</sup>

The most fascinating decision in this area, however, has to be *McGrath v. Kristensen*.<sup>81</sup> In that Supreme Court case, the Court declined to follow an Attorney General opinion, which had been issued by then Attorney General Robert H. Jackson.<sup>82</sup> However, at the time *McGrath* was decided, Robert H. Jackson had become a Justice on the Supreme Court.<sup>83</sup> Not only did Justice Jackson side

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73. 307 U.S. 325 (1939).

74. *Id.* at 347–48.

75. *Id.* at 348–49.

76. 126 F. 671, 672–73 (D. Neb. 1904).

77. *Id.* at 675–76; *Contracts with Members of Congress*, 5 Op. Att’y Gen. 697, 697–98 (1809).

78. *See Dietrich*, 126 F. at 675–76.

79. *Id.*

80. *Id.* at 676.

81. 340 U.S. 162 (1950).

82. *Id.* at 173 n.18, 175–76.

83. *Id.* at 176 (Jackson, J., concurring).

with the majority in *McGrath*, but he wrote a separate concurring opinion lambasting his own Attorney General opinion!<sup>84</sup>

Every other court that has considered the matter has reached the same conclusion, accepting that Attorney General opinions may deserve deference, but nonetheless are not binding on the courts.<sup>85</sup>

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84. *Id.* at 176–78 (Jackson, J., concurring) (“I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation. I am entitled to say of that opinion what any discriminating reader must think of it—that it was as foggy as the statute the Attorney General was asked to interpret.” (citation omitted)).

85. *See, e.g.*, *Schick v. Reed*, 419 U.S. 256, 275–76 n.12 (1974) (Marshall, J., dissenting) (“A legal opinion from the Attorney General supplies reasoned interpretations but hardly bears the force of law.”); *McElroy v. Guagliardo*, 361 U.S. 281, 285–86 (1960) (refusing to be bound by an 1872 Attorney General opinion and noting that such opinions are “entitled to some weight,” but “do not have the force of judicial decisions”); *United States v. Zucca*, 351 U.S. 91, 101 (1956) (Clark, J., dissenting) (“Many cases witness the fact that the Court has often given little or no weight to carefully drawn opinions of the Attorney General on questions of statutory interpretation.”); *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288, 311 (1913) (determining an Attorney General opinion is not sufficient “to control or modify the conclusion we have reached as to the meaning of the provision”); *Executive Bus. Media, Inc. v. U.S. Dep’t of Def.*, 3 F.3d 759, 762 (4th Cir. 1993) (explicitly declining to follow an OLC opinion); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 780 n.6 (D.C. Cir. 1984) (“While opinions of the Attorney General of course are not binding, they are entitled to some deference, especially where judicial decisions construing a statute are lacking.”); *Oloteo v. Immigration & Naturalization Serv.*, 643 F.2d 679, 683 (9th Cir. 1981) (“Although we are not bound by his interpretation, the Attorney General’s opinion deserves some deference.”); *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 496 F. Supp. 880, 884 (D. Mont. 1980) (“While it is true that opinions of the Attorney General are given great weight, an Attorney General’s opinion is not the judgment of a court of law and is not binding on this court.”). *See generally* *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (discussing the various levels of deference courts are to give interpretations provided by executive branch agencies in the context of an interpretation issued by the Attorney General); 1 NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 5A:11, at 498 (6th ed. 2002) (describing the role of state Attorney General opinions in state court cases and noting, “[n]aturally, courts have quite uniformly held that the judiciary is not bound by an attorney general’s opinion”). Two cases, using extremely loose language, at first blush appear to suggest that courts should be controlled by an Attorney General opinion. In *U.S. Bedding Co. v. United States*, 55 Ct. Cl. 459, 460–61 (1920), the Court of Claims cites to *Smith v. Jackson*, 246 U.S. 388 (1918), for the proposition that an Attorney General’s opinion “may have controlling influence.” However, as discussed in notes 90–94 and accompanying text *infra*, *Smith v. Jackson* does not in fact contain such an interpretation. Further, the *U.S. Bedding Co.* court did not itself rely on an Attorney General opinion in rendering its judgment. *U.S. Bedding Co.*, 55 Ct. Cl. At 459. Similarly, in *United States v. Allocco*, 305 F.2d 704, 714 (2d Cir. 1962), the Second Circuit referred in dicta to an 1880 case for the claim that “[t]he opinions of the Attorneys-General have been accepted as conclusive authority in support of the Government’s position in the single reported decision by a federal court on the question before us.” However, the federal case cited, *In re Farrow*, 3 F. 112 (N.D. Ga. 1880), did not in fact deem Attorney General opinions conclusive.

Even Attorneys General have acknowledged that courts are not bound by Attorney General opinions.<sup>86</sup>

Nonetheless, Attorney General opinions *are* considered binding on all government employees, even those outside the requesting agency. Executive Order 2877, issued in 1918, proclaimed that “any opinion or ruling by the Attorney General upon any question of law arising in any department, executive bureau, agency or office shall be treated as binding upon all departments, bureaus or offices therewith concerned.”<sup>87</sup> In 1934, then Attorney General Cumming confirmed that “[t]he opinions of the Attorney General as the chief law officer of the Government should be respected and followed in the administration of the executive branch of the Government.”<sup>88</sup>

OLC currently operates under the assumption that its opinions are binding on the executive branch, and it appears that executive agencies concur, at least until or unless the judiciary decides differently. As a then Assistant Attorney General in OLC stated in 2000:

[A]lthough the heads of departments are not generally required to seek legal guidance from the Department of Justice, when they do so, it is understood that the opinion provided will become the controlling view of the executive branch. Although subject to almost two hundred years of debate and consideration, the question of whether (and in what sense) the opinions of the Attorney General, and, more recently, the Office of Legal Counsel, are *legally* binding within the executive branch remains somewhat unsettled. . . . Few, however, dispute the proposition that whether for legal reasons, to promote uniformity and stability in executive branch legal interpretation, or to avoid personal risk of being ‘subject to the imputation of disregarding the law as officially pronounced,’ executive branch agencies have treated Attorney General (and later the Office of Legal Counsel) opinions as

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Rather, the court there merely stated that such opinions are “entitled to the highest consideration.” *Id.* at 115. Thus, despite the fact that ten Attorney General opinions over the span of sixty years had all reached the same conclusion on the matter before the court in *Farrow*, the court nonetheless found itself not bound by such decisions and instead assessed the legal issue on its own. *Id.*

86. *See, e.g.*, Applicability of Johnson Act and Neutrality Acts to Transactions by Foreign Branches of American Banks, 39 Op. Att’y Gen. 398, 402 (1939) (opining on the applicability of the Neutrality Laws to unincorporated foreign branches of American banks and noting that his [Attorney General Frank Murphy’s] decision “would afford no protection in subsequent prosecutions”).

87. *See* Kmiec, *supra* note 35, at 368–69 (quoting Exec. Order No. 2877 (1918)).

88. Jurisdiction of Attorney General to Determine Meaning of the Term “Adjustments” as Used in Executive Order No. 6440 of November 18, 1933, as Amended, and Inclusion of Definition of Term in Proposed Order, 37 Op. Att’y Gen. 562, 563 (1934).

conclusive and binding since at least the time of Attorney General William Wirt. Indeed, we have been able to go for over two hundred years without conclusively determining whether the law demands adherence to Attorney General Opinions because agencies have in practice treated these opinions as binding.<sup>89</sup>

The courts appear to agree, acknowledging that while they are not bound by Attorney General opinions, executive branch agencies and officials *are* so bound. In *Smith v. Jackson*, the Supreme Court evaluated whether the auditor of the Canal Zone had the power to deduct rent from the salary of the judge appointed to the Zone.<sup>90</sup> The Court noted that the Secretary of War had previously submitted that very question to the Attorney General, who determined that the auditor did not have such power.<sup>91</sup> Despite the Attorney General's opinion, the auditor nonetheless had deducted the rent.<sup>92</sup> The Supreme Court chastised the auditor for that decision, stating that the Attorney General opinion "should have put the subject at rest" for the auditor.<sup>93</sup> The auditor "had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated . . . to the ruling of the Attorney General."<sup>94</sup>

A similar acknowledgement of this dichotomy arose in *Pueblo of Taos v. Andrus*.<sup>95</sup> That case involved a boundary dispute over land held in trust for the Pueblo. Though the Attorney General had specifically opined on the exact matter at hand in favor of the defendants' position, the district court refused to accept the Attorney General opinion as dispositive of the matter.<sup>96</sup> The court nonetheless noted the discrepancy between what binds the courts and what binds executive branch employees:

[D]efendants submitted the affidavit of [the Secretary of Agriculture], stating that he considered the Attorney General's opinion as an official pronouncement superseding his own

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89. Moss, *supra* note 4, at 1318–20 (footnotes omitted); *id.* at 1305 ("When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch."); *see also* Edles, *supra* note 48, at 4 ("Importantly, OLC opinions are generally regarded as binding through the executive branch."). *But see* 2 AM. JUR. 2D *Administrative Law* § 9 (2004) (citing to state court cases for the assertion that "[w]hile it may be persuasive, an attorney general opinion is neither conclusive nor binding, and the recipient of it is free to follow it or not as he or she chooses").

90. 246 U.S. 388, 389 (1918).

91. *Id.* at 389.

92. *Id.* at 390.

93. *Id.* at 389.

94. *Id.* at 390–91.

95. 475 F. Supp. 359 (D.D.C. 1979).

96. *Id.* at 364 ("This Court is not bound by an opinion of the Attorney General.").

prior order. The Court notes that this is an entirely appropriate position for the Secretary to take. The Court notes further, however, that the Attorney General's opinion is not the judgment of a court of law and cannot operate to change the result arrived at through considered judicial interpretation.<sup>97</sup>

Therefore, both the executive and judiciary branches acknowledge and accept that Attorney General opinions operate as binding issuance for government employees. Agencies send queries to the Attorney General and OLC for legal assessment, with the resultant opinion deemed the governing answer for all government employees. As will be seen below, this is a critical element to Attorney General opinions and to our analysis of their impact on government employees.

## II. THE EFFECTIVE IMMUNITY PROVIDED BY ATTORNEY GENERAL OPINIONS

Thus far, federal courts do not appear to have considered a case in which a government employee engaged in activity in reliance on an Attorney General opinion.<sup>98</sup> Nor have I been able to find any scholarly evaluation of this issue.<sup>99</sup> One reason for this complete

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97. *Id.* at 365 n.4.

98. Searches of electronic databases and various hardbound annotated volumes failed to surface any federal cases that had considered this issue. It should be noted that the defendant Senator in *United States v. Dietrich*, 126 F. 671 (D. Neb. 1904), discussed *supra* notes 76–80 and accompanying text, did not claim that he had relied on the Attorney General opinion cited in that case before becoming Senator, or even before being prosecuted. Indeed, the court noted that nobody appeared to have ever relied upon that Attorney General opinion. *Dietrich*, 126 F. at 676 (“[I]t is not shown that this opinion has been followed in any of the executive departments for any length of time, or at all . . . .”).

99. The only possibly relevant scholarly consideration of this topic appears to be by Norman Singer, who discusses how *state* court cases are divided over the ability of *state* government employees to use a *state* Attorney General opinion as a defense. SINGER, *supra* note 85, at 499–504. Those state court cases summarized by Singer, though interesting, do not prove especially useful for our discussion. This Article's analysis of the impact of Attorney General opinions on federal government employees concerns the evaluation of federal law, which the various state court cases in Singer understandably and predictably do not address. Furthermore, the manner in which those state courts considered the issue of opinions issued by state Attorneys General also proves unilluminating for our evaluation. The state courts that found immunity for state government employees who relied on a state Attorney General's opinion held that such immunity was absolute, i.e., that the state Attorney General opinion created a complete and absolute bar on any state claim without need to evaluate the law governing the claim. *Id.* at 499–501. As discussed *infra*, absolute immunity on the federal level is limited to very few groups of individuals and has not been extended by federal courts to federal government employees who rely on U.S. Attorney General opinions. *See infra* notes 170–71 and accompanying text. In cases where the state courts did not

dearth of judicial and scholarly consideration of the issue would appear to stem from the general rarity of Attorney General opinions.<sup>100</sup> During the three-year period from January 2005 through January 2008, for example, a total of eighteen Attorney General opinions appear on the Department of Justice's website.<sup>101</sup> While, admittedly, this includes only those opinions that have been published, and does not include classified or sensitive opinions, it still suggests a relatively small number of opinions that could be relied upon by a government employee.<sup>102</sup>

Further, many Attorney General opinions address topics that would generally elude judicial review.<sup>103</sup> Using that three year period from January 2005 through January 2008 as an exemplar, several of the opinions issued during that time period concern matters that do not involve criminal statutes and do not appear to provide standing for anyone to file a civil claim. For example, Attorney General opinions issued during this period involved the President's authority to appoint individuals to various executive branch positions,<sup>104</sup> the Director of the Central Intelligence Agency

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find immunity, each ruling contained "a unique situation underlying the result." SINGER, *supra* note 85, at 500. Thus, neither the state court cases that found immunity, nor those that did not, provide particular insight as to how federal courts would systematically assess U.S. Attorney General opinions.

100. Though Attorney General opinions may be one of the most prolific formal analyses of law outside of the judicial branch, they nonetheless pale quantitatively to the vast number of opinions issued by the judiciary. See *infra* note 102 and accompanying text.

101. Dep't of Justice Opinions, *supra* note 26.

102. John McGinnis, a former Deputy Assistant Attorney General in OLC, asserts that there are at least five filing cabinets of largely unpublished Attorney General opinions in OLC's library. McGinnis, *supra* note 35, at 376. However, that reflects opinions spanning more than sixty years from 1932 to 1993. *Id.* Compare that to the hundreds of thousands of federal court opinions that have been published in the same time frame. Or compare the eighteen published Attorney General opinions from January 2005 through January 2008 with the thousands upon thousands of federal court decisions issued during that period, recognizing that the vast majority of federal court decisions never get published either.

103. For the Attorney General opinions cited on OLC's website, see Dep't of Justice Opinions, *supra* note 26.

104. Memorandum Opinion for the General Counsels of the Executive Branch from Steven G. Bradbury, Acting Assistant Attorney General, Officers of the United States within the Meaning of the Appointments Clause 1 (Apr. 16, 2007), available at <http://www.usdoj.gov/olc/2007/appointmentsclausev10.pdf> (determining that certain government officers must be appointed to their positions pursuant to the procedures outlined in the Appointments Clause of the Constitution); Memorandum Opinion for the General Counsel, Office of Management and Budget, from C. Kevin Marshall, Deputy Assistant Attorney General, Assignment of Certain Functions Related to Military Appointments 6 (July 28, 2005), available at <http://www.usdoj.gov/olc/2005/militaryappointments.pdf> (assessing that the President can delegate his appointment power for certain Department of Defense positions to the Secretary of Defense who, in turn, may delegate that function to a subordinate

taking on certain powers previously allocated to the now-defunct Director of Central Intelligence position,<sup>105</sup> and the Secretary of Defense having the authority to amend his Military Commission Order.<sup>106</sup> It is unlikely that the topics addressed in these opinions would find their way into a court of law.

Other Attorney General opinions issued between January 2005 and January 2008 concluded that an agency's proposed action was illegal.<sup>107</sup> In such cases, no government employee would be able to rely upon those Attorney General opinions in taking action, and therefore courts will have no cause to evaluate the repercussions of reliance on those Attorney General opinions.

Nevertheless, several Attorney General opinions issued between January 2005 and January 2008 do involve matters in which a government employee could be sued or prosecuted, where the employee might seek to rely upon the relevant Attorney General opinion. In one opinion (hereinafter referred to as the "Kidney Donor Opinion"), OLC determined that certain kidney donor practices, which the Secretary of Health and Human Services wished to encourage, did not violate section 301 of the National Organ Transplant Act.<sup>108</sup> There is no indication of what measures, if

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officer).

105. Memorandum Opinion for the Deputy Counsel to the President from C. Kevin Marshall, Acting Deputy Assistant Attorney General, Status of the Director of Central Intelligence under the National Security Intelligence Reform Act of 2004, at 9 (Jan. 12, 2005), *available at* <http://www.usdoj.gov/olc/dciciaappointment0112final.pdf> (determining that the Director of Central Intelligence automatically becomes the Director of the CIA with implementation of the National Security Intelligence Reform Act of 2004).

106. Memorandum Opinion for the General Counsel, Department of Defense, from C. Kevin Marshall, Deputy Assistant Attorney General, Proposed Amendments to Military Commission Order No. 1, at 1 (Aug. 12, 2005), *available at* [http://www.usdoj.gov/olc/militarycommissionchangesop\(final\).pdf](http://www.usdoj.gov/olc/militarycommissionchangesop(final).pdf) (determining that the Secretary of Defense may amend certain portions of his Military Commission Order No. 1 without violating the President's Military Order of November 12, 2001).

107. Memorandum Opinion for the General Counsel, Department of Health and Human Services, and the Senior Counsel to the Deputy Attorney General, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Scope of Criminal Enforcement under 42 U.S.C. § 1320d-6 (June 1, 2005), *available at* [http://www.usdoj.gov/olc/hipaa\\_final.htm](http://www.usdoj.gov/olc/hipaa_final.htm) (finding certain individuals and entities may be prosecuted under 42 U.S.C. § 1320d-6, which is not a specific intent statute); Memorandum Opinion for the General Counsel, Environmental [sic] Protection Agency, from C. Kevin Marshall, Deputy Assistant Attorney General, Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences (Apr. 5, 2007), *available at* <http://www.usdoj.gov/olc/2007/epa-light-refreshments13.pdf> (determining that using appropriated funds to provide refreshments to nonfederal participants at conferences violates 31 U.S.C. § 1345).

108. Memorandum Opinion for the General Counsel, Department of Health and Human Services, from C. Kevin Marshall, Deputy Assistant Attorney General, Legality of Alternative Organ Donation Practices under 42 U.S.C. § 274e, at 1 (Mar. 28, 2007), *available at* <http://www.usdoj.gov>

any, the Secretary has taken or will take regarding kidney donation practices subsequent to this Attorney General opinion.<sup>109</sup> However, if the legal analysis in the Kidney Donation Opinion is incorrect, any steps that the Secretary or the Secretary's staff do take to promote such practices could subject them to criminal sanctions for aiding and abetting a section 301 violation, as well as possible civil suits from kidney donors who perceive themselves as having been adversely affected by the Secretary's actions.

Another Attorney General opinion involves the financial interests of nonprofit organizations.<sup>110</sup> The opinion concerns 18 U.S.C. § 208, which prohibits a federal officer or employee from participating "personally and substantially" in any "particular matter in which . . . [an] organization in which he is serving as officer . . . [or] director . . . has a financial interest."<sup>111</sup> The General Counsel of the Office of Government Ethics queried OLC on whether a government employee, who serves as an officer or director of a nonprofit organization, violates § 208 if the employee considers an issue before the employee's agency which the employee's nonprofit organization has spent money to promote.<sup>112</sup> OLC concluded that the government employee would not violate § 208 in that instance because the nonprofit organization would not have a "financial interest" in a "particular matter," as those terms are used in § 208, when the organization merely spends money to promote a particular policy position on an issue before a government agency.<sup>113</sup> Government employees who subsequently engage in such activities in reliance upon this Attorney General opinion—and the opinion discusses two specific situations in which employees intended to do so—would be subject to criminal fines and possible imprisonment if the opinion's conclusions are later deemed incorrect.<sup>114</sup>

A third Attorney General opinion assessed whether membership on the President's Council on Bioethics triggers the Emoluments Clause of the United States Constitution.<sup>115</sup> That clause prohibits

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/olc/2007/organtransplant.pdf [hereinafter Kidney Donor Opinion].

109. The Health and Human Services Department website, <http://www.hhs.gov> (last visited Jan. 12, 2008), does not indicate that the Secretary has issued any guidelines on kidney donation practices.

110. Memorandum Opinion for the General Counsel, Office of Government Ethics, from Steven G. Bradbury, Acting Assistant Attorney General, Financial Interests of Nonprofit Organizations 1 (Jan. 11, 2006), available at <http://www.usdoj.gov/olc/11106nonprofitboards.pdf> [hereinafter Nonprofit Financial Interests Opinion].

111. 18 U.S.C. § 208(a) (2000).

112. Nonprofit Financial Interests Opinion, *supra* note 110, at 1.

113. *Id.*

114. 18 U.S.C. § 208(a).

115. Memorandum Opinion for the Associate Counsel to the President, from Noel J. Francisco, Deputy Assistant Attorney General, Application of the Emoluments Clause to a Member of the President's Council on Bioethics 1 (Mar. 9, 2005), available at <http://www.usdoj.gov/olc/2005/050309>

any person “holding any Office of Profit or Trust under [the United States]” from accepting any “present, Emolument, Office, or Title” from a foreign nation, absent congressional consent.<sup>116</sup> OLC determined that the President’s Council on Bioethics does not constitute an “Office of Profit or Trust under [the United States]” and that therefore members on the Council could receive presents, emoluments, etc., from foreign nations without violating the Constitution.<sup>117</sup> Should members of the Council accept such gifts, they could be subject to criminal sanctions if it is later determined that, contrary to the Attorney General opinion, the Council does indeed constitute an “Office of Profit or Trust under [the United States].”<sup>118</sup>

Civil and criminal claims stemming from these Attorney General opinions are merely theoretical at this point, since no lawsuits against individual government employees appear to have been filed regarding the issues addressed by those opinions. However, this does not preclude the possibility that lawsuits might be filed against government employees in their individual capacities regarding matters considered in these and other (possibly unpublished and therefore likely more controversial) Attorney General opinions. Indeed, plaintiffs have already filed lawsuits involving issues addressed in some Attorney General opinions. For example, numerous individuals have filed lawsuits alleging U.S. government involvement in practices constituting torture.<sup>119</sup> Two

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\_emoluments\_clause.pdf [hereinafter Emoluments Clause Opinion].

116. U.S. CONST. art. I, § 9, cl. 8.

117. Emoluments Clause Opinion, *supra* note 115, at 1–2. A similar Attorney General opinion issued during this timeframe came to the same conclusion with regard to members of the Federal Bureau of Investigation Director’s Advisory Board. Memorandum Opinion for the General Counsel, Federal Bureau of Investigation, from John P. Elwood, Deputy Assistant Attorney General, Application of the Emoluments Clause to a Member of the Federal Bureau of Investigation Director’s Advisory Board (June 15, 2007), available at [http://www.usdoj.gov/olc/2007/fbi\\_advisory\\_board\\_opinion\\_061507.pdf](http://www.usdoj.gov/olc/2007/fbi_advisory_board_opinion_061507.pdf).

118. *See* Edles, *supra* note 48, at 4 (discussing how violation of the Emoluments Clause could lead to criminal sanctions).

119. *See, e.g.*, *Idema v. Rice*, 478 F. Supp. 2d 47, 50 (D.D.C. 2007) (involving claims by prisoners held in Afghanistan that they were tortured at the direction of FBI agents); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 256 (E.D.N.Y. 2006) (involving claim that dual Syrian-Canadian citizen was removed from the United States to Syria for the purpose of being tortured by Syrian officials); *El-Banna v. Bush*, 394 F. Supp. 2d 76, 78 (D.D.C. 2005) (involving claim by detainees held at Guantanamo Bay alleging torture); *O.K. v. Bush*, 377 F. Supp. 2d 102, 106 (D.D.C. 2005) (same); *In re Iraq and Afghanistan Detainees Litig.*, 374 F. Supp. 2d 1356, 1357 (J.P.M.L. 2005) (involving claim by detainees held in Afghanistan and Iraq alleging torture); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 253 (D.D.C. 2004) (alleging complicity by United States and former national security advisor, including torture, in death of Chilean general), *aff’d*, 412 F.3d 190 (D.C. Cir. 2005); *see also* Senator Kennedy Statement, *supra* note 7 (discussing the Bybee Memorandum and its impact and stating that the

other lawsuits concern alleged practices undertaken by the CIA as part of its terrorist detention program.<sup>120</sup> These are issues directly addressed by the Bybee Memorandum and the CIA Detention Program Opinion. Thus, it is foreseeable that in the near future a government employee will claim in defense from civil suit or criminal prosecution that the employee relied upon the Bybee Memorandum, the CIA Detention Program Opinion, or some other Attorney General opinion in taking the alleged action. At that point, a court will be forced to address whether such reliance creates effective immunity for the government employee.

To consider that issue, I will address the four most likely legal claims that could be brought against a government employee to determine whether reliance on an Attorney General opinion would protect the employee from each claim. These four legal claims are: (1) commission of a tort, (2) commission of a constitutional or statutory violation, (3) a violation of federal criminal law, and (4) a violation of state or local criminal law.<sup>121</sup> For each of these legal claims, the discussion below will outline the black letter law as it applies to government employees. The analysis will then turn to whether a court would likely find a government employee culpable under that black letter law if the employee relied upon an Attorney General opinion in taking the alleged action. While no court cases have considered what defense an Attorney General opinion offers for

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Defense Department has investigated more than three hundred cases of detainee torture, sexual assault, and other abuses, with additional allegations of abuse being reported every day).

120. *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007) (involving German citizen of Lebanese descent who alleged he was tortured and subjected to inhuman treatment while detained pursuant to the CIA's detention program); *Khan v. Bush*, No. 06-1690 (D.D.C. filed Oct. 3, 2006) (involving allegation of abuse while in CIA's detention program); see also Scott Horton, *The President's Torture Order*, HARPER'S, July 26, 2007, <http://harpers.org/archive/2007/07/hbc-90000639> (stating that the CIA's detention program is "likely at some point in the future to be the subject of a serious investigation and prosecutions").

121. See Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 763 (2006) (stating that the only conceivable civil claims against government employees for torture would be tort claims under the Federal Tort Claims Act and Constitutional claims). It is, of course, impossible to predict every possible legal claim that could be raised by a particularly clever plaintiff's counsel. However, it appears that these four bases are the only really viable mechanisms for bringing a claim against a government employee, where the employee might seek to use reliance on an Attorney General opinion as a defense. Contract claims, for example, would likely be precluded since any government contract would be, by definition, between the plaintiff and the government. As the government employee would not be a party to the contract, the employee could not be sued for contractual violations of it. See, e.g., *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir. 1984) ("Generally speaking, only the parties to a contract, those holding under them . . . , and third-party beneficiaries . . . have substantive rights under private contracts.").

an individual government employee, it will become clear that, absent extraordinary circumstances, such a government employee will be found effectively immune from suit under each legal claim if the employee relied upon the Attorney General opinion in taking the alleged action.

In order to test that concept, and consider its ramifications, I will evaluate each legal claim in the context of three actual Attorney General opinions. The first Attorney General opinion will be the Kidney Donor Opinion described above.<sup>122</sup> I chose the Kidney Donor Opinion because it concerns a fairly innocuous and seemingly uncontroversial opinion that not only appears to have come to a correct conclusion, but also seems to be free from any real political taint.<sup>123</sup> The issues raised in the Kidney Donor Opinion potentially have both civil and criminal ramifications, making that opinion particularly appealing as a test case for the four legal claims under consideration.

The Kidney Donor Opinion involved an assessment of whether certain kidney donation practices violated section 301 of the National Organ Transplant Act (“NOTA”).<sup>124</sup> Persons needing a kidney transplant can acquire a kidney either from a living donor or by placing themselves on a national waiting list of kidneys from deceased donors.<sup>125</sup> However, the national waiting list is long, and living donors are often biologically incompatible with their desired recipient.<sup>126</sup> Two mechanisms have been created to attempt to solve this problem. One mechanism involves a living donor donating his or her kidney to an unknown, but compatible, recipient on the national waitlist, in exchange for the donor’s desired (but incompatible) recipient moving up on that list.<sup>127</sup> The second mechanism creates an exchange of kidneys between two or more sets of donors and their otherwise incompatible recipients.<sup>128</sup>

Section 301 of NOTA imposes criminal sanctions for persons who “knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”<sup>129</sup> Since the kidney donation practices in question involve knowing transfer of a human organ and could affect interstate commerce, the key consideration for OLC was whether the donation practices constituted “valuable

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122. *See supra* notes 108–09 and accompanying text.

123. Obviously, it is always possible that even a seemingly innocuous matter, such as kidney donations, could have a major political facet, but it is rather difficult to envision one in this instance.

124. Kidney Donor Opinion, *supra* note 108, at 1.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. 42 U.S.C. § 274e (2000).

consideration.”<sup>130</sup> OLC looked for guidance from several sources including: the language in section 301; other language in NOTA; the title affixed to section 301; and definitions of “valuable consideration” in the United States Code, state laws, commentaries on contracts, Black’s Law Dictionary, and case law.<sup>131</sup> Based upon this review, OLC determined that, while the meaning of “valuable consideration” in section 301 remained somewhat uncertain, the best view was that the kidney donation practices at issue did not constitute “valuable consideration” in violation of that section.<sup>132</sup>

The second test Attorney General opinion is the CIA Detention Program Opinion, discussed in the Introduction *supra*.<sup>133</sup> Although the opinion itself is classified, the basic parameters of the opinion have been publicly disclosed by President Bush.<sup>134</sup> In the opinion, the Attorney General assessed that the CIA’s use of an “alternative set of procedures” in interrogating captured terrorists would not violate U.S. law, presumably including the U.S. anti-torture statute, 18 U.S.C. §§ 2340–2340A (2000).<sup>135</sup> Based upon the Attorney General opinion, the CIA utilized the “alternative set of procedures” on terrorists.<sup>136</sup> This opinion, therefore, represents a relevant test case as it involves a scenario in which government employees relied upon a controversial, and possibly politically influenced, Attorney General opinion in taking action. Given that alleged detainees have already filed lawsuits regarding the CIA detention program,<sup>137</sup> this may be the first area where courts consider the impact of an Attorney General opinion vis-à-vis an individual government employee.

However, it must be noted that the CIA Detention Program Opinion does not represent an ideal test case. As noted above, the Attorney General opinion remains unpublished. Therefore, it is impossible to know the exact arguments made in that opinion, much less assess the validity of those arguments. Further, the Military Commissions Act of 2006 (“MCA”) provides immunity for government employees who engaged in any aspect of the “detention, transfer, treatment, trial, or conditions of confinement” of

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130. Kidney Donor Opinion, *supra* note 108, at 2.

131. *Id.* at 2–6.

132. *Id.* at 6–7.

133. *See supra* notes 19–25 and accompanying text.

134. *See* President Bush Speech, *supra* note 20, at 1571.

135. *Id.* I use the term “presumably” here because the opinion itself remains classified, and President Bush did not disclose the exact law(s) that the Department of Justice evaluated in determining the legality of the CIA’s terrorist detention program. However, the President did state that the CIA’s detention program did not constitute torture. *See id.* at 1573. It would appear reasonable to believe that the CIA’s Detention Program Opinion contained an evaluation of the anti-torture statute.

136. *Id.* at 1571.

137. *See supra* note 119 and accompanying text.

individuals in the CIA's terrorist detention program.<sup>138</sup> This does not represent a complete bar, however, because the MCA has come under considerable criticism<sup>139</sup> and its constitutionality is being challenged.<sup>140</sup>

In order to assess this opinion, then, a few assumptions are necessary. The first assumption I will make is that the CIA Detention Program Opinion assessed whether the "alternative set of procedures" used by the CIA in the program constitute "torture" under the anti-torture statute. Based on the President's proclamation that he did not authorize torture as part of the CIA's program,<sup>141</sup> I will assume that the Attorney General opinion determined that the Agency's "alternative set of procedures" did not constitute "torture" under the anti-torture statute and that, in reliance upon that opinion, CIA employees engaged in those "alternative set of procedures." Finally, I will assume, purely for the sake of our discussion, that the immunity granted by the MCA does not apply.

The third and final Attorney General opinion tested will be the Bybee Memorandum. As described in the Introduction *supra*,<sup>142</sup> the Bybee Memorandum contains three main sections. The first section creates a very high threshold for "torture" under the anti-torture statute, 18 U.S.C. §§ 2340–2340A.<sup>143</sup> The second section argues that the President's commander-in-chief power could trump the anti-torture statute in the current war against al Qaeda.<sup>144</sup> Finally, the

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138. 28 U.S.C. § 2241(e)(2) (Supp. 2007) ("[Except for various habeas writs,] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

139. See, e.g., *Do We Use Torture?*, *supra* note 25, at A16 (condemning the MCA for continuing to permit the CIA to use unspecified interrogation techniques); Editorial, *Justice at Guantanamo*, WASH. POST, July 18, 2007, at A18 (urging lawmakers to amend the Military Commissions Act); Editorial, *Terrorism and the Law*, N.Y. TIMES, July 15, 2007, at WK11 (referring to the MCA as a "national disgrace" and stating that "[a]long with Guantanamo the entire law needs to be scrapped").

140. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting certiorari to a claim by detainees held at Guantanamo Bay that the MCA is unconstitutional).

141. See President Bush Speech, *supra* note 20, at 1573 ("The United States does not torture. It's against our laws, and it's against our values. I have not authorized it, and I will not authorize it."); see also *60 Minutes: George Tenet: At the Center of the Storm* (CBS television broadcast Apr. 29, 2007), available at [http://www.cbsnews.com/stories/2007/04/25/60minutes/main2728375\\_page3.shtml](http://www.cbsnews.com/stories/2007/04/25/60minutes/main2728375_page3.shtml) (discussing the CIA's terrorist detention program, the former Director of Central Intelligence George Tenet stated: "Well, we don't torture people. Let me say that again to you. We don't torture people.") [hereinafter *60 Minutes*].

142. See *supra* notes 6–15 and accompanying text.

143. Bybee Memorandum, *supra* note 6, at 2–31.

144. *Id.* at 31–39.

third section asserts that claims of necessity and self-defense could be valid legal defenses to alleged violations of the anti-torture statute.<sup>145</sup>

Many have considered the second and third sections of the Bybee Memorandum to permit the use of “torture” in knowing violation of the anti-torture statute.<sup>146</sup> However, I believe that to be an erroneous interpretation of the opinion. The Bybee Memorandum concludes by reiterating its definition of torture, and then asserts that, in the current war against al Qaeda, the President’s commander-in-chief powers “may” render the anti-torture statute unconstitutional and that the defenses of necessity or self-defense “could” be used to defeat criminal liability.<sup>147</sup> By using indefinite terms, such as “may” and “could,” the Bybee Memorandum does not sanction torture in knowing violation of the anti-torture statute. Rather, the memorandum argues that, should its interpretation of “torture” prove incorrect, the government employees accused of violating the anti-torture statute could raise the defenses described in sections two and three of the memorandum.

Regardless, the Bybee Memorandum represents the most extreme type of Attorney General opinion. It is considered highly influenced by politics. As one commentator has described it, the Bybee Memorandum represents a significant departure from OLC’s normal mode of independence and “reads much like a document that an overzealous young associate in a law firm would prepare in response to a partner’s request for whatever arguments can be concocted to enable the firm’s client to avoid criminal liability.”<sup>148</sup> Further, the memorandum makes arguments and takes legal positions that are not only controversial, but have been extensively condemned. Harold Koh, a former Assistant Secretary for Human Rights and current dean of Yale Law School, in an appearance before the Senate Judiciary Committee, stated: “[T]he Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever read.”<sup>149</sup>

Finally, the Bybee Memorandum was so controversial and problematic that OLC actually issued an Attorney General opinion in December 2004 which explicitly superseded the earlier Bybee

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145. *Id.* at 39–46.

146. *E.g.*, Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557, 559 (2005); Marisa Lopez, Note, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685, 686–88 (2005) (referring to the Bybee Memorandum as the “Torture Memo” and asserting that the latter sections of the Bybee Memorandum permitted the use of torture).

147. Bybee Memorandum, *supra* note 6, at 46.

148. Dorf, *supra* note 9.

149. Dean, *supra* note 7.

Memorandum.<sup>150</sup> Drafted by Daniel Levin, the revised memorandum (which I will refer to as the “Levin Memorandum”), provided a less extreme interpretation of the term “torture” as that term is used in the anti-torture statute.<sup>151</sup> It also found the discussions of the President’s commander-in-chief powers and the potential defenses of necessity and self-defense contained in the Bybee Memorandum to be “unnecessary” and expressly declined to consider those issues in the revised opinion.<sup>152</sup>

Let us now turn to the four possible legal theories under which a government employee could be sued in his or her personal capacity.<sup>153</sup>

#### A. *Civil Liability for Tort Claims*

As a general matter, “[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.”<sup>154</sup> For tort claims, the United States has waived sovereign immunity under the Federal Tort Claims Act (“FTCA”). The FTCA provides the exclusive remedy for money damages “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”<sup>155</sup>

The FTCA, however, bars all tort claims against *individual* government employees if those employees were acting within the “scope of employment” when the alleged activity occurred. In such cases, the lawsuit continues, but the United States is substituted as a defendant in place of the individual government employees. As the FTCA states:

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150. Levin Memorandum, *supra* note 17, at 1–2.

151. *Id.* at 2.

152. *Id.*

153. Before moving on, it should be noted that Professor Richard Henry Seamon wrote an extensive article on whether the United States and its employees could be sued in U.S. courts for committing even the extreme act of torture. Seamon, *supra* note 121, at 715–17. Professor Seamon’s highly detailed analysis served as a partial template for this Article’s analysis of civil liability. Professor Seamon’s assessment was that most government officials who engaged in torture “will be effectively judgment proof. In short, the availability of civil remedies for U.S. torture under current law is razor-thin.” *Id.* at 719. Although Professor Seamon did provide passing attention to the role that executive pronouncements and directives could have on the culpability of a government employee, *e.g.*, *id.* at 796–97, he did not assess the role that an Attorney General opinion in and of itself has on an employee’s liability. The discussion *infra* will do just that.

154. *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (citations omitted)).

155. 28 U.S.C. § 1346(b)(1) (2000); *see also id.* § 2679(b)(1) (“The remedy against the United States provided by sections 1346(b) and 2672 of this title . . . is exclusive of any other civil action or proceeding for money damages . . .”). As indicated *supra* note 5, this Article will not consider the impact of the FTCA or any other claims on government contractors.

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.<sup>156</sup>

A similar provision applies to tort claims brought against federal government employees in state courts.<sup>157</sup> Under that provision, certification by the U.S. Attorney General that the employee “was acting within the scope of his office or employment” results in removal of the matter to the relevant United States District Court, with the United States substituted as a defendant for the individual federal employee.<sup>158</sup>

Acting in reliance upon an Attorney General opinion virtually ensures that a government employee’s activities fall within the scope of his or her employment. Attorney General opinions constitute responses to queries by an executive branch agency concerning the legality of activities the agency seeks to undertake.<sup>159</sup> Assuming the Attorney General opinion deems the activity legal, employees engaging in that activity would be doing so on behalf of their agency and thus, almost by definition, be acting within the scope of their government employment. Further, it is almost certain that employees acting in reliance on an Attorney General opinion will be certified as having acted within the scope of their employment since it is the Attorney General who makes such certifications.<sup>160</sup> If an Attorney General opinion determines a given agency activity is legal, it can be presumed that the Attorney General will certify that government employees engaging in that agency activity were acting within the scope of their agency employment. Admittedly, Attorney General certifications are reviewable by the courts.<sup>161</sup> However, it would be difficult to envision a court finding that a government employee who had engaged in an agency activity expressly approved by an Attorney General opinion was acting outside the scope of employment. Thus, the United States would be substituted in place of the government employee, and the employee would be exempt from any personal tort liability.

This substitution should be the outcome in our three test cases.

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156. 28 U.S.C. § 2679(d)(1) (2000).

157. *Id.* § 2679(d)(2).

158. *Id.*

159. *See supra* notes 30–34 and accompanying text.

160. *Supra* notes 156–58 and accompanying text.

161. *E.g.*, Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 417 (1995) (seeking court review of the Attorney General’s scope-of-employment certification).

Any action undertaken by employees of the Department of Health and Human Services (“HHS”) to promote or support the donation practices outlined in the Kidney Donor Opinion would have been taken as part of the employee’s job within HHS in advancement of HHS policies. Similarly, CIA employees who employed the “alternative set of procedures” in reliance upon the CIA Detention Program Opinion would have taken such actions within the confines, and as part of, a government program. In both situations, the actions of such employees would almost certainly be considered within the scope of their employment.

The same should be true with regard to a government employee who engaged in an activity in reliance upon the Bybee Memorandum. Although not limited to a particular program (such as the CIA detention program) or department (such as HHS), the Bybee Memorandum concerned the interrogation of enemy combatants by government employees.<sup>162</sup> To the extent such interrogations occurred while the enemy combatant was in U.S. government custody or in foreign custody where the U.S. government employee was authorized to engage in the interrogation, those interrogations should be construed as having occurred within the employee’s scope of employment. The issue becomes more complicated, of course, given that OLC has revoked the Bybee Memorandum and provided a more refined interpretation.<sup>163</sup> Nonetheless, if the government employee took action in reliance upon the Bybee Memorandum, before it was revoked by the Levin Memorandum, the Attorney General would likely certify that the employee acted within the scope of employment, though policy and political considerations could impact that decision.

Of course, a government employee would not be exempt from tort liability if the employee used the determination made in an Attorney General opinion to engage in activity outside the work environment. For example, if a CIA employee used the guidance in the CIA Detention Program Opinion to create a personal “detention program” not sanctioned by the CIA, that employee’s actions would certainly be outside the scope of employment and therefore the employee would be personally subject to a tort claim. Absent such a situation, however, government employees who engaged in activities pursuant to the Kidney Donor Opinion, the CIA Detention Program Opinion, the Bybee Memorandum, or any other Attorney General

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162. Bybee Memorandum, *supra* note 6, at 1–2. While the Bybee Memorandum does not explicitly state that its guidance applies only to government employees, such a presumption can be made from the context of the memorandum as it focuses on the anti-torture statute, which requires the actor to be operating under the color of law. 18 U.S.C. §§ 2340–2340A (2000). In addition, Attorney General opinions only address government matters, not issues involving private persons. *See supra* note 39 and accompanying text.

163. *See Levin Memorandum, supra* note 17, at 1–2.

opinion should be exempt from any individual tort liability.<sup>164</sup>

*B. Civil Liability for Constitutional or Statutory Violations*

The authority to sue federal employees for constitutional violations arises from the seminal case of *Bivens v. Six Unknown Federal Narcotics Agents*.<sup>165</sup> In *Bivens*, the Supreme Court recognized the right of plaintiffs to file claims against federal employees for violations of Fourth Amendment rights.<sup>166</sup> Subsequently, the Court and Congress extended the reach of *Bivens* claims to other constitutional amendments,<sup>167</sup> as well as to violations of federal statutes.<sup>168</sup>

The courts have also recognized that immunities exist for government employees in such circumstances.<sup>169</sup> The Supreme

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164. Courts might also dismiss such tort claims under any of the myriad of exemptions contained in the FTCA. For example, the “intentional torts” exemption to the FTCA generally bars “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contracts rights” so long as the defendant is not an investigative or law enforcement officer. 28 U.S.C. § 2680(h) (2000). This exemption might well apply to government employees who took action pursuant to the CIA Detention Program Opinion or the Bybee Memorandum. The “discretionary function” exemption bars “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” *Id.* § 2680(a). This exemption would likely bar an FTCA claim against any HHS employee for regulations or guidelines issued pursuant to the Kidney Donor Program. *See* *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (“Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs.”). Other FTCA exemptions might also apply to issues addressed by Attorney General opinions, including exemptions for claims for damages from operation of the Treasury or regulation of the monetary system, claims arising in a foreign country, and claims stemming from the military’s combatant activities during time of war. 28 U.S.C. § 2680(i)–(k).

165. 403 U.S. 388 (1971).

166. *Id.* at 397 (“[W]e hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the Amendment.”).

167. *Seamon*, *supra* note 121, at 774; *see also* *Carlson v. Green*, 446 U.S. 14, 17–20 (1980) (recognizing a *Bivens* action for a claimed violation of the Eighth Amendment cruel and unusual punishment clause); *Davis v. Passman*, 442 U.S. 228, 245–49 (1979) (recognizing a *Bivens* action for a claimed violation of the Fifth Amendment right to due process).

168. 28 U.S.C. § 2679(b)(2) (providing that the exclusive remedy of the FTCA “does not extend or apply to a civil action against an employee of the Government” for violations of the Constitution or a federal statute); *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982) (applying the *Bivens* rationale to both constitutional and statutory violations).

169. These immunities are entirely judicially created, though Congress

Court has held that absolute immunity shields certain government employees and officers from any civil liability.<sup>170</sup> This absolute immunity extends to judges acting in their judicial capacity, the President and members of Congress for their conduct in office, prosecutors when engaged in their prosecutorial capacity, and police officers testifying as witnesses.<sup>171</sup> In such situations, an individual cannot be held liable for any alleged constitutional or statutory violation.

All other government officers enjoy the more limited protection of qualified immunity for either alleged constitutional or statutory violations.<sup>172</sup> Government employees who rely on an Attorney General opinion in engaging in a given activity will likely be granted such qualified immunity.

The Supreme Court, in its landmark case of *Harlow v. Fitzgerald*, established a two-prong test to determine whether qualified immunity attaches to a given situation.<sup>173</sup> The first prong assesses whether the conduct of the government official violated a constitutional or statutory right.<sup>174</sup> If the official did not violate a constitutional or statutory right, the lawsuit must be dismissed.<sup>175</sup> The same is true if the statute at issue does not authorize a private right of action to file suit against the government official.<sup>176</sup>

Should the plaintiff overcome this first prong, the court then evaluates whether that constitutional or statutory right was clearly established such that a reasonable person would have known that his or her conduct violated that right.<sup>177</sup> As part of this second

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statutorily codified judicial immunity as it applied to 42 U.S.C. § 1983 suits. Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 234 n.21 (2006).

170. Erwin Chemerinsky, *Qualified Immunity Ruling Raises Hurdles for Plaintiffs*, TRIAL, Mar. 2005, at 66; Chen, *supra* note 169, at 234.

171. Chemerinsky, *supra* note 170, at 66; Chen, *supra* note 169, at 234 & n.22.

172. Chemerinsky, *supra* note 170, at 66; *see also* Wilson v. Layne, 526 U.S. 603, 609 (1999) (“Although this case involves suits under both [42 U.S.C.] § 1983 and *Bivens*, the qualified immunity analysis is identical under either cause of action.”); Tripp v. Dep’t of Def., 173 F. Supp. 2d 58, 62–63 (D.D.C. 2001) (applying qualified immunity analysis to determine if it shielded employees of the Department of Defense from a claimed violation of 18 U.S.C. § 1985(2)).

173. *Harlow*, 457 U.S. at 815–19.

174. *Id.* at 815; *see also* Saucier v. Katz, 533 U.S. 194, 200–01 (2001) (affirming the two prong test).

175. *Harlow*, 457 U.S. at 815; *Saucier*, 533 U.S. at 200–01.

176. Wilkie v. Robbins, 127 S. Ct. 2588, 2593, 2608 (2007) (dismissing a *Bivens* claim where plaintiff did not have a private right of action to bring a claim under the Racketeer Influenced and Corrupt Organizations Act); Tripp, 173 F. Supp. 2d at 61 (finding plaintiff had standing to assert a statutory violation in a qualified immunity context); *see also* 28 U.S.C. § 2679(b)(2) (2000) (permitting civil actions against government employees for constitutional violations and “for a violation of a statute of the United States under which such action against an individual is otherwise authorized” (emphasis added)).

177. *Harlow*, 457 U.S. at 818 (“We therefore hold that government officials

prong, courts may inquire whether “extraordinary circumstances” existed such that even if the law was clearly established, the official at issue was nonetheless precluded from knowing that fact.<sup>178</sup>

Our three test scenarios would not appear to fulfill the first prong of the test in *Harlow*—that the conduct of the government official violated a constitutional or statutory right—and therefore would preclude a *Bivens* claim. The Kidney Donor Opinion assessed whether certain practices violated section 301 of NOTA.<sup>179</sup> However, section 301 provides for *criminal* penalties for transfer of a human organ for valuable consideration.<sup>180</sup> There does not appear to be any private right of action for such violations. Yet, as section 301 rests on the Commerce Clause of the Constitution,<sup>181</sup> it may be possible, though quite a stretch, for a plaintiff to allege a constitutional violation pursuant to that clause.<sup>182</sup>

As for the Bybee Memorandum and the CIA Detention Program Opinion, both address the issue of torture. Much of the Bybee Memorandum (and presumably the CIA Detention Program Opinion) focuses on what constitutes a violation of the criminal anti-torture statute.<sup>183</sup> However, the anti-torture statute explicitly precludes civil claims to enforce its provisions.<sup>184</sup> To bring suit for allegations of torture, plaintiffs have typically claimed that torture committed by U.S. government officials violates the Torture Victim Protection Act (“TVPA”) and various provisions of the Constitution, especially the Fifth Amendment right to due process.<sup>185</sup> However,

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performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”); see also *Saucier*, 533 U.S. at 200.

178. *Harlow*, 457 U.S. at 819; see also *V-1 Oil Co. v. Wyo. Dep’t of Env’tl. Quality*, 902 F.2d 1482, 1488–89 (10th Cir. 1990).

179. See *supra* note 108 and accompanying text.

180. 42 U.S.C. § 274e (2000).

181. U.S. CONST. art. I, § 8, cl. 3.

182. See Kidney Donor Opinion, *supra* note 108, at 3. Section 301 specifically prohibits “any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.” 42 U.S.C. § 274e(a) (emphasis added). It is therefore possible that a plaintiff could raise a constitutional claim by arguing that support for specific kidney donor practices, if those practices involve interstate commerce, violate the Commerce Clause.

183. 18 U.S.C. §§ 2340–2340A (2000).

184. *Id.* § 2340B (“Nothing in this chapter shall be construed . . . as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.”).

185. See, e.g., *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 257 (E.D.N.Y. 2006). It should be noted that the term “torture” as defined in § 2340 differs slightly from the definition in the TVPA. Compare 18 U.S.C. § 2340(1), with 28 U.S.C. § 1350 n.b (106 Stat. 73, §3(b)). Therefore, an argument could be made that, unless the CIA Detention Program Opinion analyzed the TVPA, government employees relying on that opinion should not be able to use it to preclude a TVPA claim. While an interesting legal argument, the differences between the definitions are

the TVPA applies only to actions taken “under actual or apparent authority, or color of law, of any *foreign* nation.”<sup>186</sup> Therefore, unless the alleged torture was committed by a U.S. government employee acting under the authority of a foreign nation, the TVPA will not apply.<sup>187</sup> The Fifth Amendment right to due process, meanwhile, does not protect foreigners overseas,<sup>188</sup> though this interpretation may be subject to change.<sup>189</sup> These limitations will greatly restrict the ability of plaintiffs to successfully allege statutory or constitutional violations based on torture by U.S. government officials.<sup>190</sup>

If plaintiffs are able to meet the first prong in *Harlow*, courts will then need to assess the second prong—whether the constitutional or statutory right allegedly violated was clearly established such that a reasonable person would have known that his or her conduct violated that right.<sup>191</sup> Reliance on an Attorney

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minimal, and therefore unlikely to impact a court’s decision on whether a government employee reasonably believed his actions did not constitute “torture.”

186. Torture Victim Protection Act, 28 U.S.C. § 1350 n.b (2000) (106 Stat. 73, §2(a)) (emphasis added).

187. See *Arar*, 414 F. Supp. 2d at 287 (dismissing a TVPA claim by an individual alleging the United States transferred him to Syria to be tortured, when the defendant could not show that the individual U.S. government employee defendants were acting under the color of law of any foreign country); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004) (dismissing a TVPA claim against former Secretary of State Henry Kissinger for the death of a Chilean general because, “[i]n carrying out the direct orders of the President of the United States, Dr. Kissinger was most assuredly acting pursuant to U.S. law, if any, despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law” (citation omitted)), *aff’d*, 412 F.3d 190 (D.C. Cir. 2005); Seamon, *supra* note 121, at 778 (“[C]ongress has enacted legislation authorizing private suits by the victims of official torture, but only when the torture is inflicted under color of a foreign country’s law, and not when it is inflicted under color of U.S. law.”).

188. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (stating that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), “reject[s] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”); *Eisentrager*, 339 U.S. at 785 (noting that the Constitution “does not confer . . . an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States”).

189. See *Rasul v. Bush*, 542 U.S. 466, 478 (2004) (suggesting constitutional habeas protections could possibly extend to detainees held at Guantanamo Bay, Cuba); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007) (granting certiorari to a claim that the United States has violated the Fifth Amendment and other constitutional rights of detainees held at Guantanamo Bay).

190. See *Arar*, 414 F. Supp. 2d at 287–88 (dismissing claim of alleged torture); Seamon, *supra* note 121, at 779–80 (discussing the difficulties to plaintiffs in meeting the *Bivens* requirements for torture claims).

191. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly

General opinion would become a critical factor here, though courts have not yet considered whether a government employee who takes action based on an Attorney General opinion meets the reasonableness standard in *Harlow*.

Several courts have ruled, however, on the related issue of whether qualified immunity attaches to a government employee who relied on the advice of *local* government counsel. For example, in *Forman v. Richmond Police Department*, a police officer relied on the advice of the County Prosecutor regarding the process required for closing down a bingo game and searching the premises.<sup>192</sup> The Seventh Circuit determined that, though the police officer may have violated the Constitution, the officer was entitled to qualified immunity, in part due to his reliance on the advice of the County Prosecutor.<sup>193</sup> The court held that reliance on the advice of counsel “does not alone satisfy [the government official’s] burden of acting reasonably, [but] it does provide evidence of his good faith and objective reasonableness.”<sup>194</sup>

The Tenth Circuit reached a similar result in *V-1 Oil Co. v. Wyoming Department of Environmental Quality*.<sup>195</sup> In *V-1 Oil*, an official of the Wyoming Department of Environmental Quality conducted a warrantless search of the plaintiff’s property after being advised by a Senior Assistant Attorney General of Wyoming that a state statute authorized such searches.<sup>196</sup> Finding first that the warrantless search violated the Constitution, the Tenth Circuit evaluated the second prong in *Harlow*—whether a reasonable person would have known that the search violated the Constitution—by assessing whether the advice of the Senior Assistant Attorney General constituted “extraordinary circumstances” such that the government official was effectively prevented from knowing the unconstitutionality of his actions.<sup>197</sup>

Noting that “few things in government are more common than the receipt of legal advice,”<sup>198</sup> the Tenth Circuit nonetheless found that the legal advice in that case constituted “extraordinary circumstances,” and granted qualified immunity to the government employee.<sup>199</sup> In making that determination, the court considered

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established statutory or constitutional rights of which a reasonable person would have known.”).

192. 104 F.3d 950, 960 (7th Cir. 1997).

193. *Id.* at 960–61.

194. *Id.* at 960; *see also* Tubbesing v. Arnold, 742 F.2d 401, 407 (8th Cir. 1984) (holding that qualified immunity applies where, among other factors, reliance was placed on the advice of counsel); Wentz v. Klecker, 721 F.2d 244, 247 (8th Cir. 1983) (same); Ways v. City of Lincoln, 909 F. Supp. 1316, 1327–28 (D. Neb. 1995) (same).

195. 902 F.2d 1482, 1488–89 (10th Cir. 1990).

196. *Id.* at 1484.

197. *Id.* at 1488–89.

198. *Id.* at 1488.

199. *Id.* at 1489.

four factors: (1) whether the advice was unequivocal and specifically tailored to the facts in the matter, (2) whether the advising attorney had been provided complete information, (3) the prominence and competence of the attorney(s) whose advice was sought, and (4) the time delay between when the advice was given and the activity undertaken.<sup>200</sup> The Tenth Circuit found the government employee in *V-1 Oil* fulfilled all four factors.<sup>201</sup>

In contrast, the Tenth Circuit, in *Cannon v. City and County of Denver*, found that the police officers there were not entitled to qualified immunity after acquiring the advice of a county judge on the constitutionality of certain arrests.<sup>202</sup> Applying the *V-1 Oil* test, the court assessed that the judge's advice was not unequivocal, was not specifically tailored to the facts, and had not been acted on immediately.<sup>203</sup> Other courts have similarly refused to provide qualified immunity for taking action based upon the advice of counsel. Whether employing the *V-1 Oil* factors or merely considering the more overarching issue of reasonableness, these courts have refused to provide qualified immunity where the advice of counsel was equivocal,<sup>204</sup> was not tailored to the facts,<sup>205</sup> or was not actually followed by the government employees.<sup>206</sup>

Using these local attorney cases as a guide, cases involving Attorney General opinions would likely meet the "reasonableness"

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200. *Id.*

201. *Id.*; see also *Davis v. Zirkelbach*, 149 F.3d 614, 620 (7th Cir. 1998) (employing the *V-1 Oil* test to determine that qualified immunity should attach to officers who, after consultation with a deputy prosecutor on the legality of their proposed actions, used a taped conversation acquired from a private citizen to induce a suspect to cooperate with the police); *Schroeder v. City of Vassar*, 371 F. Supp. 2d 882, 897 (E.D. Mich. 2005) (applying the *V-1 Oil* test to find that qualified immunity attaches to a city manager who sought advice from the city's counsel before firing a city employee).

202. 998 F.2d 867, 869, 876 (10th Cir. 1993).

203. *Id.* at 876; see also *Lawrence v. Reed*, 406 F.3d 1224, 1231 (10th Cir. 2005) (applying the four-factor test in *V-1 Oil* to determine qualified immunity did not attach where defendant did confer with the city attorney before seizing the plaintiff's vehicle but in that the discussion the city attorney "never once discussed the applicable constitutional law governing [the defendant's] conduct").

204. See *Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1495-96 (8th Cir. 1987) (holding that no qualified immunity attaches where attorney's advice was equivocal and the case did not present a unique fact situation or a perilous one requiring immediate action).

205. See *Kincade v. City of Blue Springs*, 64 F.3d 389, 399 (8th Cir. 1995) (holding that "[r]eliance on the advice of counsel is a factor to be weighed in assessing whether a public official is entitled to qualified immunity" but refusing to grant such immunity when it is unclear whether counsel had been provided all the critical facts).

206. See *Buonocore v. Harris*, 134 F.3d 245, 253 & n.3 (4th Cir. 1998) (declining to grant qualified immunity to government officials who sought the advice of a Commonwealth Attorney to conduct a search of property, but then failed to heed the attorney's advice on the limitations on that search).

standard of *Harlow*. To begin with, Attorney General opinions should fulfill most of the factors outlined in *V-1 Oil*. Such opinions are typically tailored to the facts at hand (part of the first factor in *V-1 Oil*) and should be based on complete information (the second factor in *V-1 Oil*), given that a government agency is responsible for providing the Attorney General or OLC with all relevant facts in the case.<sup>207</sup> There should generally not be any question as to the competency, and certainly the prominence, of the legal advisors rendering Attorney General opinions (the third factor in *V-1 Oil*).<sup>208</sup> Finally, though there may be a time delay between when the advice is rendered and when a government employee acts pursuant to it (the fourth factor in *V-1 Oil*), that delay would only be relevant if the law or facts significantly changed in the interim.

However, Attorney General opinions do deal with uncertain legal topics and therefore are rarely entirely unequivocal (part of the first factor of *V-1 Oil*). The Kidney Donor Opinion, for example, concludes that the general understanding of the critical term “valuable consideration” . . . does remain open to some question.<sup>209</sup> Similarly, the Bybee Memorandum asserts that the President’s commander-in-chief power “may” overcome the anti-torture statute and that necessity or self-defense “could” be viable defenses to that statute.<sup>210</sup> In the end, these opinions provide what the Attorney General or the OLC construe as the best legal assessment, not an unequivocal one.

This sometimes equivocal nature of Attorney General opinions should not preclude qualified immunity from attaching, however, since a reasonable person following the advice contained in such opinions would not believe he or she was violating a constitutional or statutory right. The Attorney General is the highest legal officer in the executive branch.<sup>211</sup> An Attorney General opinion therefore does and should carry extraordinary weight for a government employee, as there is no more senior legal advisor in the executive branch from whom to seek further advice. With advice rendered by,

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207. See *supra* note 49 and accompanying text. Part III.B of this Article will consider what happens if government agencies do not provide OLC with complete information. See *infra* notes 316–25 and accompanying text.

208. See *supra* notes 61–64 and accompanying text (discussing the competency of attorneys at OLC). But see Dean, *supra* note 7 (questioning the competency of the OLC attorneys who drafted the Bybee Memorandum).

209. Kidney Donor Opinion, *supra* note 108, at 6.

210. Bybee Memorandum, *supra* note 6, at 2.

211. See 28 U.S.C. § 503 (2000) (“The Attorney General is the head of the Department of Justice.”); *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (referring to the Attorney General as “the senior law enforcement official in the Nation”); *Marshall v. Gibson’s Prods., Inc. of Plano*, 584 F.2d 668, 676 n.11 (5th Cir. 1978) (“[T]he Attorney General is the chief legal officer of the United States.”); *FDIC v. Irwin*, 727 F. Supp. 1073, 1074 (N.D. Tex. 1989) (“[T]he Attorney General is the chief legal officer of the United States . . . .”), *aff’d*, 916 F.2d 1051 (5th Cir. 1990).

for example, the Senior Assistant Attorney General of Wyoming from the *V-1 Oil* case, there is always a question of whether a more senior attorney (e.g., the Attorney General of Wyoming) would render a different and more authoritative opinion. The same is true for advice rendered by attorneys working in government agencies. The advice that I provide to employees of the CIA, though certainly sound (at least in my view), does not carry the same weight as advice rendered by the General Counsel of the CIA. And neither of our advice rises to the same level as the Attorney General. As one Senator recently acknowledged, “the attorney general, through the Department of Justice and the Office of Legal Counsel, is ultimately responsible for the legal decisions of the executive branch.”<sup>212</sup> Thus, an opinion from the Attorney General or OLC represents the pinnacle of legal advice in the executive branch. Even if somewhat equivocal, such advice fulfills the second prong of *Harlow*. Namely, a reasonable person, provided guidance from the highest legal advisor in the executive branch, would have believed that he or she was not violating a clearly established constitutional or statutory right by acting on that advice.

Further, such advice is relatively rare.<sup>213</sup> There were only eighteen Attorney General opinions published during the three year span between January 2005 and January 2008.<sup>214</sup> While there are numerous Attorney General opinions that are not published,<sup>215</sup> there are still only a relatively small number of such opinions issued each year.<sup>216</sup> By being in such short supply, these written Attorney General opinions garner greater credibility amongst government employees than the usually brief, and often verbal, legal advice that government lawyers provide on an everyday basis to their agencies.<sup>217</sup>

The detailed and complicated analysis of Attorney General opinions lends further basis for employees to reasonably rely upon the legal guidance contained in such opinions. Absent exceptional situations, government employees, as well as most government

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212. *Nomination of John Rizzo to be CIA General Counsel: Hearing of the S. Select Intelligence Comm.*, 110th Cong. 2 (2007) (on file with author) (statement of Sen. John D. Rockefeller IV, Chairman, S. Select Intelligence Comm.) [hereinafter *Rizzo's Nomination*].

213. *See supra* notes 100–02 and accompanying text.

214. *See supra* note 101 and accompanying text.

215. *See Nat'l Council of La Raza v. Dep't of Justice*, 339 F. Supp. 2d 572, 575 (S.D.N.Y. 2004) (noting the Department of Justice's acknowledgement that it “publishes only a small fraction of the OLC's opinions”).

216. *See supra* note 102 (noting only five file cabinets of unpublished Attorney General opinions exist for a span of sixty years).

217. *See Buonocore v. Harris*, 134 F.3d 245, 252 (4th Cir. 1998) (discussing qualified immunity, the Fourth Circuit noted “[i]t is hardly unusual, let alone extraordinary, for public officers to seek legal advice”); *V-1 Oil Co. v Wyo. Dep't of Envtl. Quality*, 902 F.2d 1482, 1488 (10th Cir. 1990) (noting that “few things in government are more common than the receipt of legal advice”).

lawyers, will not have the expertise to assess the validity of the arguments raised in an Attorney General opinion, nor the time to conduct the requisite research to determine the accuracy of the legal analysis anchoring those arguments. Indeed, this is why government agencies raise legal questions with the Attorney General and OLC in the first place—to acquire an opinion on the matter by experts who have knowledge in the area and the time and ability to engage in the necessary research. Because of the detail and complexity of these opinions, it is reasonable for government employees to believe that they are legally accurate, even in cases where the government employee may not agree with the legal conclusion or may find that conclusion morally repugnant.

The Kidney Donor Opinion represents a fairly straightforward Attorney General opinion. Nonetheless, its relatively brief seven pages evaluates not only the language of section 301 of NOTA, but also the Commerce Clause, analogous acts in the U.S. Code, the laws of other states, and common understandings in attempting to ascertain the meaning of “valuable consideration.”<sup>218</sup> The final legal determination in the opinion appears reasonable on its face, but only considerable research, or true expertise of the topic, could ensure the accuracy of the opinion’s conclusion. Given the source and content of the opinion, it would be reasonable for a government employee to believe the determination in the Kidney Donor Opinion is legally correct and to take action in reliance on it.

The same could be argued with regard to the Bybee Memorandum. The Bybee Memorandum devotes fifty pages of text to consider, in complicated analysis, the language and legislative history of the anti-torture statute, treaty law, the TVPA, various international decisions on torture, the constitutional separation of powers, and criminal defenses.<sup>219</sup> While its conclusion appears extreme and highly aggressive, and perhaps even morally repugnant and legally questionable to many, it would take considerable expertise in constitutional and human rights law to know for certain that the arguments raised in the opinion were flat-out wrong. An expert such as Harold Koh, dean of Yale Law School, might possess that expertise.<sup>220</sup> Most government employees would not. And even experts can disagree. The acting General Counsel of the CIA, in discussing the Bybee Memorandum, recently stated that he found the memorandum to be “aggressive,” “expansive,” and “overbroad for the issue that it was intended to cover,” but noted that he did not have “any specific objections to any specific parts of it.”<sup>221</sup> Thus,

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218. Kidney Donor Opinion, *supra* note 108, at 1.

219. See Bybee Memorandum, *supra* note 6.

220. See Dean, *supra* note 7 (quoting Harold Koh describing the Bybee Memorandum as “perhaps the most clearly legally erroneous opinion I have ever read”).

221. *Rizzo’s Nomination*, *supra* note 212, at 9 (statement of John A. Rizzo,

even if a government employee was repulsed by the memorandum's conclusion or disagreed with its assessments on a moral level, it would still be reasonable for that employee to believe that the final determination in the Bybee Memorandum was legally correct and act accordingly.<sup>222</sup>

The CIA Detention Program Opinion should arrive at the same result. Though that opinion remains classified, it can be presumed that it provided a detailed legal analysis of whether the CIA's "alternative set of procedures" used in interrogating high-value terrorists violated U.S. law, especially the anti-torture statute.<sup>223</sup> Assuming that analysis was as complicated and detailed as section one of the Bybee Memorandum, which also evaluated the anti-torture statute, it would be reasonable for a government employee to rely on the CIA Detention Program Opinion as legally sound and engage in activity based on it in the belief that it offered correct legal analysis. Thus, the complexity and detail of Attorney General opinions support reasonable belief in their reliability.

Most importantly, however, Attorney General opinions are *binding* on government employees.<sup>224</sup> They are binding not just on the employees of the agency seeking the advice, but indeed on all executive branch officers.<sup>225</sup> This differs greatly from the advice rendered by the Senior Assistant Attorney General of Wyoming in the *V-1 Oil* case, or even the advice I provide to employees at the CIA, where the advice is merely "advice" and is not binding on the government employees who seek it.

The binding aspect of an Attorney General opinion has a considerable impact on a government employee. The employee cannot ignore or disregard the legal advice contained in the opinion. The opinion also effectively precludes the employee from seeking an alternative legal assessment elsewhere. Most importantly, once an Attorney General opinion authorizes a given act, the government employee is expected to implement that activity. Agencies do not submit theoretical requests to the Attorney General's office, and the Attorney General's office does not provide theoretical responses.<sup>226</sup> Rather, both the request and response presume implementation of a given activity that is waiting in abeyance for legal approval from the Attorney General or OLC. Once that approval is provided, the requesting agency, as well as the Attorney General and OLC, expect

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acting General Counsel, CIA).

222. This assumes that, as argued previously, the Bybee Memorandum does not actually authorize torture. *See supra* notes 146–48 and accompanying text. If it does in fact authorize torture, i.e., authorize a government employee to purposefully and knowingly violate the anti-torture statute, I would find such a determination to be unreasonable on its face, as discussed *infra* notes 310–22.

223. *See* President Bush Speech, *supra* note 20.

224. *See supra* notes 87–88 and accompanying text.

225. *See supra* notes 88–89 and accompanying text.

226. *See supra* note 50 and accompanying text.

government employees to engage immediately in the proposed activity. A refusal to do so could be considered a dereliction of duty.<sup>227</sup> The government employee could also be held accountable for the consequences of failing to take the authorized activity, which can be considerable.<sup>228</sup>

In the end, the Attorney General's office represents the highest legal office in the executive branch. Attorney General opinions are rare and usually highly detailed and legally complex, and such opinions are binding on all government employees. It would therefore be logical for virtually any court to find that a government employee relying on an Attorney General opinion fulfills the second prong in *Harlow*—that a reasonable person would have believed that he or she was not violating a clearly established constitutional or statutory right by following the guidance in such an opinion—and is entitled to qualified immunity.

### C. Federal Criminal Law

Federal criminal cases are investigated, indicted, and prosecuted by the Department of Justice—by either the main office of the Department or one of the various U.S. Attorney offices around the country.<sup>229</sup> Given that the Department of Justice—through either its highest officer (the Attorney General) or that officer's designee (OLC)—issues Attorney General opinions, it is difficult to envision how any segment of the Department could then turn around and proceed to prosecute those who engaged in activities pursuant to an Attorney General opinion.

Admittedly, a change in Attorney General or in the administration could induce a change in legal analysis with regard

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227. See SINGER, *supra* note 85, at 502.

228. For example, the Director of the CIA recently stated that “[i]f the CIA, with all its expertise in counterterrorism had not stepped forward to hold and interrogate people like [senior al-Qaida operatives] Abu Zubaydah and Khalid Sheikh Mohammed, the American people would be right to ask why.” Katherine Shrader, *Bush Alters Rules for CIA Interrogations*, WASH. POST, July 21, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001581.html>. Similarly, numerous government employees and agencies were castigated for not taking action in the months leading up to 9/11. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 339–60 (2004) (discussing the failure of numerous individuals and agencies to take action that could have prevented 9/11).

229. *United States v. Nixon*, 418 U.S. 683, 694 (1974) (“Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government.”); *In re Persico*, 522 F.2d 41, 54 (2d Cir. 1975) (“The Executive Branch—specifically, the Attorney General—has the power to conduct federal criminal litigation. . . . [The Attorney General] has supervision of all litigation in which the United States is a party and is commanded to ‘direct all United States Attorneys, assistant United States Attorneys, and special attorneys . . . in the discharge of their respective duties.’” (citing 28 U.S.C. § 519 (2000))).

to certain controversial matters, such as the CIA's detention program or the definition of "torture." Indeed, there are instances in which an Attorney General has issued an opinion that conflicted with a determination provided by a predecessor, such as when the Levin Memorandum, issued by the office of Attorney General Gonzales, superseded the Bybee Memorandum, issued by the office of Attorney General John Ashcroft.<sup>230</sup> Still, regardless of whatever controversy may be involved, it remains virtually unfathomable that a new Attorney General, or even a new administration, could prosecute government employees who operated pursuant to prior legal guidance from the same office. This is especially true given that, as discussed previously, an Attorney General opinion is deemed binding on executive branch officers.<sup>231</sup>

Indeed, an analogy can be drawn to the Ex Post Facto Clause of the United States Constitution.<sup>232</sup> That clause precludes prosecution of an individual under a criminal statute for an act that took place prior to the statute's enactment, absent clear congressional indication that the statute is to apply retroactively.<sup>233</sup> The purpose of the Ex Post Facto Clause is to ensure that individuals are given fair warning of what is proscribed and can feel secure in relying on what has been authorized.<sup>234</sup> Courts view laws that have retroactive application, i.e., ex post facto laws, with extraordinary distaste, describing such laws as "oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man."<sup>235</sup> The reason for such disgust is that ex post facto laws defy our sense of "fundamental justice."<sup>236</sup> As one court stated:

The very notion of law is that known, or at least knowable, rules govern the conduct and affairs of those subject to the law's reach. It is quite incompatible with our fundamental notions of law that an act lawful at the time it was done can, at the stroke of the legislative pen, be rendered unlawful and the actor called to account for a completed, now-condemned deed in the halls of justice.<sup>237</sup>

The same issue of fundamental unfairness would arise were the Department of Justice to inform government employees in a formal statement (i.e., an Attorney General opinion) that given conduct was legal, only to later prosecute those employees for that very conduct.

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230. See *supra* note 150 and accompanying text.

231. See *supra* note 89 and accompanying text.

232. U.S. CONST. art. I, § 9, cl. 1 ("No . . . ex post facto Law shall be passed.").

233. *Carmell v. Texas*, 529 U.S. 513, 521–25 (2000).

234. *Id.* at 531 n.21; *Stiver v. Meko*, 130 F.3d 574, 578 (3d Cir. 1997).

235. *Carmell*, 529 U.S. at 532 (quoting *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266 (1827) (discussing several Supreme Court cases and commentary regarding the disdain for ex post facto laws)).

236. *Id.* at 531.

237. *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1127 (D.C. Cir. 1985).

Even if the Department of Justice sought to pursue such a course and prosecuted a government employee who relied on an Attorney General opinion, the employee's reliance on the opinion might well negate the "intent" element of the crime. Criminal liability generally requires that the defendant possess "an evil-meaning mind" at the time the activity occurs,<sup>238</sup> which is often referred to as an "intent" requirement, or *mens rea*.<sup>239</sup>

The issue of intent in criminal culpability has long created confusion among courts. Historically, crimes were designated as requiring either "general intent" or "specific intent."<sup>240</sup> However, such terminology generated substantial uncertainty because the terms were inconsistently defined and employed.<sup>241</sup> The Model Penal Code, therefore, created a hierarchy of culpability, dividing crimes into those that required purpose or intention to commit a forbidden act, knowledge of the act, recklessness in taking the act, or negligence in engaging in the act.<sup>242</sup> In addition to these crimes, there are crimes requiring no intent, referred to as strict liability crimes.<sup>243</sup> However, even the terminology employed in this hierarchy can create substantial confusion.<sup>244</sup>

Some rules have emerged though. In determining the intent necessary to perpetrate a given crime, courts look to the specific language of the statute, but will also refer to the legislative history if the statutory language is ambiguous.<sup>245</sup> If any doubt persists, courts interpret statutes as containing an "intent" requirement.<sup>246</sup> This is particularly true where a substantial penalty attaches to

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238. *Morissette v. United States*, 342 U.S. 246, 251–52 (1952); *see also* *United States v. Bailey*, 444 U.S. 394, 402 (1980) (affirming and quoting *Morissette*).

239. *See* 1 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 5.1, at 332 (2d ed. 2003).

240. *Bailey*, 444 U.S. at 403.

241. *Id.*

242. *Id.* at 404; LAFAYE, *supra* note 239, § 5.1(c), at 337.

243. LAFAYE, *supra* note 239, § 5.1(c), at 337.

244. *Id.* § 5.1(b), at 334.

245. *Liparota v. United States*, 471 U.S. 419, 424–25 (1985); *see also* *Bailey*, 444 U.S. at 406 (“[C]ourts obviously must follow Congress’ intent as to the required level of mental culpability for any particular offense.”). It should be noted that while criminal acts used to be governed by common law, presently most are based on statute. *See* LAFAYE, *supra* note 239, § 5.1(a), at 333.

246. *Liparota*, 471 U.S. at 426 (“[W]e noted that ‘[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement’ and that criminal offenses requiring no *mens rea* have a ‘generally disfavored status.’” (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978))); *id.* at 427 (“[R]equiring *mens rea* is in keeping with our long-standing recognition of the principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))).

commission of the crime.<sup>247</sup>

The requisite level of intent, however, might often be missing where a government employee relied on an Attorney General opinion in taking the alleged action. For example, the criminal statute at the heart of the Kidney Donor Opinion, 42 U.S.C. § 274e (2000), provides for criminal penalties up to \$50,000 and five years in prison for anyone who “*knowingly* acquire[s], receive[s], or otherwise transfer[s] any human organ for valuable consideration.”<sup>248</sup> Courts have found use of the term “knowingly” to evince an intent requirement.<sup>249</sup> The problem of course is whether the term “knowingly” in § 274e requires the actor to know merely that he or she is transferring a human organ or, alternatively, to know that the organ is being transferred for valuable consideration.<sup>250</sup> Since the statute seeks to preclude transfers of organs for valuable consideration (and not ordinary donations), and carries a significant penalty for doing so, it would appear likely that a defendant would have to know that the kidney was being transferred for valuable consideration. Otherwise the statute would ensnare the innocent and unknowing ambulance driver who physically delivers the kidney to the hospital, as well as the surgeon who conducts the operation. Assuming this interpretation is correct, the Kidney Donor Opinion would negate that “knowing” requirement. The Kidney Donor Opinion asserts that the donation of kidneys under the programs outlined in the opinion do not constitute “valuable consideration.”<sup>251</sup> Therefore, even if the legal assessment in the Kidney Donor Opinion proved erroneous, any government official relying on that opinion in supporting such programs would not appear to be supporting the “knowing” transfer of human organs for valuable consideration, and therefore would not possess the intent required to violate § 274e.

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247. *Staples v. United States*, 511 U.S. 600, 618–19 (1994) (“[A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.”). Strict liability crimes, which do not have an intent requirement, typically carry a light penalty, e.g., a misdemeanor. LAFAVE, *supra* note 239, § 5.5, at 381.

248. 42 U.S.C. § 274e (2000) (emphasis added).

249. *See Liparota*, 471 U.S. 419, 419 (1985) (finding an intent requirement for a statute that reads: “[W]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations shall be guilty of a criminal offense.” (quoting 7 U.S.C. § 2024(b)(1) (1982))); *Morissette v. United States*, 342 U.S. 246, 246 (1952) (finding an intent requirement for a statute that provides: “whoever embezzles, steals, purloins, or knowingly converts property of the United States is punishable by fine or imprisonment” (quoting 18 U.S.C. § 641 (1952))).

250. *See* LAFAVE, *supra* note 239, § 5.1(b), at 335 (noting the confusion caused by use of the term “knowingly” in criminal statutes, since “ambiguity . . . frequently exists concerning what the words or phrases in question modify”).

251. Kidney Donor Opinion, *supra* note 108, at 1.

A similar result could occur from reliance on the Bybee Memorandum or the CIA Detention Program Opinion. Both presumably focus on the anti-torture statute, which authorizes imprisonment of up to twenty years for committing torture and the death penalty or life imprisonment if the torture leads to death.<sup>252</sup> The statute defines “torture” as “an act committed by a person acting under the color of law *specifically intended* to inflict severe physical or mental pain or suffering.”<sup>253</sup>

The CIA Detention Program Opinion apparently assessed that the CIA’s alternative set of techniques did not constitute torture,<sup>254</sup> presumably by determining that use of those techniques did not constitute the severe physical or mental pain or suffering prohibited by the anti-torture statute. A government employee relying on that opinion could argue that he or she did not specifically intend to inflict the amount of pain or suffering requisite to constitute “torture,” and therefore did not possess the required intent to violate the anti-torture statute.

The same could be true for a government employee relying on section one of the Bybee Memorandum, which provided an extreme definition of “torture” under the anti-torture statute. So long as that government employee engaged in actions that fell below the threshold for torture offered in the memorandum, the employee could claim that he or she did not possess the requisite intent to cause the severe physical or mental pain or suffering necessary for violation of the anti-torture statute.<sup>255</sup> However, if a government employee interpreted sections two and three of the Bybee Memorandum—discussing the commander-in-chief powers and the defenses of necessity and self-defense—as permitting the employee to engage in torture, and the employee then actually engaged in such activity, that employee would in fact possess the requisite intent for prosecution under the anti-torture statute. Indeed, that government employee would have been put on notice, by section one of the Bybee Memorandum, that his or her conduct would in fact constitute “torture” in violation of the statute.

Obviously, the intent requirement varies from statute to statute, and therefore the applicability of a given Attorney General opinion to negate that intent requirement will need to be assessed on a case-by-base basis. Nonetheless, it appears likely that reliance

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252. 18 U.S.C. § 2340A(a) (2000).

253. *Id.* § 2340(1) (emphasis added).

254. *See* President Bush Speech, *supra* note 20, at 1573.

255. The Levin Memorandum had considerable difficulty assessing the meaning of the term “specifically intended” in the anti-torture statute. Levin Memorandum, *supra* note 17, at 16–17. However, it did determine that “if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340-2340A.” *Id.* at 17.

on an Attorney General opinion will create at least an arguable (if not complete) basis for claiming the government employee did not possess the requisite intent to commit the alleged crime. Therefore, should the Department of Justice somehow decide to prosecute a government employee for acting in reliance on an Attorney General opinion, the arguable lack of intent created by that opinion could nonetheless insulate the government employee from federal criminal sanction.

*D. State or Local Criminal Law*

It would not seem likely that a state or local court would have jurisdiction, much less a desire, to prosecute a federal government employee for engaging in federal government activity, especially in situations where such activity has been explicitly authorized by the U.S. Attorney General. Nonetheless, should such a scenario arise, the same lack of intent discussed above in the federal prosecution context could also insulate the federal government employee from sanction under state or local law. Again, the government employee's reliance on an Attorney General opinion providing that certain activity did not constitute a crime could be used to demonstrate that a federal government employee lacked the intent necessary to violate the state or local law at issue.

More fundamentally, however, a court-created doctrine known as Supremacy Clause immunity, which is based upon the Supremacy Clause of the Constitution,<sup>256</sup> would prove an even better bar to state or local prosecution. The doctrine was first espoused in the Supreme Court Case of *In re Neagle*, decided in 1890.<sup>257</sup> In a fascinating set of facts, the Attorney General assigned Deputy United States Marshal David Neagle to protect California Supreme Court Justice Stephen Field.<sup>258</sup> Justice Field needed protection because former California Supreme Court Chief Justice David Terry and his wife had tried to attack Justice Field previously, and there was fear that they would try to attack him again.<sup>259</sup> Such fears were well founded as the Terrys booked themselves onto the same train Justice Field (accompanied by Marshal Neagle) was using to travel from Los Angeles to San Francisco.<sup>260</sup> The Terrys eventually cornered Justice Field in the dining car.<sup>261</sup> Mr. Terry started physically assaulting Justice Field, while Mrs. Terry left to get a

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256. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.").

257. 135 U.S. 1 (1890).

258. *Id.* at 51–52.

259. *Id.* at 44–46.

260. *Id.* at 52.

261. *Id.*

revolver.<sup>262</sup> At this point, Marshal Neagle drew his weapon, announced that he was a federal officer, and ordered Mr. Terry to stop assaulting Justice Field.<sup>263</sup> Mr. Terry refused, and reached into his clothing as if to grab a weapon.<sup>264</sup> Marshal Neagle immediately shot Mr. Terry twice, killing him instantly.<sup>265</sup> It turned out that Mr. Terry had no weapon on him, and Marshal Neagle was charged with murder in a California state court.<sup>266</sup>

The United States Supreme Court dismissed the state court claim, establishing what came to be known as Supremacy Clause immunity:

[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California.<sup>267</sup>

Since *Neagle*, only a few courts have considered Supremacy Clause immunity.<sup>268</sup> Indeed, the Supreme Court has not considered such a case since 1920, leaving the lower courts to develop the doctrine.<sup>269</sup> The courts that have analyzed the issue employ a two-part test, derived from *Neagle*. The first query is whether the federal officer was engaged in an act that the officer was authorized to do by the law of the United States.<sup>270</sup> The second query is whether the officer, in performing that act, did no more than what was necessary and proper.<sup>271</sup> In assessing this second part, some courts have held that the officer must subjectively believe the act the officer takes is justified, and such a belief must be objectively reasonable; other courts abandon the subjective factor and merely require that the officer had an “objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties.”<sup>272</sup>

The most famous case to apply this immunity was *In re*

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262. *Id.* at 52–53.

263. *Id.* at 53.

264. *Id.*

265. *Id.*

266. *Id.* at 4–5, 52–53.

267. *Id.* at 75.

268. *See* Wyoming v. Livingston, 443 F.3d 1211, 1213 (10th Cir. 2006) (referring to cases involving such immunity as “a seldom-litigated corner of the constitutional law of federalism”), *cert. denied* 127 U.S. 553 (2006).

269. *Id.* at 1220.

270. *In re Neagle*, 135 U.S. 1, 75 (1890); Kentucky v. Long, 837 F.2d 727, 744 (6th Cir. 1988).

271. *Neagle*, 135 U.S. at 75; *Long*, 837 F.2d at 744.

272. *Livingston*, 443 F.3d at 1222; *see also id.* at 1220–22 (noting that some courts have imposed both a subjective and objective test, but leaving the subjective requirement “for another day”).

*McShane*, decided in 1964, which involved U.S. Marshals firing tear gas into a crowd that had grown hostile due to the admission of an African American student, James Meredith, to the University of Mississippi.<sup>273</sup> The court dismissed the charges against the head marshal, finding that he (1) was executing a court order and taking action under express orders of the United States Attorney General and (2) “had an honest and reasonable belief that what he did was necessary in the performance of his duty.”<sup>274</sup>

The same outcome should result for a government employee taking action in reliance on an Attorney General opinion. First, that employee is engaging in an act that the Attorney General or the Attorney General’s designee has expressly authorized the employee to do and has determined is in accordance with the laws of the United States. Second, if the employee takes action within the scope of behavior permitted by the Attorney General opinion, the employee likely will be taking action that is no more than what was necessary and proper. Obviously, this second part will be heavily fact-specific. However, a federal court would likely find, for example, that guidelines relating to the kidney donation practices permitted in the Kidney Donor Opinion were necessary and proper. A court would probably arrive at a similar result with regard to a government employee who utilized the authorized “alternative set of procedures” in the limited context of the CIA’s terrorist detention program. Whether a court would arrive at the same conclusion with regard to the Bybee Memorandum would depend extensively on the context. Nonetheless, it would be expected that, in the vast majority of situations, a federal court would hold that a government employee conducting his or her job in reliance on an Attorney General opinion was engaging in necessary and proper activity and would find Supremacy Clause immunity applicable.<sup>275</sup>

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273. 235 F. Supp. 262, 263–64 (N.D. Miss. 1964).

274. *Id.* at 274–75.

275. Supremacy Clause immunity is often considered to have a “functional similarity” to qualified immunity. *Livingston*, 443 F.3d at 1221 (noting that both immunities “reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties by enabling government officials to dispose of cases against them at an early stage of litigation”); *New York v. Tanella*, 374 F.3d at 141, 147 (2d Cir. 2004) (“[T]he defense of federal immunity protects federal operations from the chilling effect of state prosecution.”); *Long*, 837 F.2d at 752 (finding the immunity in *Neagle* analogous to the immunity in *Harlow* as “[t]heir goal is not only to avoid the possibility of conviction of a federal agent, but also to avoid the necessity of undergoing the entire process of the state criminal procedure”). Supremacy Clause immunity should attach and preclude state or local prosecutions of government employees who rely on Attorney General opinions for the same reasons that qualified immunity precludes *Bivens* claims against such employees. See discussion *supra* Part II.B.

*E. Two Possible Roadblocks*

The above discussion focused on the ability of Attorney General opinions to shield a federal government employee who relied upon such an opinion from both civil suit and criminal prosecution, except in extraordinary situations. Tort claims against the federal government can only be brought pursuant to the FTCA. However, the FTCA provides for the dismissal of individual government employees and the substitution of the United States in their stead, so long as the Attorney General determines that the government employee acted within the “scope of his office or employment.”<sup>276</sup> An Attorney General would likely make such a determination in the situation where a government employee took action based upon authorization from the Attorney General’s own office in the form of an Attorney General opinion. Thus, unless a government employee operated outside the scope of employment, which is highly unlikely, the employee should not be subject to any civil tort claim.

Constitutional and statutory claims would likely also be barred. Federal government employees who rely on an Attorney General opinion are taking action based on a rarely acquired legal determination made by the highest legal office in the executive branch, which is binding on all federal government employees. Qualified immunity would therefore likely attach because any reasonable person, acting under a binding and complicated opinion stating that certain actions were legal, would not know that taking the authorized conduct violated a clearly established constitutional or statutory right.<sup>277</sup>

On the criminal front, it is difficult to envision the Department of Justice prosecuting a government employee who took action in reliance on an opinion issued by the head of the Department of Justice (the Attorney General) or the Attorney General’s designee (OLC). Even if such a prosecution were undertaken, the Attorney General opinion could undercut any requisite criminal intent, both for federal and state crimes. Finally, in the unlikely event of a state prosecutor indicting a federal government employee for an act authorized by an Attorney General opinion, Supremacy Clause immunity would likely attach since the federal officer would have been engaged in an act that the officer was authorized to do under the law of the United States (as defined by the Attorney General), and a court would likely find that the officer did no more than what was necessary and proper in engaging in such activity.

This near absolute defense to civil and criminal liability accorded by an Attorney General opinion could nonetheless be thwarted by two potential impediments which would not negate the validity of the defense itself, but rather could preclude the

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276. See 28 U.S.C § 1346(b)(1) (2000).

277. See *Harlow v. Fitzgerald*, 457 U.S. 800, 813–19 (1982).

government employee from being able to raise the defense at all. First, the government could seek to prohibit a government employee from being able to admit as evidence an Attorney General opinion which is classified. Second, the government could assert the attorney-client privilege or the deliberative process privilege with regard to the Attorney General opinion.<sup>278</sup>

A government employee should be able to overcome the first possible impediment. In the criminal context, a relevant classified Attorney General opinion would represent clear exculpatory information since, as discussed above, it could represent a near complete defense to the allegations raised against the government employee. Pursuant to the Classified Information Procedures Act ("CIPA"), a federal court would likely dismiss the prosecution should the government refuse to permit the defendant to use the opinion at trial.<sup>279</sup> Though the federal CIPA statute would be inapplicable in a state court, such courts would likely come to a similar result, as it would be patently unfair to deprive a defendant of a key, and as shown above, virtually complete defense in a criminal proceeding.

In the civil context, which presumably would involve a private party suing a government employee, the United States government would likely intervene pursuant to the State Secrets Privilege to protect disclosure of the Attorney General opinion or its contents by the government employee. The State Secrets Privilege permits the United States to invoke an absolute evidentiary bar regarding secrets of state, the disclosure of which would harm the national security.<sup>280</sup> It does not matter whether the United States is a named party to the action.<sup>281</sup> Judicial scrutiny of a properly asserted state secrets claim is extremely limited.<sup>282</sup> If properly invoked, the protected information may not be employed at trial, with the

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278. It is unlikely that the government would seek to employ a similarly invoked doctrine, the attorney work product doctrine, in this context. That doctrine protects materials that were prepared in anticipation of litigation or trial. *See, e.g., Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997). Attorney General opinions would not appear to fall within that category. Indeed, as discussed previously, OLC policy precludes issuance of an Attorney General opinion for matters in litigation. *See supra* note 51 and accompanying text.

279. 18 U.S.C. app. §6(e)(2) (2000) (stating that when a defendant is precluded from presenting classified information, the court "shall dismiss the indictment or information" if no substitute for the classified information is available).

280. *United States v. Reynolds*, 345 U.S. 1, 6–8 (1953); *see also Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978).

281. *See Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 270–73 (4th Cir. 1980).

282. *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) ("When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege.").

attendant result that the court must dismiss any claims based upon the protected information, even if it means dismissal of the entire lawsuit.<sup>283</sup> As noted above, reliance on an Attorney General opinion is an almost absolute defense to all civil claims. Thus, though no case appears to have considered the State Secrets Privilege in the context of a relevant and classified Attorney General opinion, it is likely that a court, confronted with such a scenario, would dismiss most, and likely all, of the claims against the government employee.<sup>284</sup> In such a context, a classified Attorney General opinion would not present a roadblock to the government employee, but rather to the plaintiff.<sup>285</sup>

The second potential roadblock to utilizing an Attorney General opinion—the attorney-client privilege or the deliberative process privilege—would be more problematic. The attorney-client privilege protects confidential communications between an attorney and his client.<sup>286</sup> The deliberative process privilege shields materials that were created prior to the establishment of an agency policy and reflect the deliberations that led to the creation of that policy.<sup>287</sup> Since an Attorney General opinion is issued in a governmental context, it is the United States, not the individual government employee, who holds either privilege; thus, only the United States can waive either privilege and permit the opinion to be used in court.<sup>288</sup>

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283. See *CIA v. Sims*, 471 U.S. 159, 179–81 (1985) (dismissing a claim that would have required disclosure of individual names and their institutional affiliations after the Director of the CIA invoked the State Secrets Privilege); *Reynolds*, 345 U.S. at 10–11 (protecting a military report from disclosure after the Secretary of the Air Force invoked the State Secrets Privilege); *Zuckerbraun*, 935 F.2d at 546, 548 (dismissing the entire case when key purported evidence was inaccessible pursuant to the State Secrets Privilege).

284. *Sims*, 471 U.S. at 179–81. The closest any court has come to this issue in the context of an Attorney General opinion would appear to be when the Fourth Circuit, pursuant to the government’s assertion of the State Secrets Privilege, dismissed a plaintiff’s claim that he was abused while in the CIA’s terrorist detention program. *El-Masri v. United States*, 479 F.3d 296, 299–300 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007). The dismissal was based on the fact that any discussion of the program would have been classified; there is no indication that the court specifically considered the CIA Detention Program Opinion in its decision.

285. Should the government decline to intervene in a civil claim, the defendant government employee would face no impediment to utilizing the classified Attorney General opinion in court, and therefore no roadblock would exist.

286. *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997).

287. *Id.* at 616; see also *Fed. Trade Comm’n v. Warner Commc’ns*, 742 F.2d 1156, 1161 (9th Cir. 1984) (noting the purpose of the deliberative process privilege is “to promote frank and independent discussion among those responsible for making governmental decisions and also to protect against premature disclosure of proposed . . . policies or decisions” (citation omitted)).

288. *Tax Analysts*, 117 F.3d at 618; *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980); *United States v. Edelin*, 128 F.

Courts have explicitly held that the deliberative process privilege protects Attorney General opinions from disclosure.<sup>289</sup> While no court appears to have made the same determination with regard to the attorney-client privilege, the Sixth Circuit recently determined that a city could employ that privilege to preclude a former Director of Police from deposing city attorneys about communications he had had with them, where the city official sought to claim reliance on those communications as a basis for qualified immunity.<sup>290</sup> By analogy, such a privilege could attach to Attorney General opinions.

Nonetheless, a court would almost certainly require the government to waive either privilege in a criminal context or dismiss the prosecution. As noted above, an Attorney General opinion provides a significant, if not complete, defense for actions taken pursuant to it. It would therefore constitute significant exculpatory information, which courts would be highly loathe to preclude. As the Supreme Court has stated, "it is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."<sup>291</sup> Thus, the privileges should not prove a challenge in any criminal context.

The attorney-client and deliberative process privileges prove a more daunting problem in a civil context. To the extent that the Attorney General opinion at issue has been published, such as the Kidney Donor Opinion, the privileges should not be a bar because public disclosure of documents constitutes waiver of the privilege.<sup>292</sup> If the opinion is unpublished because it is classified, then, as discussed above, the government would likely raise the State Secrets Privilege to protect the information contained in the opinion,

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Supp. 2d 23, 40 (D.D.C. 2001) ("In this context, the governmental agency serves as the client, and the government attorney is its attorney."); *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998) (stating, with regard to the deliberative process privilege, that the government holds the privilege and "private parties can neither assert nor waive the privilege").

289. *See Nat'l Council of La Raza v. Dep't of Justice*, 339 F. Supp. 2d 572, 581, 583 (S.D.N.Y. 2004) (finding memoranda written by OLC to be "predecisional and deliberative" and thus protected by the privilege); *Southam News v. U.S. Immigration & Naturalization Serv.*, 674 F. Supp. 881, 886 (D.D.C. 1987) (same).

290. *Ross v. City of Memphis*, 423 F.3d 596, 606 (6th Cir. 2005).

291. *United States v. Reynolds*, 345 U.S. 1, 12 (1953); *see also United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (including Judge Learned Hand's argument that the government cannot use its privileges to suppress exculpatory documents in criminal prosecutions).

292. *See In re Keeper of the Records*, 348 F.3d 16, 22 (1st Cir. 2003) ("When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised."); *Coastal States*, 617 F.2d at 863-64 (noting that a lack of confidentiality destroys the attorney-client privilege).

and the court would likely dismiss the case.<sup>293</sup>

Left uncertain, then, are civil cases in which reliance is made based upon an unclassified, but unpublished, Attorney General opinion. Hopefully, the United States would not assert the privilege in such cases and preclude the government employee from raising a near absolute defense. However, it would appear that, as in the Sixth Circuit case described above,<sup>294</sup> the government has the power to do just that, which would effectively strip the government employee of his or her near complete protection.

### III. IT IS APPROPRIATE FOR GOVERNMENT EMPLOYEES TO BE PROTECTED FROM SUIT

The ability of government employees to shield themselves from both civil litigation and criminal prosecution via an Attorney General opinion raises considerable concerns. These concerns fall into two categories: concerns regarding flawed opinions and concerns regarding the impact that immunity could have on the conduct of government employees. However, these concerns prove overstated when divorced from the rhetoric. Further, they are outweighed by the benefits of immunity, both for the government employee and for society.

#### A. *Concerns About Possibly Flawed Attorney General Opinions.*

Providing effective immunity to a government employee who relies on a legally accurate Attorney General opinion raises no concerns. After all, if the opinion is correct, reliance upon it will not result in civil or criminal penalty. Effective immunity in such situations provides a quicker mechanism for disposing of what would be long, drawn-out litigation of a meritless claim. There is no basis for objection to such judicial efficiency.

Concerns, however, arise in situations where the Attorney General opinion is not correct, or at least where one court somewhere decides a matter inconsistent with the opinion issued by the Attorney General or OLC. The easiest scenario is where an Attorney General opinion is well researched, well argued, and comes to a logical conclusion, yet a court in some jurisdiction (or even the Supreme Court) later decides the matter differently. An example of this could be the Kidney Donor Opinion, where OLC concluded that the practices at issue there do not constitute “valuable consideration” in violation of 42 U.S.C. § 274e, but acknowledged that the term “valuable consideration” does “remain open to some question.”<sup>295</sup> In such scenarios, it would appear equitable for a government employee to be protected for any action the employee

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293. See *supra* notes 280–285 and accompanying text.

294. See *supra* note 290 and accompanying text.

295. Kidney Donor Opinion, *supra* note 108, at 1, 6.

takes in reliance upon such an opinion. The government employee (or more accurately the employee's agency) submitted the matter to the Attorney General's office for review, received a written response that seemed logical and legally sound, and took action based on that response. In such cases, the government employee is acting upon the highest legal authority available, i.e., the Attorney General's office,<sup>296</sup> and application to the judiciary branch remains unavailable since no action has yet been taken and thus the matter is not ripe for court review.<sup>297</sup> Therefore, as the government employee has exhausted all options for legal review and acquired advice that appears correct on its face, the government employee should not be held personally accountable for actions taken pursuant to that advice should a court later decide that the Attorney General opinion was erroneous. This would not mean that a plaintiff would be without a remedy. Claims against the United States would remain valid, assuming of course, that they fall within the congressionally mandated confines of the FTCA or meet the standards for other claims against the United States. It would merely mean the individual government employee would be beyond suit.

But what if an Attorney General opinion is not well researched or well argued or comes to an erroneous conclusion? Should a government employee relying on that opinion be protected from suit? To begin with, such a situation is highly unlikely to occur. Given the expertise and quality of the lawyers in OLC and their need to provide valid opinions to uphold their reputation,<sup>298</sup> it would be unusual for an Attorney General opinion to be poorly researched, poorly argued, or completely wrong. However, such situations can occur, as the cases in Part I.B above illustrate.<sup>299</sup> The Supreme Court found the conclusions contained in the Attorney General opinion at issue in *Elg* to be "not adequately supported."<sup>300</sup> In *Dietrich*, the court found the Attorney General opinion at issue to be "brief and unsatisfactory."<sup>301</sup> *McGrath v. Kristensen* even contained an awkward situation in which a Supreme Court Justice described the opinion he had previously approved when he served as Attorney General to be "as foggy as the statute the Attorney General was asked to interpret."<sup>302</sup>

Even in these cases, a government employee relying on even a

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296. See *supra* note 211 and accompanying text.

297. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy,' and 'a federal court [lacks] the power to render advisory opinions.'" (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975))).

298. See *supra* notes 63–68 and accompanying text.

299. See *supra* Part I.B.

300. *Perkins v. Elg*, 307 U.S. 325, 348–49 (1939).

301. *United States v. Dietrich*, 126 F. 671, 676 (D. Neb. 1904).

302. 340 U.S. 162, 176 (1950) (Jackson, J., concurring).

poorly argued or poorly concluded Attorney General opinion should be shielded from civil or criminal liability so long as his or her reliance on that opinion was reasonable. Attorney General opinions often grapple with legal principles that have not yet been fully resolved—hence the reason that government agencies submit matters to the Attorney General and OLC. What may appear to a court several years later to have been obviously correct or obviously erroneous might not have appeared so clear at the time the Attorney General opinion was issued. With the passage of time, Congress may pass laws on the topic or create statutes and definitions for similar or analogous matters. Courts may alter their mechanism for resolving certain disputes or create judicial preferences or procedures not in existence at the time the Attorney General opinion was rendered. Finally, public opinion and perception may change in ways that impact judicial assessment of certain matters, such as what constitutes “valuable consideration” or “reasonableness.” An example of this is the *Dietrich* case, in which the defendant, claiming it was legal both to have a contract with the government and be a Senator, referred to an Attorney General opinion issued almost one hundred years previously to support his position.<sup>303</sup> As noted above, the court found the opinion to be “brief and unsatisfactory.”<sup>304</sup> However, it should come as no surprise that attitudes might change regarding the proper conduct of members of Congress, as well as judicial interpretation of conflicts of interest, over the course of almost a century.

Furthermore, even if some might view a given Attorney General opinion as erroneous on its face, it does not mean that a reasonable government employee would or should. As discussed above, the vast majority of government employees and even lawyers, no matter how bright and competent, will have difficulty assessing the validity of the complicated legal issues and extensive discussions in an Attorney General opinion and will not have the time or ability to research every claim made in the opinion to assess its accuracy.<sup>305</sup> Unless that opinion appears unreasonable on its face, a government employee should be able to rely upon it, especially as it is a binding issuance from the highest attorney in the executive branch. Thus, not only were government employees bound by the first section of the Bybee Memorandum, which provided an extreme definition of “torture,” but, even if they found it repulsive, few would have been able to state that the memorandum’s final assessment of that term was *legally* invalid.<sup>306</sup>

The same should be true even if the government employee or lawyer knows that politics impacted the opinion. In an ideal world,

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303. See *supra* notes 76–80 and accompanying text.

304. See *supra* note 301 and accompanying text.

305. See *supra* pp. 135–36.

306. See *supra* notes 219–22 and accompanying text.

Attorney General opinions would provide unbiased legal opinions unaffected by political desires. However, we live in a far from ideal world and, as expressed in Part I.A above, political taint does creep into Attorney General opinions, in some cases more predominately than others.<sup>307</sup> For example, it could be argued that political desires influenced the CIA Detention Program Opinion, i.e., that the executive branch wished to use certain techniques on high-value terrorists and ensured that OLC issued an opinion validating the use of such techniques. Yet, as unappealing as political taint may be, it does not, in and of itself, render an Attorney General opinion erroneous. The mere fact that a government agency, or the President, puts pressure on the Attorney General's office to find law permitting a particular outcome does not make that outcome erroneous. The mere fact that the executive branch may have wanted to submit certain high-level terrorists to an "alternative set of procedures" does not mean that the resulting Attorney General opinion on the matter bears no legal validity. Indeed, it is likely that virtually every matter submitted for an Attorney General opinion has some political pressure or influence on it. The Secretary of Health and Human Resources presumably submitted the kidney donor issue to OLC because the Secretary wished to support the donor practices described therein. The Associate Counsel to the President presumably submitted to OLC the issue of whether a member of the President's Council on Bioethics held an "Office of Profit or Trust" under the Emoluments Clause because the President presumably wished to be able to attract members to that council and wanted to assure them that they would not violate a constitutional provision through their outside activities.<sup>308</sup> The fact that these and other opinions may have a political aspect to them does not render them baseless or unreliable.

The dividing line, however, occurs with regard to an Attorney General opinion that is objectively unreasonable, i.e., an opinion that is so baseless in its legal research, argument, or conclusion that no reasonable person would rely on it. As noted above, the detail and complexity of Attorney General opinions make it very unlikely that an Attorney General opinion would appear objectively unreasonable. However, should such a result occur, the government employee should not, and would not, be able to hide behind that opinion. The employee's action might remain in the "scope of employment" and thus bar a tort action against the employee under the FTCA. Similarly, the federal government might decline to prosecute a case where the government employee relied on even an obviously erroneous Attorney General opinion. However, qualified immunity, which requires "reasonableness," would likely not attach to protect a government employee who claimed to rely upon an

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307. *See supra* Part I.A.

308. *See supra* notes 115–18 and accompanying text.

unreasonable Attorney General opinion. Similarly, Supremacy Clause immunity would likely not protect a government employee relying on an unreasonable Attorney General opinion since any actions taken would not be in accordance with the law of the United States, nor necessary and proper.

Nor should immunity protect government employees in such circumstances. A government employee who acts in reliance on an Attorney General opinion that is objectively unreasonable—and certainly if the employee subjectively knows it to be unreasonable or wrong—is knowingly and purposefully engaging in illegal activity. That employee should not be able to rely on a Nuremberg defense in taking such action, claiming that the employee was merely following orders from the highest legal authority in the executive branch to commit a knowingly illegal act.<sup>309</sup> One should not be immune for engaging in knowingly unlawful action merely because an unreasonable Attorney General opinion asserts otherwise.

Nonetheless, it is difficult to envision an Attorney General opinion that would be objectively unreasonable. One example, however, could be the second and third sections of the Bybee Memorandum, assuming one construes the discussions of the commander-in-chief powers and the defenses of necessity and self-defense as authorizing torture in violation of even the extreme definition of that term offered in the first section of the memorandum.<sup>310</sup> Torture is so universally reviled<sup>311</sup> that it would seem patently unreasonable for anyone to accept an Attorney General opinion authorizing it, which is presumably why the Levin Memorandum revoked these two sections of the Bybee

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309. In the so-called “Nuremberg Defense,” a defendant seeks to avoid culpability by claiming that he or she took the alleged action at the orders of a superior; such defenses have been uniformly rejected by the courts. *See* Grossman v. City of Portland, 33 F.3d 1200, 1209 (9th Cir. 1994) (“[A]s historical events such as the Holocaust and the My Lai massacres demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority.”); *United States v. North*, 910 F.2d 843, 879, 881 (D.C. Cir. 1990) (stating that the U.S. justice system “has historically recoiled” from the Nuremberg defense in rejecting a proposed instruction from defendant Oliver North that suggested a lack of culpability for merely following orders).

310. As noted *supra* notes 146–47 and accompanying text, based on the equivocal language in the Bybee Memorandum, I do not interpret sections two and three of the memorandum as authorizing torture, but rather as possible defenses if the interpretation of the term “torture” in the first section of the Bybee Memorandum is eventually found erroneous. Nonetheless, the arguments raised in sections two and three of the memorandum remain disturbing regardless of how they are interpreted.

311. *See* Levin Memorandum, *supra* note 17, at 1. The very first paragraph of the Levin Memorandum states: “Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law . . .” *Id.*

Memorandum.<sup>312</sup>

On the flip side, though the act of torture itself is despicable, that does not necessarily render unreasonable an argument that presidential power can trump a statute, even a critical statute like the anti-torture statute, in times of crisis, as suggested in the second and third sections of the Bybee Memorandum.<sup>313</sup> In so arguing, I am not advocating torture, a practice I find personally revolting and that the CIA has steadfastly refused to countenance.<sup>314</sup> Rather, I am arguing that it could be reasonable for a government employee to believe a binding written legal statement issued by the highest legal advisor in the executive branch, which states that presidential power can trump a congressional statute in times of crisis. In the most extreme of circumstances, e.g., a ticking bomb in a major metropolitan area, would a government employee's use of torture in reliance upon the complex arguments raised in sections two and three of the Bybee Memorandum really be unreasonable?<sup>315</sup> Though I am not willing to condone such a claim, I believe that a powerful argument could be made in its support.

*B. Concerns About the Impact Immunity Will Have on Government Employees*

There are legitimate concerns that immunity will have a negative impact on government employees. Knowing that their actions have no legal consequences, government employees could engage in sloppy, if not purposefully negligent, behavior. After all, one of the primary purposes of law is to provide guidance on proper activity and to sanction improper action.<sup>316</sup>

However, the threat of litigation or prosecution is only one, and certainly not the primary, motivator for government employees to conduct their work in a correct fashion. After all, other immunities, such as absolute immunity for judges and prosecutors,<sup>317</sup> do not appear to encourage such officials to engage in subpar work. Rather, government employees seek to do good work out of a sense of devotion to country. On a more practical level, government

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312. *See id.*

313. Bybee Memorandum, *supra* note 6, at 31.

314. *See 60 Minutes*, *supra* note 141 (quoting former Director of Central Intelligence George Tenet in discussing the CIA's terrorist detention program as saying: "Well, we don't torture people. Let me say that again to you. We don't torture people."); President Bush Speech, *supra* note 20, at 1573 ("The United States does not torture. It's against our laws, and it's against our values. I have not authorized it, and I will not authorize it.").

315. *See, e.g., The Torture Mystery*, *supra* note 25, at A20 ("[T]he 'ticking time bomb' is the scenario of choice for those who argue that in some circumstances torture might be permissible to serve the greater good.").

316. *See supra* notes 232–37 and accompanying text for a discussion of ex post facto laws.

317. *See supra* notes 169–71 and accompanying text for a discussion of absolute immunity.

employees, like all employees, conduct good work for self-centered reasons. Doing good work leads to promotions and respect; engaging in sloppy work is detrimental to career advancement and harms an employee's standing among the employee's peers. More importantly, bad or negligent work has *immediate* negative consequences as supervisors can sanction, demote, transfer, or fire bad workers much quicker than any legal recourse by an outside party (whether through criminal prosecution or civil litigation). Thus, there are more immediate and persuasive inducements and repercussions to promote good work than the threat of possible litigation or prosecution that would only take place months, if not years, after the fact. It is difficult to believe that the possibility of lawsuit in the future would provide the catalyst for good behavior that these other factors would not.

Of greater concern than government employees conducting poor work is the concern that government employees could lie about or omit critical facts when describing their proposed action to OLC in the hopes of receiving a favorable Attorney General opinion that will shield them from liability. However, an Attorney General opinion is like the old computer adage: garbage in, garbage out. The Attorney General opinion itself describes all of the key facts upon which the opinion is based. Since OLC and the Attorney General do not conduct independent factual investigations,<sup>318</sup> the facts in an Attorney General opinion are those, and only those, offered by the government agency. A government employee can only claim to rely on an Attorney General opinion to the extent that the employee's actions match, or at least are very similar to, the facts depicted in the opinion. Otherwise, a government employee will be unable to claim immunity based on reliance on the Attorney General opinion.

For example, the Kidney Donor Opinion describes the basic procedures in the two kidney donation practices at issue in the opinion.<sup>319</sup> Should the actual practices, or a future alternative practice, differ significantly from the practices described in the opinion, the government employee would have no basis for claiming that the opinion shields the employee from liability. The same would be true if the actual "alternative set of procedures" used by the CIA in their detention program differed significantly from those described and considered in the CIA Detention Program Opinion. The issue is analogous to the use of precedent in a court case—if the facts of the precedent are inconsistent with the case at issue, courts disregard the precedent. The same is true with an Attorney General opinion. If the facts at issue do not align with the facts stated in the opinion, whether because of different practices or because a government employee purposefully altered or hid facts from OLC, then the Attorney General opinion offers little to no protection for

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318. See *supra* note 49 and accompanying text.

319. Kidney Donor Opinion, *supra* note 108, at 1.

the government employee. Therefore, government employees would have little reason to withhold facts from the Attorney General or OLC or provide them with false facts since the resultant Attorney General opinion would not shield the government employees from liability.

The greatest concern, of course, is that immunity will induce government employees to conspire with the Department of Justice to have OLC issue an Attorney General opinion that all parties know to be legally incorrect, but which is issued to immunize government employees who take knowingly illegal action. As the Sixth Circuit recently stated in discussing a *Bivens* action, individuals should not be allowed to “cloak themselves in immunity” from lawsuit merely by “first seeking self-serving legal memoranda before taking action that may violate a constitutional right.”<sup>320</sup>

This is a completely valid concern. Government employees could seek to conspire with, or at least exert considerable pressure on, the Attorney General or OLC to issue an opinion that permits the government employees to engage in their desired (though illegal) activity, while at the same time providing those employees with effective immunity. Indeed many believe this may have already occurred with regard to the Bybee Memorandum and the CIA Detention Program Opinion.<sup>321</sup>

There is valid reason to believe, however, that the Attorney General’s office and OLC would not engage in such a conspiracy. As noted in Part I, OLC possesses a reputation for independence and

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320. *Silberstein v. City of Dayton*, 440 F.3d 306, 318 (6th Cir. 2006); *see also* *Molloy v. Blanchard*, 907 F. Supp. 46, 50–51 (D.R.I. 1995) (declining to attach qualified immunity to a police chief where the law was exceptionally clear, despite advice of counsel to the contrary), *aff’d*, 115 F.3d 86 (1st Cir. 1997). As the court in *Molloy* noted, if it concluded otherwise, “[a]dvice of counsel’ would be reduced to an empty shibboleth—a password to immunity—if used knowingly to disregard the law.” *Id.*

321. *See, e.g.*, Editorial, *CIA’s Attention Slap*, DAYTONA BEACH NEWS-J., July 25, 2007 (stating that the President has authorized torture, refused to permit the validating documents to be provided to the Senate, and asks that everyone just trust him); Editorial, *Terrorism and the Law: In Washington, a Need to Right Wrongs*, N.Y. TIMES, July 15, 2007, at WK11 (describing the Military Commissions Act as a “national disgrace [which] gave legal cover to secret prisons, kangaroo courts and the indefinite detention of prisoners without charges.”); *The Torture Mystery*, *supra* note 25, at A20 (“[B]oth critics and supporters of [a 20 July 2007 Executive Order authorizing the CIA’s detention program] seem to assume that the CIA will be skirting the ban on torture.”); *Bush Spells Out Rules for Interrogations*, CBS NEWS, July 20, 2007, [http://www.cbsnews.com/stories/2007/07/20/terror/main3082043.shtml?source=RSSattr=HOME\\_3082043](http://www.cbsnews.com/stories/2007/07/20/terror/main3082043.shtml?source=RSSattr=HOME_3082043) (quoting the director of Physicians for Human Rights asserting that “torture was authorized at the highest levels and utilized by U.S. forces”); Horton, *supra* note 120 (labeling the CIA’s detention program as a “criminal conspiracy” that will lead to “a serious investigation and prosecutions . . . when the criminals and political sycophants are chased out of the Department of Justice and people sworn to uphold the law are reinstalled there”).

excellence.<sup>322</sup> Its officers are unlikely to be willing to sacrifice that reputation for a particular Attorney General opinion. This is especially true given that the Attorney General opinion would not offer immunity to the Attorney General or OLC attorneys who authored or approved the opinion. The effective immunity described above protects only employees who rely on the opinion in undertaking action. The authors of a knowing false opinion would not fall in that category and therefore would be susceptible to prosecution or lawsuit for conspiring to break the law.<sup>323</sup> The opinion then would not protect these authors from legal recourse. In fact, the opposite is true—the opinion would likely be offered as plaintiff's Exhibit A in any subsequent trial.

Indeed, the written aspect of an Attorney General opinion creates disincentive for a conspiracy. A government employee would need to produce the opinion in court for the effective immunity described in this Article to attach. Yet that very document would evidence any purported conspiracy or pressure, outlining the facts provided by an agency to the Attorney General's office and the resultant legal determination. Grand conspiracies thrive where there is no evidence of their existence, not where the lynchpin of the conspiracy is contained in a written document, especially one that will by necessity need to be introduced to a court for the desired effect (immunity) to occur.

Finally, though the concept of a conspiracy is alluring, it faces practical limitations. Unlike opinions generated by local counsel or agency lawyers, opinions from the Attorney General's office are not quickly generated. Because of the importance and binding impact of such opinions, not to mention OLC's overall professionalism and workload, the process for acquiring an Attorney General opinion is quite detailed and slow. From personal experience, it can take months or longer for OLC to issue an opinion, especially if the matter concerns a complicated legal issue (which any issue important enough to be part of a conspiracy likely would). OLC takes considerable time making sure that it has all of the relevant facts, conducting the requisite research, and writing a clear and valid legal opinion. Queries may be made to other government agencies.<sup>324</sup> Draft opinions are often sent to other offices in the

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322. *See supra* notes 61–69 and accompanying text.

323. This concern would also dissuade OLC attorneys from engaging in their own conspiracy, without the requesting agency's knowledge or involvement, to issue an opinion authorizing knowingly illegal actions merely to provide effective immunity to the requesting agency's employees. In such a situation, OLC attorneys would be placing themselves squarely at risk of civil litigation or criminal prosecution in order to protect employees of other government agencies from such claims. Self-preservation, if nothing else, undermines the incentive and likelihood of OLC attorneys to engage in such action.

324. For example, before issuing the Attorney General opinion regarding whether a nonprofit organization has a financial interest in a particular matter,

Department of Justice to ensure their factual and legal validity.<sup>325</sup> Once finalized, the draft Attorney General opinion needs to be vetted by the requisite management in OLC. All of these steps not only increase the number of individuals who would need to be part of a conspiracy but also take considerable time. It seems unlikely that an agency wishing to engage in illegal activity would put its desires on hold for a significant period of time in order to bring Department of Justice employees into the conspiracy for the sole purpose of acquiring an opinion that documents the very illegal activity they intend to pursue.

C. *The Benefits of Effective Immunity*

The benefits of the effective immunity discussed in this Article significantly outweigh any of the above possible concerns. As noted above, government employees rely on the advice issued in an Attorney General opinion. They view that advice as binding and the final legal decision of the federal government. They should not be penalized, nor worry about being penalized, for following that guidance. Immunity therefore protects the government employee from having to create a defense in court or having to worry about doing so. This benefit is frequently discussed in court cases involving qualified immunity. As the Supreme Court stated in *Harlow*:

[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’<sup>326</sup>

Effective immunity further ensures that government employees are not faced with what the Seventh Circuit has described as

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discussed *supra* notes 110–14, OLC “obtained the views” of the Department of the Interior, the Department of Agriculture, the Department of Health and Human Services, the Environmental Protection Agency, the National Science Foundation, the National Aeronautics and Space Administration, and the Department of Commerce. Nonprofit Financial Interests Opinion, *supra* note 110, at 2 n.2.

325. For example, OLC sent the Kidney Donor Opinion to the Department of Justice’s Criminal Division before issuing it. See Kidney Donor Opinion, *supra* note 108, at 2 n.1.

326. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (footnote and citation omitted); see also *id.* at 817 (noting that “broad-ranging discovery and the deposing of numerous persons . . . can be peculiarly disruptive of effective government”). Courts often voice these concerns in the context of Supremacy Clause immunity as well. See *supra* note 275 and accompanying text.

“perverse incentives.”<sup>327</sup> Absent such immunity, an Attorney General opinion either precludes government employees from taking the proposed activity (if the opinion finds the activity illegal) or provides them with no legal protection (if the opinion authorizes the activity). This creates an incentive for government employees to avoid Attorney General review and claim complete ignorance if their activity is later deemed illegal.<sup>328</sup>

In contrast, the effective immunity established by an Attorney General opinion induces government employees to seek such opinions more often and provide more (rather than fewer) facts in order to ensure the shield is as wide and complete as possible. Though certainly an increased burden on OLC, this creates a good result for government employees and for society. It induces government employees to go outside their insulated agencies and seek guidance from at least one other executive department, the Department of Justice. This reduces the likelihood of a conspiracy, ensures that important policies are reviewed and assessed by at least one other federal entity (if not more), and helps ensure that the activities undertaken by agencies are legal. Finally, it increases the comfort level of the employees who undertake the activity because they know that their actions are legally permissible and have been approved by not just an outside agency, but indeed by the highest legal office in the executive branch.

#### IV. CONCLUSION

Government employees are often faced with difficult hurdles, including engaging in activities often disliked by at least some segment of the general public. In engaging in such activities, government employees rely extensively on the advice of their agency’s legal counsel to ensure that their activities, though perhaps not appreciated, are nonetheless legal. When the agency itself, however, is uncertain as to the legality of the operation it seeks to have its employees undertake, it has the option of submitting the matter to the Attorney General, or the Attorney General’s designee, OLC, for guidance. The resulting Attorney General opinion is not only the analysis of the highest legal authority in the executive branch, but it is also considered binding on all federal employees (not just those of the agency that submitted the question). When a

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327. *Davis v. Zirkelbach*, 149 F.3d 614, 620 (7th Cir. 1998).

328. *See id.* at 620–21 (noting that absent qualified immunity for police officers who sought the advice of counsel, “if [the officers] sought advice of counsel that turned out to be wrong, they would be liable, but if they maintained a deliberate ignorance, they might be able to get away with arguing that no reasonable officer would have known that the rule applied to their particular situation. Neither *Harlow* nor any other Supreme Court decision of which we are aware compels us to reach such an undesirable solution” (citation omitted)).

federal employee engages in activity pursuant to that guidance, the employee should not thereafter become subject to civil litigation or criminal prosecution.

Laws in place effectively create immunity for those government employees. Under the FTCA, qualified immunity, rules regarding ex post facto laws, and Supremacy Clause immunity, government employees would appear to be precluded from facing prosecution or litigation for following the guidance in an Attorney General opinion. This result is a good one because it permits government employees to do their job without the chilling effect of a possible trial. It also ensures that low-level (or even high-level) government employees are not left “holding the bag” for a decision made by the upper echelons of the executive branch and authorized by the highest legal authority in the administration. Finally, it comports with basic justice. The federal government should rightly be held accountable for any illegal activities it undertakes that have been vetted and authorized by the office of the Attorney General. Unless part of a conspiracy or acting outside the scope of employment, the government employee who reasonably follows the advice of that office should not be subjected to sanctions.