DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

REPORT

Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists

July 29, 2009

NOTE: THIS REPORT CONTAINS SENSITIVE, CLASSIFIED AND CONFIDENTIAL INFORMATION. DO NOT DISTRIBUTE THE REPORT OR ITS CONTENTS WITHOUT THE PRIOR APPROVAL OF THE OFFICE OF PROFESSIONAL RESPONSIBILITY.

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INTRODUCTION AND SUMMARY

In June 2004, an August 1, 2002 memorandum from then Assistant Attorney General (AAG) Jay S. Bybee of the Department of Justice's Office of Legal Counsel (OLC) to Alberto R. Gonzales, then White House Counsel, was leaked to the press. The memorandum was captioned "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A" (the Bybee Memo), and had been drafted primarily by OLC's then Deputy Assistant Attorney General, John Yoo. The memorandum examined a criminal statute prohibiting torture, 18 U.S.C. §§ 2340-2340A (the torture statute), in the context of interrogations conducted outside the United States.

One of the primary areas of discussion in the Bybee Memo was the statute's description of what constitutes "torture." The definition contained in the statute is as follows:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
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> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from –
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> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
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> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
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> (C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340.

The Bybee Memo concluded that under the torture statute, torture:

> covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. Additionally, such severe mental pain can arise only from the predicate acts listed in Section 2340. Because the acts inflicting torture are extreme, there is sufficient range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.
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> Further, we conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.

Bybee Memo at 46.

Some commentators, law professors, and other members of the legal community were highly critical of the Bybee Memo. For example, Harold Koh, then Dean of Yale Law School, characterized the memorandum as "blatantly

wrong" and added: "[i]t's just erroneous legal analysis." Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, Financial Times, June 10, 2004. A past chairman of the international human rights committee of the New York City Bar Association, Scott Horton, stated that "the government lawyers involved in preparing the documents could and should face professional sanctions." *Id.* Cass Sunstein, a law professor at the University of Chicago, said: "It's egregiously bad. It's very low level, it's very weak, embarrassingly weak, just short of reckless." Adam Liptak, *Legal Scholars Criticize Memos on Torture*, New York Times, June 25, 2004 at A14. In the same article, Martin Flaherty, an expert in international human rights law at Fordham University, commented, "The scholarship is very clever and original but also extreme, one-sided and poorly supported by the legal authority relied on." *Id.*

Other commentators observed that the Bybee Memo did not address important Supreme Court precedent and that it ignored portions of the Convention Against Terrorism (CAT) that contradicted its thesis. *Id.* One article suggested that the Bybee Memo deliberately ignored adverse authority, and commented that "a lawyer who is writing an opinion letter is ethically bound to be frank." Kathleen Clark and Julie Mertus, *Torturing Law; The Justice Department's Legal Contortions on Interrogation*, Washington Post, June 20, 2004 at B3; *see* R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, Washington Post, July 4, 2004 at A12. Other critics suggested that the Bybee Memo was drafted to support a pre-ordained result. Mike Allen and Dana Priest, *Memo on Torture Draws Focus to Bush*, Washington Post, June 9, 2004 at A3. Similar criticism was raised by a group of more than 100 lawyers, law school professors, and retired judges, who called for a thorough investigation of how the Bybee Memo and other, related OLC memoranda came to be written. Fran Davies, *Probe Urged Over Torture Memos*, Miami Herald, August 5, 2004 at 6A; Scott Higham, *Law Experts Condemn U.S. Memos on Torture*, Washington Post, August 5, 2004 at A4.

A few lawyers defended the Bybee Memo. In a Wall Street Journal op-ed piece, two legal scholars argued that the Bybee Memo appropriately conducted a dispassionate, lawyerly analysis of the law and properly ignored moral and policy

considerations. Eric Posner and Adrian Vermeule, *A "Torture" Memo and Its Tortuous Critics,* Wall Street Journal, July 6, 2004 at A22.[1]

On June 21, 2004, the Office of Professional Responsibility (OPR) received a letter from Congressman Frank Wolf. In his letter, Congressman Wolf expressed concern that the Bybee Memo provided legal justification for the infliction of cruel, inhumane, and degrading acts, including torture, on prisoners in United States custody, and asked OPR to investigate the circumstances surrounding its drafting.

On June 22, 2004, Executive Branch officials responded to public criticism of the Bybee Memo. Then White House Counsel Alberto Gonzales told reporters:

> [T]o the extent that [the Bybee Memo] in the context of interrogations, explored broad legal theories, including legal theories about the scope of the President's power as Commander-in-Chief, some of their discussion, quite frankly, is irrelevant and unnecessary to support any action taken by the President. . . .
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> Unnecessary, over-broad discussions . . . that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by decision-makers are under review, and may be replaced, if appropriate, with more concrete guidance addressing only those issues necessary for the legal analysis of actual practices.

White House Daily Press Briefing, June 22, 2004 (2004 WLNR 2608695). The same day, Deputy Attorney General (DAG) James Comey, cited in news reports as a "senior Justice official" or a "top Justice official," told reporters during a not-for-

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1 *See also* Testimony of Michael Stokes Paulsen, Professor of Law, University of St. Thomas School of Law, before the Subcommittee on Administrative Oversight and the Courts of the United States Senate Committee on the Judiciary (May 13, 2009). In addition, John Yoo has vigorously defended his work since leaving the Department. *See, e.g.,* John C. Yoo, *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press 2006); John Yoo, *A Crucial Look at Torture Law,* L.A. Times, July 6, 2004 at B11; John Yoo, *Commentary: Behind the Torture Memos,* UC Berkeley News, January 4, 2005 (available at http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml).

attribution briefing session that the analysis in the Bybee Memo was "over broad," "abstract academic theory," and "legally unnecessary." Toni Locy & Joan Biskupic, *Interrogation Memo to be Replaced,* USA Today, June 23, 2004 at 2A. Comey reportedly added, "We're scrubbing the whole thing." *Id.*

On July 15, 2004, OPR asked then OLC AAG Jack Goldsmith, III, to provide certain information and documents relevant to the Bybee Memo. OLC's then Principal Deputy AAG, Steven G. Bradbury, met with then OPR Counsel H. Marshall Jarrett on July 23, 2004, to discuss that request. Bradbury provided OPR with a copy of the Bybee Memo, but asked us not to pursue our request for additional material. After considering the issues raised by Bradbury, we repeated our request for additional documents on August 9, 2004. On August 31, 2004, Bradbury gave OPR copies of unclassified documents relating to the Bybee Memo, including email and documents from the computer hard drives and files of the former OLC attorneys who worked on the project. We learned that, in addition to Bybee, the following OLC attorneys worked on the Bybee Memo: former Deputy AAG John Yoo; former Deputy AAG Patrick Philbin; and former OLC Attorney [redacted][2]

We reviewed the Bybee Memo, along with email, correspondence, file material, drafts, and other unclassified documents provided by OLC. On October 25, 2004, OPR formally initiated an investigation.[3]

On December 30, 2004, OLC Acting AAG Daniel Levin issued an unclassified Memorandum Opinion for the Deputy Attorney General captioned

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2 [redacted]

3 OLC initially provided us with a relatively small number of emails, files, and draft documents. After it became apparent, during the course of our review, that relevant documents were missing, we requested and were given direct access to the email and computer records of [redacted] Yoo, Philbin, Bybee, and Goldsmith. However, we were told that most of Yoo's email records had been deleted and were not recoverable. Philbin's email records from July 2002 through August 5, 2002 – the time period in which the Bybee Memo was completed and the Classified Bybee Memo (discussed below) was created – had also been deleted and were reportedly not recoverable. Although we were initially advised that Goldsmith's records had been deleted, we were later told that they had been recovered and we were given access to them.

"Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A" (the Levin Memo). The Levin Memo, which was posted on OLC's web site the same day, superseded the Bybee Memo and eliminated or corrected much of its analysis.

During the course of our investigation, we learned that the Bybee Memo was accompanied by a second, classified memorandum (addressed to then Acting General Counsel of the Central Intelligence Agency (CIA) John Rizzo and dated August 1, 2002), which discussed the legality of specific interrogation techniques (the Classified Bybee Memo). We also learned that the OLC attorneys who drafted the Bybee Memo and the Classified Bybee Memo subsequently prepared a classified March 14, 2003 Memorandum to the Department of Defense: "Memorandum for William J. Haynes, II, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Unlawful Combatants Held Outside the United States* (March 14, 2003)" (the Yoo Memo).

We conducted interviews of [redacted] Patrick Philbin, and Jack Goldsmith, all of whom told us that they could not fully discuss their involvement without referring to Sensitive Compartmented Information. We eventually obtained the necessary clearances and requested and reviewed additional documents from OLC and from the CIA. We then re-interviewed [redacted] Philbin, and Goldsmith, and interviewed Yoo and Bybee.[4]

In addition, we interviewed former DAG James Comey; former OLC Acting AAG Daniel Levin; former Criminal Division AAG Michael Chertoff; former Criminal Division Deputy AAG Alice Fisher; OLC Principal Deputy AAG Steven Bradbury; CIA Acting General Counsel John Rizzo;[5] former White House Counsel

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[4] Bybee complained in his comments on OPR's draft report that he did not have access to classified material in preparing for his interview with OPR. That is inaccurate. Although our request to the National Security Counsel for security clearances for Bybee's attorneys had not been granted by the date of the interview, Bybee reviewed key documents, including emails and classified material, prior to his interview.

[5] Rizzo would not agree to meet with us until after his Senate confirmation hearing for the position of CIA General Counsel. That hearing was canceled and rescheduled, and finally held on June 19, 2007. We interviewed Rizzo on July 7, 2007.

Alberto Gonzales; former Counselor to Attorney General (AG) John Ashcroft, Adam Ciongoli; and former National Security Council (NSC) Legal Adviser John Bellinger, III.[6]

Some witnesses declined to be interviewed. Former AG Ashcroft did not respond to several interview requests but ultimately informed us, through his attorney, that he had declined our request. CIA Counter Terrorism Center (CTC) attorneys [redacted] refused to meet with us on the advice of counsel, but we were able to review brief summaries of their interviews with the CIA's Office of the Inspector General (CIA OIG) in connection with CIA OIG's investigation and May 7, 2004 report entitled "Counterterrorism Detention and Interrogation Activities (September 2001 - October 2003)" (the CIA OIG Report). CTC attorney [redacted] also refused our request for an interview, as did former CTC attorney [redacted], although [redacted] spoke briefly with us by telephone. Finally, former Counsel to the Vice President David Addington and former Deputy White House Counsel Timothy Flanigan did not respond to our requests for interviews.

In May 2005, Bradbury informed us that he had signed two classified memoranda that replaced the Classified Bybee Memo. Initially, we were permitted to review, but not to retain, copies of those documents, captioned "Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005)" (the 2005 Bradbury Memo), and "Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005)" (the Combined Techniques Memo). We were later provided with copies of these documents. The 2005 Bradbury Memo discussed certain individual

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[6] Bellinger declined several requests for an interview, but informed us in response to a final request, as we were completing our draft report, that he would be willing to talk to us. We interviewed Bellinger on December 29, 2008.

interrogation techniques (referred to elsewhere herein as "enhanced interrogation techniques" or "EITs") and concluded that their use by CIA interrogators would not violate the torture statute. The Combined Techniques Memo concluded that the combined effects of those EITs would not render a prisoner unusually susceptible to severe physical or mental pain or suffering and thus would not violate the torture statute.

On July 20, 2007, the *New York Times* reported that President Bush had signed an executive order allowing the CIA to use interrogation techniques not authorized for use by the United States military, and that the Department of Justice had determined that those techniques did not violate the Geneva Conventions. Shortly thereafter, reporter Jane Mayer wrote in the August 13, 2007 issue of the *New Yorker* magazine that Senator Ron Wyden had placed a "hold" on the confirmation of John Rizzo as CIA General Counsel after reviewing a "classified addendum" to the president's executive order.

In late August 2007, we asked OLC to provide copies of the executive order and the "classified addendum." Bradbury informed us that there was no "classified addendum," but that he had drafted an additional classified opinion, captioned "Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees* (July 20, 2007)" (the 2007 Bradbury Memo). When we obtained copies of those documents on August 29, 2007, we learned that there was a third classified OLC memorandum – "Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the*

Interrogation of High Value al Qaeda Detainees (May 30, 2005)" (the Article 16 Memo).[7] We reviewed those documents and conducted additional interviews.

After he became Attorney General in late 2007, Michael Mukasey reported to Congress, in his July 2, 2008 Responses to Questions for the Record by the Senate Committee on the Judiciary, that he had reviewed the Bradbury Memos and that he had concluded that the current CIA interrogation program was lawful. He also reported that the Bradbury Memos' analyses were "correct and sound."

A draft of OPR's report was completed in December 2008, and provided to Attorney General Mukasey and Deputy Attorney General Mark Filip for their comments and a sensitivity review for information that could not be made public. On December 31, 2008, OPR attorneys met with AG Mukasey and DAG Filip. The two were highly critical of the draft report's findings. However, AG Mukasey commented that the August 1, 2002 Bybee Memo was a "slovenly mistake."

On January 19, 2009, AG Mukasey and DAG Filip submitted a letter to OPR outlining their concerns and criticisms of the draft report.

On January 22, 2009, President Obama issued an executive order providing, among other things, that no officers, employees, or agents of the United States government could rely upon any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001 and January 20, 2009.

OPR provided copies of the draft report to Bybee, Yoo, Philbin, and the CIA for review and comment. AG Mukasey gave a copy of the draft to OLC for comment and Bradbury participated in the review of the draft report. OLC's

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[7] According to Bradbury, he did not bring the Article 16 Memo to OPR's attention when it was issued because it did not replace either the Bybee Memo or the Yoo Memo, which OLC understood to be the only subjects of OPR's investigation. The Article 16 Memo may have been inadvertently turned over to us when a junior OLC attorney produced other classified documents we had asked to reexamine in August 2007. The 2005 Bradbury Memo, the Combined Techniques Memo, the Article 16 Memo, and the 2007 Bradbury Memo are hereinafter referred to collectively as the Bradbury Memos.

comments were received in January 2009. OPR later offered Bradbury an additional opportunity to comment on the draft report, and he declined. Written comments from Bybee, Yoo, and Philbin were received by OPR on May 3, 2009.[8] Yoo also submitted a letter from Ronald Rotunda, a professor at Chapman University Law School. Comments were submitted by Rizzo on April 8, 2009. OPR carefully reviewed these responses and made changes to the draft report where appropriate.[9]

Although we have attempted to provide as complete an account as possible of the facts and circumstances surrounding the Department's role in the implementation of certain interrogation practices by the CIA, it is important to note that our access to information and witnesses outside the Department of Justice was limited to those persons and agencies that were willing to cooperate with our investigation.

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

Although we refer to works of legal commentary in this report, we did not base our conclusions on any of those sources. We independently researched and analyzed the issues that are discussed in this report. Citations to law review articles and other commentary are intended to note the sources of certain arguments and to inform the reader where further discussion can be found. They

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8 Those comments are subsequently referred to as the Bybee Response, Bybee Classified Response, Yoo Response, and Philbin Response.

9 Because they were not criticized in the draft report, OPR did not request that either [redacted] Levin, or Goldsmith provide comments on the draft report. However, Goldsmith sent Associate Deputy Attorney General David Margolis a memorandum discussing the OPR investigation.

are not offered as support for our conclusions.

Similarly, although we report the views of some former Department officials regarding the merits of the memoranda, we did not base our findings on their comments. Our findings are limited to the particular circumstances of this case, which, as discussed below, involved issues of the highest importance that demanded the highest degree of thoroughness, objectivity, and candor from the lawyers involved.

Based on the results of our investigation, we concluded that former Deputy AAG John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.

We concluded that former AAG Jay Bybee committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.[10]

We did not find that the other Department officials involved in this matter committed professional misconduct.

In addition to these findings, we recommend that, for the reasons discussed in this report, the Department review certain declinations of prosecution regarding incidents of detainee abuse referred to the Department by the CIA OIG.

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10 Pursuant to Department policy, we will notify bar counsel in the states in which Yoo and Bybee are licensed.

I. BACKGROUND

A. The Office of Professional Responsibility

OPR has jurisdiction to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. 28 C.F.R. Section 0.39a(a)(1). In addition to reporting its findings and conclusions in individual investigations, OPR is also charged with providing advice to the Attorney General and Deputy Attorney General concerning the need for changes in policies and procedures that become evident during the course of OPR's investigations. 28 C.F.R. Section 0.39a(a)(8).

OPR receives allegations against Department attorneys from a variety of sources, including self-referrals and referrals of complaints by officials in U.S. Attorneys' offices and litigating divisions, private attorneys, defendants and civil litigants, other federal agencies, state or local government officials, judicial and congressional referrals, and media reports.

Upon receipt, OPR reviews allegations and determines whether further investigation is warranted. OPR ordinarily completes investigations relating to the actions of attorneys who have resigned or retired in order to better assess the impact of alleged misconduct and to permit the Attorney General and Deputy Attorney General to determine the need for changes in Department policies or practices.

OPR investigations normally include a review of all relevant documents and interviews of witnesses and the subjects of the investigation.[11] OPR has the power to compel the testimony of current Department employees and collect internal Department documents, but it does not have the ability to subpoena documents

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[11] Typically, interviews of witnesses are audio recorded; interviews of subjects typically are taken under oath and transcribed.

or witnesses.[12] In analyzing the evidence collected in the course of the investigation, OPR uses the preponderance of the evidence standard.[13]

At the conclusion of the investigation, OPR makes findings of fact and conclusions as to whether professional misconduct has occurred. OPR generally finds professional misconduct in two types of circumstances: (1) where an attorney intentionally violated an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy; or (2) where an attorney acted in reckless disregard of his or her obligation to comply with that obligation or standard. OPR may also find that the attorney exercised poor judgment or made a mistake; such findings do not constitute findings of professional misconduct.

If OPR concludes that a Department attorney committed professional misconduct, it will recommend an appropriate range of discipline for consideration by the attorney's supervisors. OPR may include in its report information relating to management and policy issues noted in the course of the investigation for consideration by Department officials. In cases in which OPR finds professional misconduct, pursuant to Department policy, it ordinarily notifies bar disciplinary authorities in the jurisdiction where the attorney is licensed of its finding.

B. This Investigation

This was not a routine investigation. A routine case investigated by OPR receives little or no public attention and discipline is handled within the Department without any public disclosure. This matter has been followed closely by the media, Congress, the American public, and international audiences.

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[12] OPR's administrative review of allegations of professional misconduct is unlike civil litigation, where parties may request documents or notice depositions, or a criminal investigation, where access to witnesses and documents may be obtained through the use of a grand jury subpoena.

[13] OPR's use of the preponderance of the evidence standard is based on the statutory standard of proof for upholding a disciplinary action for misconduct. *See* 5 U.S.C. § 770(c)(1)(B). State bar authorities, on the other hand, generally use the higher "clear and convincing evidence" standard of proof.

Despite the complexity and notoriety of this matter, however, OPR must determine whether Department attorneys acted in conformity with the Department's expectations and professional obligations. Assessing compliance of Department attorneys with Departmental and professional standards, whether in conducting litigation or providing legal advice, is the core function of OPR.[14]

In order to best accomplish OPR's mission, we allowed the subjects of the investigation to review and comment on a draft of this report prior to its issuance. In addition, we recommended that the report be released publicly. We based our recommendation on the amount of public interest in this matter, the gravity of the matter, and the interest of the Department in full disclosure of the facts to the American public.

This investigation was long and difficult. It was hampered by the loss of Yoo's and Philbin's email records, our need to seek the voluntary cooperation of non-DOJ witnesses, and our limited access to CIA records and witnesses (including almost all of the CIA attorneys and all witnesses from the White House other than former White House Counsel Alberto Gonzales). Our investigation was slowed by some of the witnesses' initial reluctance to provide information, as well as time spent obtaining the necessary security clearances for OPR personnel, witnesses, and their attorneys. In addition, we were initially not permitted to copy or to retain copies of many of the key underlying documents, which increased the difficulty of our task. Moreover, the scope of our investigation changed as new information about the CIA interrogation program came to light through press reports and congressional investigations. All of these problems were exacerbated

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[14] In his response, Bybee argued that "[i]t is not the role of OPR to critique legal judgment at all." Bybee Response at 59. We reject that assertion. As discussed above, the Department has charged OPR with the investigation of allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or *provide legal advice*.

In his response, Bybee also claimed – based on an examination of OPR's annual reports containing summaries of selected cases – that OPR has never previously reviewed legal advice. That claim is incorrect.

by limited OPR resources, in light of an unprecedented number of complex investigations of high-level officials occurring during this same time period.

C. The Office of Legal Counsel[15]

The Attorney General has delegated to the OLC the function of providing authoritative legal advice to the President and all the Executive Branch agencies. The OLC provides written opinions and oral advice in response to requests from the Counsel to the President, agencies of the Executive Branch, and offices within the Department. OLC opinions are binding on the Executive Branch.

In a memorandum that "reaffirm[ed] the longstanding principles that have guided and will continue to guide OLC attorneys in preparing the formal opinions of the Office," Principal Deputy AAG Bradbury stated that OLC's role is to provide "candid, independent, and principled advice – even when that advice may be inconsistent with the desires of policymakers."[16] As Bradbury wrote to the OLC attorneys:

> In general, we strive in our opinions for clarity and conciseness in the analysis and a balanced presentation of arguments on each side of an issue. . . . OLC's interest is simply to provide the correct answer on the law, taking into account all reasonable counterarguments, whether provided by an agency or not.

OLC Best Practices Memo at 3. Thus, "it is imperative that [OLC] opinions be clear, accurate, thoroughly researched, and soundly reasoned. The value of an OLC opinion depends on the strength of its analysis." *Id.* at 1.

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15 Attachment A is a timeline of OLC leadership and significant events relevant to this report. Attachments B and C are glossaries of acronyms and of names used in the report. Attachment D is a chronological list of OLC memoranda on the issue of enhanced interrogation techniques.

16 Memorandum for Attorneys of the Office *Re: Best Practices for OLC Opinions*, authored by Steven G. Bradbury, Principal Deputy Assistant Attorney General, May 16, 2005 (OLC Best Practices Memo) (Attachment E) at 1. Bradbury told us that the OLC Best Practices Memo was written to "set forth some basic principles that we should all keep in mind as we prepare opinions" and to "reaffirm traditional practices in order to address some of the shortcomings of the past."

OLC attorneys from prior administrations share Bradbury's view of the mission and role of the OLC. These views are expressed in a document entitled Principles to Guide the Office of Legal Counsel, December 21, 2004 (OLC Guiding Principles) (Attachment F), signed by nineteen former OLC attorneys. The document explains that:

> When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

OLC Guiding Principles at 1. The OLC should take the Executive Branch's goals into account and "assist their accomplishment within the law" without "seek[ing] simply to legitimate the policy preferences of the administration of which it is a part." *Id.* at 5.

The legal standards, including the rules of professional responsibility, that apply to all Department attorneys also apply to OLC attorneys.[17] Despite the complexity and difficulty of the issues the OLC attorneys handle, they are, and must be, held to professional legal standards. Furthermore, OLC attorneys must adhere to the well-established principles that were described in its own Best Practices Memo.

OLC's obligation to counsel compliance with the law pertains with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.

> An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's

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[17] We reject Bybee's assertion that "the rules of professional responsibility have no role to play in evaluating the conduct of OLC attorneys." Bybee Response at 3.

> constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. . . . OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all the varied work of the executive branch.

OLC Guiding Principles at 1, 2. If the OLC fails to provide complete and objective legal advice, it fails to properly represent its client – the Executive Branch.

These principles are not simply aspirational. They mirror the Model Rules of Professional Responsibility, which require that "a lawyer shall exercise independent professional judgment and render candid advice." Model Rules of Professional Conduct, Rule 2.1.[18]

The OLC's duties are heightened because many of its opinions will never be reviewed by a court or disclosed publicly and are made outside of an adversarial system where competing claims can be raised. *See* Model Rules of Professional Conduct, Rule 3.3(d), Candor toward the Tribunal ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse"). In contrast to attorneys in private practice, the OLC establishes through its opinions the state of the law for the Executive Branch, the head of which is constitutionally charged with upholding the Constitution and laws of the United States. U.S. Const. art. II, § 3.

The importance of the OLC's duties can be seen in the effect of its opinions on actions by government officials. As former OLC AAG Goldsmith stated:

> One consequence of OLC's authority to interpret the law is the power to bestow on government officials what is effectively an advance

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[18] In addition, courts have frequently observed that the government has an overriding obligation to see that justice is done, and that such an overriding obligation imposes an expectation of even greater candor on government counsel than attorneys representing private parties. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935).

> pardon for actions taken at the edges of vague criminal laws. This is the flip side of OLC's power to say "no," and to put a brake on government operations. It is one of the most momentous and dangerous powers in the government: the power to dispense get-out-of-jail-free cards. . . . Its everyday job of interpreting criminal laws gives OLC the incidental power to determine what those laws mean and thus effectively to immunize officials from prosecutions for wrongdoing.

Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 149-50 (WW Norton & Co. 2007).

D. OPR's Analytical Framework and Professional Standards

1. OPR's Analytical Framework

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy. In determining whether an attorney has engaged in professional misconduct, OPR uses the preponderance of the evidence standard to make factual findings.

An attorney intentionally violates an obligation or standard when the attorney (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits; or (2) engages in conduct knowing its natural and probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits.

An attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages

in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.[19]

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

2. Professional Standards

Pursuant to Department of Justice regulations set forth at 28 C.F.R. Part 77, *Ethical Standards for Attorneys for the Government*, Department attorneys must conform to the rules of ethical conduct of the court before which a particular

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19 We disagree with Bybee's assertion in his response that the Supreme Court's decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), "squarely forecloses" any finding of recklessness on the facts at issue here. Bybee Response at 28. In *Safeco*, the Court defined the term "recklessness" as consistent with common law standards in the context of the Fair Credit Reporting Act, which requires willfulness to establish civil liability. The definition of "recklessness" under the OPR standard is explained in OPR's analytical framework and does not require willfulness.

case is pending. 28 C.F.R. § 77.4.[20] Where there is no case pending, "the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rules of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought." 28 C.F.R. § 77.4(c)(1). Because Bybee is a member of the District of Columbia Bar, the D.C. Rules of Professional Responsibility apply to his conduct.

Yoo is a member of the Pennsylvania bar. Under the Pennsylvania Disciplinary Rules of Professional Conduct, where the conduct in question is not in connection with a matter pending before a tribunal, "the rules of the jurisdiction in which the lawyer's conduct occurred [shall be applied], or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." Pennsylvania Disciplinary Rules of Professional Conduct, Rule 8.5, Disciplinary Authority, Choice of Law.[21] Because there is no
one jurisdiction in which the legal advice rendered in this matter will have effect, the District of Columbia bar rules, where Yoo authored the advice, apply.[22]

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[20] These regulations implement Title 28, section 530B of the U.S. Code, which provides that an "attorney for the Government shall be subject to State laws and rules, and local Federal court rules governing attorneys in each State where such attorney engages in that attorney's duties . . . ." The phrase "attorney for the Government" includes "any attorney employed in . . . a Department of Justice agency." 28 C.F.R. § 77.2.

[21] In his response to the draft report, Yoo incorrectly asserted that the Pennsylvania Rules of Professional Conduct apply. Yoo also asserted that the Pennsylvania Bar's statute of limitations has run on any possible action against him. Department policy requires that OPR notify relevant state bars of professional misconduct findings. The state bar then applies its rules as it sees fit. As discussed above, the Department's interest in OPR's investigation of allegations of misconduct is to ensure that Department attorneys adhere to the highest ethical standards, not to assist state bars in enforcing their rules.

[22] In addition, we note that Philbin, [redacted] and Bradbury are members of the District of Columbia Bar. Philbin is also a member of the Massachusetts bar, and [redacted]

a. The Duty to Exercise Independent Professional Judgment and to Render Candid Advice

The Bybee Memo was written to advise the CIA on whether certain conduct would violate federal law. Thus, the OLC attorneys were not acting as advocates, but advisors, and had the duty, under D.C. Rule 2.1 ("Advisor") (Attachment G), to "exercise independent professional judgment and render candid advice."

This requirement is explained further in the commentary accompanying the rule:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.[23]

Echoing these concepts, the OLC Best Practices Memo observes that the office "has earned a reputation for giving candid, independent, and principled advice – even when that advice may be inconsistent with the desires of policymakers." OLC Best Practices Memo at 1.

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[23] D.C. Rule 2.1 also states that, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The relevant commentary adds that "moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." Because the rule's language regarding extra-legal considerations is permissive, however, a lawyer's decision not to provide such advice should not be subject to disciplinary review. D.C. Rules, Scope at ¶ 1; ABA, Ann. Mod. Rules Prof. Cond., Preamble and Scope at ¶ 14 (6th ed. 2007).

The ABA Committee on Ethics and Professional Responsibility wrote, in Formal Op. 85-352 (1985):

> [i]n the role of advisor, the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged .... Competent representation of the client would require the lawyer to advise the client fully as to whether there is or was substantial authority for the position taken ....

Although some courts have found attorneys to have violated Rule 2.1, the reported decisions and professional literature provided little guidance for application of the standard in this context.[24] Accordingly, in addition to the rules and comments set forth immediately above, we looked to the OLC's own Best Practices Memo, as well as the OLC Guiding Principles Memo, for guidance.

b. The Duty of Thoroughness and Care

Relevant to Rule 2.1's duty to exercise independent professional judgment and render candid advice are the provisions of D.C. Rule 1.1. Rule 1.1(a) provides that: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." D.C. Rule 1.1 (b) states that: "A

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24 The Annotation to the Model Rule 2.1 explains the dearth of Rule 2.1 cases as follows:

> Although Rule 2.1 is the ethics rule that clearly enunciates the lawyer's duty to exercise independent professional judgment in representing a client, it is not invoked nearly as frequently as the ethics rules that address specific threats to that independence. These issues are fully addressed in the Annotations for Rule 1.7 (Conflict of Interest: Current Clients), Rule 1.8 (Conflict of Interest: Current Clients: Specific Rules), and Rule 5.4 (Professional Independence of a Lawyer); also see Rule 1.9 (Duties to Former Clients) and Rule 1.18 (Duties to Prospective Client).

lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters."[25] (Attachment H.)

Comment 5 to Rule 1.1 adds, among other things: "The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." In addition, as noted in Comment 2 to Rule 1.1, the analysis of precedent is an essential element of competent legal advice. Thus, an error or omission that might be considered an excusable mistake in a routine matter, might constitute professional misconduct if it relates to an issue of major importance.

Legal research must be sufficiently thorough to identify all current, relevant primary authority. Christina L. Kunz, et al., *The Process of Legal Research* 2-3 (Aspen Publishing 1989). *See United States v. Russell*, 221 F.3d 615, 620 (4th Cir. 2000) (in evaluating allegations of ineffective assistance of counsel, the court noted that, pursuant to Rule 1.1, "an attorney has a duty to adequately examine the law and facts relevant to the representation of his client"); OLC Best Practices Memo at 1 ("it is imperative that our opinions be clear, accurate, thoroughly researched, and soundly reasoned").

Adequate steps must be taken to identify any subsequent authority that affirms, overrules, modifies, or questions a cited authority. *See, e.g., Continental Air Lines, Inc., v. Group Systems International Far East, Ltd.*, 109 F.R.D. 594, 596 (C.D. Cal. 1986) (in considering the imposition of Rule 11 sanctions, the court noted that failure to cite important U.S. Supreme Court case decided four months earlier "fell below the required standard of reasonable inquiry"); *Cimino v. Yale*, 638 F. Supp. 952, 959 n.7 (D. Conn. 1986) (admonishing counsel that "diligent research, which includes Shepardizing cases, is a professional responsibility"); *Taylor v. Belger Cartage Service, Inc.*, 102 F.R.D. 172, 180 (W.D. Mo. 1984) (award for attorney's fees justified in part by fact that opposing counsel "never

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[25] This rule has been interpreted in the District of Columbia as requiring proof of a "serious deficiency" in an attorney's work and more than "mere careless errors." *In re Ford*, 797 A.2d 1231, 1231 (D.C. 2002) (citations omitted).

Shepardized his principle [sic] authority" and failed to identify later decisions that limited the cited authority to its facts); Charles R. Calleros, *Legal Method and Writing* 177-78 (Aspen Publishing 5th ed. 2006).

In legal memoranda or opinion letters that seek to predict a legal outcome, a thorough discussion of the law should include the strengths and weaknesses of the client's position and should identify any counter arguments. Calleros at 88; William Statsky, *Legal Research and Writing, Some Starting Points* 179 (West Publishing Co. 1999). The OLC Best Practices Memo specifically states: "In general, we strive in our opinions for . . . a balanced presentation of arguments on each side of an issue . . . , taking into account all reasonable counter arguments." OLC Best Practices Memo at 3.

3. Analytical Approach

In order to determine whether the Department attorneys who drafted and reviewed the OLC memos met the minimum standards of independent professional judgment, candid advice, thoroughness, and care commensurate with the complexity and sensitivity of the issues confronting them, we reviewed the memoranda in question and identified the legal arguments and conclusions the authors presented. We examined the methodology and legal authority underlying the memoranda's arguments and conclusions in light of the basic standards discussed above. We also conducted independent research to determine whether the cited authorities constituted a thorough, objective, and candid view of the law at the time the memoranda were written.

Moreover, we looked at the circumstances surrounding these particular requests for legal advice, to assess whether the requirements of the applicable professional rules and Department regulations were met. In doing so, we began with the premise that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir.), *cert. denied*, 507 U.S. 1017 (1993). *See also, e.g., Filartiga v. Pena-Irala*, 630

F.2d 876, 884 (2d Cir. 1980).[26] We thus determined that Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the highest standards of professional conduct.

II. FACTS

A. Subject and Witness Backgrounds

The first AAG for the OLC under the Bush administration was Jay Bybee, who was not sworn in until November 2001. Bybee graduated from the J. Reuben Clark Law School, Brigham Young University, in 1980. He worked as a Department attorney early in his career, first at the Office of Legal Policy (1984-1986), and then in the Civil Division (1986-1989). From 1989 to 1991, he was Associate Counsel to the President in the White House Counsel's Office. From 1991 to 1998, he was a professor at the Paul M. Hebert Law Center, Louisiana State University, and then at the William S. Boyd School of Law, University of Nevada from 1999 to 2000.

Bybee was nominated by President Bush for a position as federal judge on the United States Court of Appeals for the Ninth Circuit on May 22, 2002. He was confirmed on March 13, 2003, and he resigned from the Department on March 28, 2003.

John Yoo joined the OLC as a Deputy AAG in the Summer of 2001. He had graduated from Yale Law School in 1992 and then clerked for Judge Laurence H. Silberman, U.S. Court of Appeals for the D.C. Circuit. Yoo joined the faculty of the University of California Berkeley School of Law in 1993. He later took a leave of absence from Berkeley to clerk for U.S. Supreme Court Justice Clarence Thomas. He served as general counsel of the U.S. Senate Judiciary Committee from 1995-1996, then continued to teach at Berkeley until joining OLC.

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[26] *Jus cogens* refers to principles of international law so fundamental that no nation may ignore them. Other *jus cogens* norms include the prohibitions against slavery, murder, genocide, prolonged arbitrary detention, and systematic racial discrimination. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 702 (1987).

At the time of the September 11, 2001 terrorist attacks, Yoo was the resident expert in the OLC on foreign policy and national security issues. Yoo wrote in his book, *War By Other Means*:

> Among scholars, I was probably best known for my work on the historical understanding of the Constitution's war powers, and I had written a number of articles on the relationship between presidential
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> and legislative powers over foreign affairs. . . . I was one of the few appointed Justice Department officials whose business was national security and foreign affairs.

John C. Yoo, *War By Other Means: An Insider's Account of the War on Terror* 20 (Atlantic Monthly Press 2006).

After September 11, 2001, Yoo authored a number of OLC opinions dealing with terrorism and presidential power. One of the first was dated September 25, 2001, and was entitled "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them." In the opinion, signed by Yoo, he asserted that no law "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make." In that same time period, Yoo authored a memorandum on the legality of a program of warrantless electronic surveillance by the National Security Agency (NSA) and a memorandum on the applicability of the Geneva Convention to al Qaeda and Taliban detainees.[27]

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[27] The latter memorandum, which was signed by Bybee, concluded that Common Article Three of the Geneva Conventions did not apply to al Qaeda or Taliban detainees. In a February 2002 memorandum, President Bush issued a formal decision that Common Article Three did not apply to the armed conflict with al Qaeda. These findings were subsequently rejected by the U.S. Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (overturning the opinion of the United States Court of Appeals for the D.C. Circuit by a 5-4 vote).

Yoo resigned from the Department in late May 2003 and returned to his tenured position at Berkeley.

Patrick F. Philbin graduated from Harvard Law School in 1992. He clerked for Supreme Court Justice Clarence Thomas from 1993 to 1994. Philbin was an associate at the law firm of Kirkland & Ellis for several years before joining the Department. In September 2001, he became a Deputy AAG in OLC. In June 2003, he became an Associate Deputy Attorney General in the Office of the Deputy Attorney General. He resigned from the Department in 2005 and returned as a partner to Kirlkand & Ellis.

[redacted]

Jack Goldsmith, III, is a 1989 graduate of Yale Law School. In 1991, he received a graduate degree from Oxford University, and from 1992 to 1994 he worked as an associate at the Washington, D.C. office of Covington & Burling. He became an Associate Professor at the University of Virginia School of Law in 1994, and a Professor at the University of Chicago School of Law in 1997. From September 2002 until July 2003 he worked at the Defense Department, assisting General Counsel Haynes on international law issues. In July 2003 he was asked to take the position of AAG at OLC, and he began working at the Department on October 6, 2003. Goldsmith resigned from the Department on July 17, 2004. He is currently a tenured Professor of Law at Harvard Law School.

Daniel Levin served as the Acting AAG for OLC from June 2004, until he resigned from the Department in February 2005. Prior to serving as Acting AAG, Levin held a number of high-level positions in the Department, including Chief of

Staff to the Director of the FBI (2001-2002), and Counselor to the Attorney General (2002, 2003-2004). Levin became Senior Associate Counsel to the President and Legal Adviser to the National Security Council in 2005. He is currently a partner at the law firm of White & Case.

After Levin's departure from OLC, Steven G. Bradbury, the Principal Deputy AAG under Goldsmith, became the Acting AAG and was nominated by the White House for the position of AAG of OLC on June 23, 2005. Bradbury graduated from the University of Michigan Law School in 1988. He was an Attorney Advisor at OLC from 1991-1992, and served as a law clerk for Supreme Court Justice Clarence Thomas from 1992-1993. Bradbury was at Kirkland & Ellis from 1993 to 2004, first as an associate and then as a partner. In April 2004, Bradbury was hired by Goldsmith to serve as his Principal Deputy AAG.

Bradbury's nomination to be AAG expired without action by the Senate. Bradbury continued to act as head of OLC under the title of Principal Deputy AAG. He was renominated by President Bush in January 2007 and January 2008, but he was not confirmed.

Prior to the current administration taking office, the OLC either withdrew or cautioned against reliance on a number of Yoo's and Bybee's opinions. In addition to the withdrawal of the Bybee and Yoo Memos, the memorandum authored by Yoo relating to warrantless electronic surveillance by the NSA was withdrawn by Goldsmith. Bradbury later cautioned against reliance on seven additional memoranda. On October 6, 2008, Bradbury wrote a memorandum "advising that caution should be exercised before relying in any respect" on the October 23, 2001 Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States*. Bradbury found that the memorandum was "the product of an extraordinary – indeed, we hope, a unique – period in the history of the Nation: the immediate aftermath of the attacks of 9/11." However,

it found that the memorandum's treatment of several legal issues was "either incorrect or highly questionable."[28]

On January 15, 2009, Bradbury issued another memorandum, identifying certain propositions in several OLC memoranda authored after September 11, 2001, and stating that they did not "reflect the current views" of the OLC.[29] Bradbury stated that some of the OLC opinions – including the previously withdrawn Bybee and Yoo Memos and three additional opinions authored by Bybee, Yoo, and Philbin, "advanced a broad assertion of the President's Commander-in-Chief power that would deny Congress any role in regulating the detention, interrogation, prosecution, and transfer of enemy combatants captured in the global War on Terror." Bradbury January 15, 2009 Memo at 2.

Bradbury also withdrew a Yoo memorandum which "relied on a doubtful interpretation of the Foreign Intelligence Surveillance Act (FISA)," and confirmed that two other opinions – one by Bybee and one by Yoo – that dealt with the President's authority to suspend treaties had been withdrawn. *Id.* at 6-8. Finally, Bradbury withdrew another memorandum by Yoo, noting that the memorandum's assertion that "national self-defense" was a justification for warrantless searches "inappropriately conflate[d] the Fourth Amendment analysis for government searches with that for the use of deadly force." *Id.* at 10.

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[28] Bradbury October 6, 2008 Memo at 1. These included Yoo's findings in the memorandum that: (1) the Fourth Amendment would not apply to domestic military operations designed to deter and prevent further terrorist attacks; (2) "broad statements" suggesting that First Amendment speech and press rights under the Constitutionally would potentially be subordinated to overriding military necessities; and (3) that domestic deployment of the Armed Forces by the President to prevent and deter terrorism would fundamentally serve a military purpose rather than law enforcement purpose and thus would not violate the Posse Comitatus Act. These and other positions taken in the memorandum were disavowed by Bradbury.

[29] Bradbury January 15, 2009 Memo at 1. Bradbury noted that his memorandum on the previous OLC opinions was not "intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility."

Bradbury resigned from the Department in January 2009. He is currently a partner at Dechert, LLP.

B. The Bybee Memo and the Classified Bybee Memo (August 1, 2002)

1. The CIA Interrogation Program

[redacted]

CIA Acting General Counsel John Rizzo told us that the term "interrogation" has traditionally been used by the CIA to describe active, aggressive questioning designed to elicit information from an uncooperative or hostile subject, as opposed to "debriefing," which involves questioning the subject in a non-confrontational way. Rizzo told us that throughout most of its history the CIA did not detain subjects or conduct interrogations. Prior to the September 11, 2001 terrorist attacks, CIA personnel debriefed sources [redacted] but the agency was not authorized to

detain or interrogate individuals and, therefore, had no institutional experience or expertise in that area.[30]

[redacted]

The CIA also provided us with a copy of an undated, unsigned, ten-page memorandum titled "United Nations Convention Against Torture and Other Cruel,

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30 *But see* Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (Henry Holt & Co. 2006) (describing the CIA's role in sponsoring and conducting research into coercive interrogation techniques in the decades following World War II, and its propagation of such techniques overseas during the Cold War era).

Inhumane, or Degrading Treatment." The memorandum discussed the CAT definition of torture, the ratification history of the CAT, United States reservations to the treaty, interrogation-related case law from foreign jurisdictions, and a discussion of cruel and unusual punishment under the Eighth Amendment.[31]

The interrogation of suspected terrorists overseas was initially conducted jointly by CIA operational personnel and FBI agents. The FBI used traditional "rapport building" interrogation techniques that were consistent with United States criminal investigations. The CIA operatives soon became convinced, however, that conventional interrogation methods and prison conditions were inadequate to deal with hardened terrorists and that more aggressive techniques would have to be developed and applied. CIA leadership agreed, and began exploring the possibility of developing "Enhanced Interrogation Techniques," or EITs.

The issue of how to approach interrogations reportedly came to a head after the capture of a senior al Qaeda leader, Abu Zubaydah, during a raid in Faisalabad, Pakistan in late March 2002. Abu Zubaydah was transported to a "black site," a secret CIA prison facility [redacted] where he was treated for gunshot wounds he suffered during his capture.

According to a May 2008 report by the Department of Justice Office of the Inspector General and other sources, the FBI and the CIA planned to work together on the Abu Zubaydah interrogation, although the FBI acknowledged that

[redacted]

the CIA was in charge of the interrogation and that the FBI was there to provide assistance.[32] Because the CIA interrogators were not yet at the site when the FBI agents arrived, two experienced FBI interrogators began using "relationship building" or "rapport building" techniques on Abu Zubaydah. During this initial period, the FBI was able to learn his true identity, and got him to identify a photograph of another important al Qaeda leader, Khalid Sheikh Muhammad, as "Muktar," the planner of the September 11, 2001 attacks.

When the CIA personnel arrived, they took control of the interrogation. The CIA interrogators were reportedly unhappy with the quality of information being provided, and told the FBI interrogators that they needed to use more aggressive techniques. The FBI believed that its traditional interrogation techniques were achieving good results and should be continued. However, the CIA interrogators were convinced that Abu Zubaydah was withholding information and that harsh techniques were the only way to elicit further information. According to an FBI interrogator quoted in the DOJ OIG Report, the CIA began using techniques that were "borderline torture," and Abu Zubaydah, who had been responding to the FBI approach, became uncooperative. According to one of the FBI interrogators, CIA personnel told him that the harsh techniques had been approved "at the highest levels."

According to the DOJ OIG Report, the FBI interrogators reported these developments to FBI headquarters and were instructed not to participate in the CIA interrogations and to return to the United States. One of them left the black site in late May 2002, and the other left in early June 2002.[33]

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32 The DOJ Inspector General's Report, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* (the DOJ OIG Report), focuses on the FBI's role in military interrogations at Guantanamo and elsewhere but also discusses the CIA's handling of Abu Zubaydah.

33 Although CIA and DOJ witnesses told us that the CIA was waiting for DOJ approval before initiating the use of EITs, the DOJ OIG Report indicates that such techniques may have been used on Abu Zubaydah before the CIA received oral or written approval from OLC.

The CIA's perception that a more aggressive approach to interrogation was needed accelerated the ongoing development by the CIA of a formal set of EITs by CIA contractor/psychologists, some of whom had been involved in the United States military's Survival, Evasion, Resistance, and Escape (SERE) training program for military personnel.

SERE training was developed after the Korean War to train pilots to withstand the type of treatment they could expect to receive at the hands of the enemy during wartime. The SERE program placed trainees in a mock prisoner of war camp and subjected them to degrading and abusive treatment, similar to, but less intense than, actual conditions experienced by United States troops in the past. Its purpose was to prepare trainees for the demands they may face as prisoners of war and to improve their ability to resist harsh treatment. Aggressive interrogation techniques used in SERE training were based on techniques used by the German, Japanese, Korean, Chinese, and North Vietnamese military in past conflicts. They included slapping, shaking, stress positions, isolation, forced nudity, body cavity searches, sleep deprivation, exposure to extreme heat or cold, confinement in cramped spaces, dietary manipulation, and waterboarding.

However, according to a May 7, 2002 SERE training manual, "Pre-Academic Laboratory (PREAL) Operating Instructions" (PREAL Manual), the SERE training program differed in one significant respect from real-world conditions. The PREAL Manual noted that:

> Maximum effort will be made to ensure that students do not develop a sense of "learned helplessness" during the pre-academic laboratory.
>
> * * *
>
> The goal is not to push the student beyond his means to resist or to learn (to prevent "Learned Helplessness"). The interrogator must recognize when a student is overly frustrated and doing a poor job resisting. At this point the interrogator must temporarily back off,

and will coordinate with and ensure that the student is monitored by a controller or coordinator.

PREAL Manual, ¶¶ 1.6 and 5.3.1.[34]

The CIA psychologists eventually proposed the following twelve EITs to be used in the interrogation of Abu Zubaydah:

(1) **Attention grasp:** The interrogator grasps the subject with both hands, with one hand on each side of the collar opening, in a controlled and quick motion, and draws the subject toward the interrogator;

(2) **Walling:** The subject is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash;

(3) **Facial hold:** The interrogator holds the subject's head immobile by placing an open palm on either side of the subject's face, keeping fingertips well away from the eyes;

(4) **Facial or insult slap:** With fingers slightly spread apart, the interrogator's hand makes contact with the area between the tip of the subject's chin and the bottom of the corresponding earlobe;

(5) **Cramped confinement:** The subject is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space up to 18 hours;

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[34] OLC's files included a copy of the PREAL Manual but no indication of how or when it was obtained.

(6) **Insects:** A harmless insect is placed in the confinement box with the detainee;

(7) **Wall standing:** The subject may stand about 4 to 5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The subject is not allowed to reposition his hands or feet;

(8) **Stress positions:** These positions may include having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45 degree angle;

(9) **Sleep deprivation:** The subject is prevented from sleeping, not to exceed 11 days at a time;[35]

(10) **Use of Diapers:** The subject is forced to wear adult diapers and is denied access to toilet facilities for an extended period, in order to humiliate him;

(11) **Waterboard:** The subject is restrained on a bench with his feet elevated above his head. His head is immobilized and an interrogator places a cloth over his mouth and nose while pouring water onto the cloth. Airflow is restricted for 20 to 40 seconds; the technique produces the sensation of drowning and suffocation;

(12) [redacted]

35 As initially proposed, sleep deprivation was to be induced by shackling the subject in a standing position, with his feet chained to a ring in the floor and his arms attached to a bar at head level, with very little room for movement.

[redacted]

According to Rizzo, CIA personnel were concerned that they might face criminal liability for employing some of the EITs. [redacted] concluded that most of the proposed techniques were lawful, they had not made a determination with respect to waterboarding [redacted] and recommended asking the Department's Office of Legal Counsel for guidance on the legality of all the proposed techniques.[36] [redacted]

Bellinger told us that he received a telephone call from CIA attorneys in the Spring of 2002 informing him that Abu Zubaydah had been captured and the CIA wanted to use an aggressive interrogation plan to question him. Bellinger said the CIA wanted a Department of Justice criminal declination in advance of the interrogation because of concerns about the application of criminal laws, in particular the torture statute, to their actions. Bellinger said that he arranged a meeting between Department attorneys Yoo and Chertoff and the CIA, and that he thought the CIA attorneys may have even brought a draft declination

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36 Rizzo told us that, although he thought use of the EITs would not violate the torture statute, he recognized that some of the techniques were aggressive, and could be "close to the line at a minimum." When he raised the question with OLC, he considered the legality of EITs to be an open question.

memorandum to the meeting. However, Rizzo disputed that the CIA had ever drafted a proposed declination memorandum.

According to Yoo, Bellinger told him during their initial telephone conversation that access to information about the program was extremely restricted and that the State Department should not be informed.[37] [redacted]

[redacted] Yoo recalled telling Bellinger that he would have to report on the matter to Attorney General Ashcroft and the AG's Counselor, Adam Ciongoli, and that additional OLC attorneys would be needed to work on it.

[redacted]

37 [redacted] Bybee stated that he had no recollection of being told that the draft was not to be distributed to the State Department. [redacted]

38 [redacted]

Bellinger added that, by the Spring of 2002, he had confrontations with John Yoo over the OLC's failure to include him, as the NSC Legal Adviser, in OLC opinions that affected national security and that, in some cases, he was not even aware that OLC opinions had been issued on important legal issues.

[redacted] Bellinger concluded that Yoo was "under pretty significant pressure to come up with an answer that would justify [the program]" and that, over time, there was significant pressure on the Department to conclude that the program was legal and could be continued, even after changes in the law in 2005 and 2006.

Shortly after Yoo's conversation with Bellinger, Yoo contacted Ciongoli and arranged to brief him and Attorney General Ashcroft. According to Yoo, he told them that the CIA and NSC had asked OLC to explain "the meaning of the torture statute." He believed he would have told them that the issue had been raised by the capture of Abu Zubaydah, and that the CIA wanted to know what limits the torture statute placed on his interrogation. Yoo also recalled consulting the Attorney General about who else in the Department should know about the project. At that point, the Attorney General decided that access would be limited to AG Ashcroft, Ciongoli, DAG Larry Thompson, AAG Bybee, Yoo, and OLC Deputy AAG Patrick Philbin.[39]

Yoo told us that shortly after his conversation with Ashcroft, he met with AAG Bybee and Deputy AAG Philbin to tell them about the assignment and to determine which OLC line attorney should work on the project with him.[40] According to Yoo, they agreed that [redacted] was the best choice, probably because she had recently joined OLC and therefore had some time available. Philbin was the "second Deputy" on the project.[41]

Email records indicate that the matter was recorded on an OLC log sheet on April 11, 2002, with [redacted] and Yoo designated as the assigned attorneys.

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39 Ciongoli's recollection of the meeting with AG Ashcroft and Yoo is generally consistent with that of Yoo, although Ciongoli did not recall any discussion with Yoo or the Attorney General about who would be granted access to information about the project.

40 Neither Bybee nor Philbin have any specific memory of this meeting. Bybee told OPR that he is not sure when he first learned about the project, and suggested that Yoo may have selected the line attorney without consulting him.

41 As a matter of OLC practice, a second Deputy AAG reviews every OLC opinion before it is finalized. This is referred to as the "second Deputy review."

The log sheet listed "John Rizzo Central Intelligence Agency" as the client. Yoo provided [redacted] with the research he had already done and made a few suggestions about where she should start. He instructed her to determine whether anyone had ever been prosecuted under the torture statute, to check the applicable statute of limitations, and to determine what types of conduct had been held to constitute torture under the Torture Victim Protection Act (TVPA)[42] and the Alien Tort Claims Act. He also asked her to look at two foreign cases that discussed interrogation techniques and torture.[43] [redacted] sent Yoo a four-page summary of her research on April 15, 2002, and they met that afternoon to discuss it in advance of the NSC meeting that was scheduled for the following day.

[redacted]

[42] As discussed more fully below, the TVPA's definition of torture is similar to that of the torture statute.

[43] Those cases were *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (*Ireland v. United Kingdom*) and a decision of the Supreme Court of Israel, *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999) (*PCATI v. Israel*).

[44] Most of the witnesses we asked about meetings on interrogation issues had only general recollections of the dates and attendees. To our knowledge, the DOJ participants did not take notes or prepare written summaries relating to any of the meetings. Our factual summary is therefore based on the witnesses' recollections, occasionally substantiated by contemporaneous email messages or calendar entries, and in some instances by a post-meeting Memorandum for the Record (MFR) prepared by the CIA attendees. Although we have summarized the CIA MFRs to describe what may have occurred, we recognize that those reports reflect the author's view of the proceedings. [redacted]

[redacted]

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45 The MFR did not name or cite those cases, but the reference was clearly to the two cases referenced above – *Ireland v. United Kingdom* and *PCATI v. Israel*. The CIA attorneys and Yoo reportedly discussed the cases and their descriptions of specific EITs used by the British and Israeli military and intelligence services.

[redacted]

46 OLC reported its conclusion regarding Common Article Three in a Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (January 22, 2002). As noted earlier, that view of the law was subsequently rejected in a five-to-four decision by the U.S. Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[redacted]

2. Drafting the Bybee Memo

After the meeting, [redacted] and Yoo began drafting what would eventually become the Bybee Memo.[47] Working together, they produced at least four drafts before reporting back to the CIA and NSC in July 2002. Their normal practice was for [redacted] to prepare a draft that incorporated whatever comments or direction Yoo had provided. Yoo would then review [redacted] work and provide additional comments by email, usually within a few days. They also met from time to time to discuss the project.[48]

Yoo told us that he did not feel time pressure to complete the memoranda. He said the time between the original request and the issuance of the opinions was "fairly lengthy," although not by OLC opinion standards, as the office sometimes "takes years" to issue opinions. Yoo said there was some time pressure towards the end because the decision to prepare the classified memorandum (addressing specific techniques as opposed to general advice) was made "late in the game."

From the outset, the drafts took the position that the torture statute's definition of torture applied only to extreme conduct, and that lesser conduct, which might constitute "cruel, inhuman or degrading" treatment, did not rise to the level of torture. Yoo and [redacted] supported this position through analysis of the text and legislative history of the torture statute, the text and ratification history of the CAT, case law relating to the TVPA, and the Israeli and European Court of Human Rights (ECHR) cases mentioned above. As the drafts progressed, they emphasized this point more strongly.

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47 On April 24, 2002, [redacted] complained to a friend by email about the long hours she was working, and stated, "I have a number of large projects with different people. I would have said no but it didn't seem like that was an option here." [redacted] told her friend that she liked the work she was doing but wanted "enough time to do a good job on it" and complained that she was working twelve hour days without breaks. However, in her OPR interview, [redacted] denied that she was overworked or that she had insufficient time to devote to her projects.

48 The first draft, dated April 30, 2002, was followed by drafts dated May 17, 2002, June 26, 2002, and July 8, 2002. The July 8, 2002 draft appears to be the first draft that was distributed outside OLC for comment.

For example, in the first draft, [redacted] noted that in order to constitute physical torture under the statute, conduct must result in the infliction of "severe pain" and cited two dictionary definitions of "severe," suggesting that the degree of pain must be intense and difficult to endure. The torture statute's legislative history, the text and ratification history of the CAT, the statements of fact in several cases applying the TVPA, and the two international cases mentioned above were also cited to support the conclusion that torture was "extreme conduct" that went beyond cruel, inhuman, or degrading treatment.

In his comments of May 23, 2002, Yoo responded to the above definition of "severe" by asking [redacted] "[I]s severe used in this way in other parts of the US Code?"[49] In the next draft, dated June 26, 2002, [redacted] cited several essentially identical health care benefits statutes, which listed symptoms that would lead a reasonable person to conclude that someone was suffering an "emergency medical condition." The term "severe pain" was not defined in the health care statutes, but was listed as a possible indicator that a person was experiencing an emergency medical condition.

That draft included the statement that these health care benefits statutes "suggest that 'severe pain,' as used in [the torture statute] must rise to . . . the level that indicates that death, organ failure, or serious impairment of body functions will reasonably result . . . ." Bybee June 26, 2002 draft memo at 2. This proposition was summarized in the conclusion section of the draft as follows: "Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it is likely to be accompanied by serious physical injury, such as damage to one's organs or broken bones." *Id.* at 23. In his comments to the statement in this draft that "Congress's use of 'severe pain' elsewhere in the United States Code can shed more light on its meaning, Yoo wrote "[cite and quote S.Ct. case for this proposition]." *Id.* at 2.

On July 10, 2002, Yoo told [redacted] by email, "We're going over to visit with the NSC at 10:45 on Friday [July 12, 2002] [redacted] and give them at that time our draft of the opinion to comment on." The subject line of

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[49] Yoo also suggested that they "discuss in the text a few of what we consider the leading [TVPA] cases from the appendix to demonstrate how high the bar is to meet the definition of torture."

Yoo's email was "bad things opinion." [redacted] responded by sending Yoo a copy of a draft dated July 8, 2002, with the comment, "I like the opinion's new title." She also stated:

> I'm a little concerned about the use of the phrase "life threatening."[50] Did you mean for that [to] apply beyond the physical pain context? As drafted, I think it suggests that mental pain would somehow have to rise to that level as well. While I think that's a wholly legitimate characterization with respect to physical pain, I'm a little concerned that it suggests that the bar is perhaps higher than it is for mental pain or suffering. Of course, I could be reading far too much into it. I just don't want to give anyone the wrong idea.

On July 11, 2002, [redacted] provided a copy of the draft opinion to OLC paralegal [redacted] for cite checking, and two meetings were scheduled – one with White House Counsel on Friday, July 12, 2002, and one with AAG Chertoff, the FBI, CIA, and NSC on Saturday, July 13, 2002. From emails, it appears that [redacted] and Yoo had a briefing session with AAG Chertoff on July 11, 2002. A few minor changes and cite-checking corrections were made to the memorandum prior to the meeting at the White House, and a new draft dated July 12, 2002 was produced by Yoo and [redacted]

The July 12, 2002 draft was addressed to John Rizzo as Acting General Counsel for the CIA, and was divided into four parts:

> (1) an examination of the text and history of the statute, which concluded that (a) for physical pain to amount to torture, it "must be of such intensity that it is likely to be accompanied by serious physical injury, such as organ failure, impairment of bodily function, or even death" and (b) for mental pain or suffering to constitute torture, "it must result in psychological harm of significant duration, e.g., lasting for months or even years"; Bybee July 12, 2002 draft memo at 1.

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50 The July 8, 2002 draft concluded its discussion of the TVPA by stating that the case law shows that "only acts of an extreme, life-threatening nature rise to the level [of] torture." "Life-threatening" was removed from the next draft.

(2) an examination of the text, ratification history, and negotiating history of the CAT, which concluded that the treaty "prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for cruel, inhuman, or degrading treatment"; *Id.*

(3) analysis of case law under the TVPA, concluding that "these cases demonstrate that most often torture involves cruel and extreme physical pain, such as the forcible extraction of teeth or tying upside down and beating"; *Id.* at 2.

(4) examination of the Israeli Supreme Court and ECHR decisions mentioned above, concluding that the cases "make clear that while many of these techniques [such as sensory deprivation, hooding and continuous loud noises] may amount to cruel, inhuman and degrading treatment, they simply lack the requisite intensity and cruelty to be called torture . . . . Thus, [the two cases] appear to permit, under international law, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist." *Id.* at 26-27.

On Friday morning, July 12, 2002, Yoo told [redacted] by email, "Let's plan on going over [to the White House] at 3:30 to see some other folks about the bad things opinion. Please stamp draft on it and make two copies (and one for me and you, of course)." Yoo and [redacted] met Gonzales at the White House Counsel's Office later that day. It is likely that either Deputy White House Counsel Tim Flanigan or Counsel to the Vice President David Addington was present, but [redacted] and Yoo were not certain who else attended this meeting. [redacted] orally summarized the memorandum's conclusions for the group and they gave Gonzales and the other attendee a copy of the memorandum for review. According to Yoo, none of the attendees provided any feedback or comments at this meeting.

[redacted]

[redacted] In his OPR interview, Chertoff stated that he told the group that in his view, it would not be possible for the Department to provide an advance declination. Rizzo confirmed, in his interview, that Chertoff flatly refused to provide any form of advance declination to the CIA. Although Bybee was not present at this meeting, he told us that he was aware that "there was some discussion with the criminal division over the question of providing advance immunity. . . . [and that it] was not their practice, to provide that kind of advance [sic]."

According to several sources, Levin stated that the FBI would not conduct or participate in any interrogations employing EITs, whether or not they were found to be legal, and that the FBI would not participate in any further discussions on the subject. [redacted]

[redacted]

[redacted]

After the meeting, at Rizzo's request, Yoo drafted a two-page letter to Rizzo setting forth the elements of the torture statute and discussing the specific intent required to establish infliction of severe mental pain or suffering. The specific intent discussion read as follows:

> Specific intent can be negated by a showing of good faith. Thus, if an individual undertook any of the predicate acts for severe mental pain or suffering, but did so in the good faith belief that those acts would not cause the prisoner prolonged mental harm, he would not have acted with the specific intent necessary to establish torture. If, for example, efforts were made to determine what long-term impact, if any, specific conduct would have and it was learned that the conduct would not result in prolonged mental harm, any actions undertaken relying on that advice would have be [sic] undertaken in good faith. Due diligence to meet this standard might include such actions as surveying professional literature, consulting with experts, or evidence gained from past experience.

The letter, dated July 13, 2002, appears to have been sent to Rizzo by secure fax on July 15, 2002.

Some time between July 13, 2002 and July 16, 2002, Chertoff asked Yoo to draft a letter to the CIA stating that the Department does not issue pre-activity declination letters. On July 16, 2002, Yoo told [redacted] to prepare a draft, and on July 17, 2002, after consulting with Chertoff, Criminal Division Deputy AAG Alice Fisher, and other OLC attorneys, [redacted] sent Yoo a one-page draft of a letter from Yoo to Rizzo, which included the following statement:

> You have inquired as to whether the Department of Justice issues letters declining to prosecute future activity that might violate federal law. . . . It is our understanding, . . . after consultation with the Criminal Division, that the Department does not issue letters of

declination for future conduct that might violate federal law. We have found no authority for issuing a letter for such conduct.

The letter was reviewed and approved by OLC and the Criminal Division on July 17 and 18, 2002, but the Department does not have any record of it being sent to the CIA. John Rizzo told us he does not believe he ever received it, although he stated after reviewing the document that it is consistent with his understanding of the Department's position.

Yoo told us that he provided regular briefings about the draft memorandum to Attorney General Ashcroft and Adam Ciongoli, and remembered mentioning to Ashcroft that the CIA had requested some sort of advance assurance that CIA officers would not be prosecuted for using EITs.[52] According to Yoo, Ashcroft was sympathetic to the request, and asked Yoo if it would be possible to issue "advance pardons." Yoo replied that it was not, and told Ashcroft that Chertoff had rejected the CIA request. Ciongoli told us that he remembered Yoo telling him at some point that the CIA had requested an advance declination of prosecution and that the request had been denied, but did not recall if Ashcroft was present at the time. He also remembered that the concept of an "advance pardon" was discussed as the Bybee Memo was being finalized, but stated that Ashcroft was not present at that time.

On July 15, 2002, Yoo sent the following email message [redacted]

> One other thing to include in the op: a footnote saying that we do not address, because not asked, about defenses, such as necessity or self defense, or the separation of powers argument that the law would not apply to the exercise of the commander in chief power.

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[52] Bybee told us that he remembered attending one meeting with Ashcroft and Yoo about the interrogation memorandum, but did not recall if anyone from the Attorney General's staff was present. Bybee and Yoo told Ashcroft that OLC was preparing a sensitive memorandum for the White House interpreting the torture statute. According to Bybee, Ashcroft did not ask to review the memorandum, and Bybee did not recall if he said anything about immunity or advance pardons. Bybee did remember the Attorney General expressing regret that it was necessary to answer such questions but acknowledging that it was necessary to do so.

The next day, Tuesday, July 16, 2002, Yoo and [redacted] met once again with Gonzales (and possibly Addington and Flanigan) at the White House. Yoo provided a copy of his July 13, 2002 letter to Rizzo on the elements of the torture statute and specific intent. Gonzales, Yoo, and [redacted] all told OPR that they had no specific recollection of what was discussed at this meeting.

Following the meeting, [redacted] and Yoo began working on two new sections to the memo: (1) a discussion of how the Commander-in-Chief power affected enforcement of the torture statute; and (2) possible defenses to violations of the statute. On July 17, 2002, [redacted] drafted a document she captioned "Defenses to a charge of torture under Section 2340," in which she outlined possible defenses to violations of the torture statute.

[redacted] told us that Yoo had asked her to begin working on a section on possible defenses, and that the notes reflect her preliminary research.[53] She added that, to her knowledge, the new section was not added in response to any request from the White House, NSC, or CIA, or to address any concerns raised by them. At about the same time, Yoo told her they were adding a section on the impact of the Commander-in-Chief power on the enforceability of the statute. [redacted] stated that she believed both sections were added to "give the full scope of advice" to the client. [redacted] also told us that she thinks she ended up writing the Commander-in-Chief section, with "a lot of input" from Yoo and Philbin, and that Yoo wrote the section on defenses.[54]

Yoo told OPR that he was "pretty sure" that the two sections were added because he, Bybee, and Philbin "thought there was a missing element to the opinion." He stated that he remembered the three of them talking about the

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[53] In her notes, [redacted] raised several problems with the defenses, including the comment that self defense "seems to me wholly implausible" because of the requirement that threatened harm be imminent. In her interview with OPR, Koester told us that she ultimately resolved all of her problems with the defenses and concluded that the defenses were applicable to the torture statute.

[54] According to Bradbury and Philbin, the Commander-in-Chief section of the report was similar to discussions in other OLC memoranda authored since September 11, 2001, relating to the war on terror. Philbin told OPR, however, that he believed the section in the Bybee Memo was "very aggressive" and "a step beyond things we had said [in prior memoranda]."

sections and whether to include them in the memorandum, and he believes that Bybee went back and forth on that question before the memorandum was finalized. Yoo acknowledged that the CIA may have indirectly suggested the new sections by asking him what would happen in a case where an interrogator went "over the line" and inadvertently violated the statute. Although he initially thought [redacted] may have worked on a draft of the two sections, when we showed him a copy of the first draft to include them, Yoo told us, "I think I wrote this. I don't think [redacted] wrote this. It's sort of written in my style. And it's all red-lined, which means I probably e-mailed it . . . to her and had her cut and paste it into the thing."

Philbin told us that he did not know why the two sections were added. As second deputy, he did not review any drafts until late in the process, and when he did, he told Yoo that he thought the sections were superfluous and should be removed. According to Philbin, Yoo responded, "They want it in there." Philbin did not know who "they" referred to and did not inquire; rather, he assumed that it was whoever had requested the opinion.

Bybee told us he did not recall why the two sections were in the memorandum and he did not remember discussing them with Yoo and Philbin, nor did he recall that Philbin raised any concerns about them. He did not remember seeing any drafts that did not contain the two sections. He told OPR, however, that criticism that the Commander-in-Chief and defenses sections were not necessary was "just flat wrong if the client requested the analysis." Bybee Response at 11.

Rizzo stated that the CIA did not request the addition of the two sections. Although he thought the Bybee Memo presented a very aggressive interpretation of the torture statute, he did not offer any specific objections to the analysis. From the agency's point of view, a broad, expansive view of permissible conduct was considered a positive thing.

Gonzales told us that he did not recall ever discussing the two sections, or how they came to be added to the Bybee Memo. He speculated that because David Addington had strong views on the Commander-in-Chief power, he may have played a role in developing that argument.

Addington appeared before the House Judiciary Committee on June 17, 2008, and testified that at some point, Yoo met with him and Gonzales in Gonzales's office and outlined the subjects he planned to discuss in the Bybee Memo. Those subjects included the constitutional authority of the President relative to the torture statute and possible defenses to the torture statute. Addington testified that he told Yoo, "Good, I'm glad you're addressing these issues."

With regard to why the two new sections were added to the draft Bybee Memo, we found it unlikely that Philbin and Bybee played a part in the decision, notwithstanding Yoo's recollection to the contrary. We noted that on July 15, 2002, Yoo told [redacted] by email that he did not intend to address possible defenses or the powers of the Commander-in-Chief in the memorandum, and that the day after their July 16, 2002 meeting with Gonzales (and possibly Addington and Flanigan), he and [redacted] began working on the two new sections. Although [redacted] at Chertoff's direction, drafted a letter from Yoo to Rizzo confirming that the Department would not provide an advance declination of prosecution, Yoo does not appear to have signed or transmitted the letter. In view of this sequence of events, we believe it is likely that the sections were added because some number of attendees at the July 16 meeting requested the additions, perhaps because the Criminal Division had refused to issue any advance declinations.

[redacted]

On July 22, 2002, Yoo sent an email to [redacted] asking him to explain how common law defenses were incorporated into federal criminal law.[55] [redacted] responded that he was "just

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55 Yoo's email reads as follows:

> I've got a work question for you. How are the common law defenses, such as necessity, self-defense, etc., incorporated into the federal criminal law? From what I can tell, there is no federal statute granting these defenses, yet federal courts recognize that they exist. Is there some Supreme Court case that requires or

headed out" but explained in a short email message, without citing any specific statutory or case law authority, that federal courts generally accept and recognize common law defenses.

On July 23, 2002, [redacted] asked paralegal [redacted] for assistance in obtaining additional dictionary definitions for "prolonged," "profound," and "disrupt." [redacted] also sent Yoo a new draft, dated July 23, 2002, noting in her email that she had incorporated the cite check, new material on specific intent, and Philbin's comments. This draft was the first to include sections on possible defenses and the Commander-in-Chief power. It also included a new discussion of specific intent as it related to the infliction of prolonged mental harm under the torture statute.[56] The memorandum was no longer addressed to John Rizzo, but rather to Gonzales. According to Rizzo, he would not have wanted an unclassified memorandum on interrogation techniques to be addressed to the CIA, because it would have confirmed the existence of the classified interrogation program.

On July 24, 2002, Yoo telephoned Rizzo and told him that the Attorney General had authorized him to say that the first six EITs (attention grasp, walling, facial hold, facial slap, cramped confinement, and wall standing) were lawful and that they could proceed to use them on Abu Zubaydah. [redacted] Rizzo reported that as for [redacted] more controversial techniques" [waterboarding [redacted] Yoo had told him that DOJ was waiting for more data from the CIA. [redacted]

Yoo told OPR that most of the techniques "did not even come close to the [legal] standard [of torture]," but that "waterboarding did." He told us during his

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mentions them?

[56] That discussion incorporated and expanded upon the language in Yoo's July 13, 2002 letter to Rizzo, including the letter's assertions that specific intent "can be negated by a showing of good faith," and "[d]ue diligence to meet this [good faith] standard might include such actions as surveying professional literature, consulting with experts, or evidence gained from past experience." July 13, 2002 letter from John Yoo to John Rizzo at 1.

interview: "I had actually thought that we prohibited waterboarding. I didn't recollect that we had actually said that you could do it." He added:

> [T]he waterboarding as it's described in that memo, is very different than the waterboarding that was described in the press. And so when I read the description in the press of what waterboarding is, I was like, oh, well, obviously that would be prohibited by the statute.

At some point thereafter, according to Rizzo [redacted] OLC told the CIA that approval for the remaining techniques would take longer if [redacted] were part of the EIT program. Rizzo remembered Yoo asking how important the technique was to the CIA, because it would "take longer" to complete the memorandum if it were included. [redacted]

[redacted]

On July 24, 2002, [redacted] sent an email to another OLC attorney, asking about the protocol for working on a classified laptop computer. This suggests that work on the Classified Bybee Memo began sometime thereafter.

Over the next few days, [redacted] sent [redacted] additional information relating to the proposed interrogation, including a psychological assessment of Abu Zubaydah and a report from CIA psychologists asserting that the use of harsh interrogation techniques in SERE training had resulted in no adverse long-term effects.

[redacted] also provided additional information about the proposed interrogation program to [redacted] On July 26, 2002, [redacted] sent [redacted] three memoranda the CIA had obtained from the Department of Defense Joint Personnel Recovery Agency (JPRA) and the United States Air Force. The memoranda, dated July 24 and July 25, 2002, were in response to requests for information from the DOD Office of General Counsel about SERE interrogation techniques. The two JPRA memoranda were in response to a request for information about interrogation techniques used against United States prisoners of war, and the techniques used on students in SERE training. The Air Force memorandum was from a psychologist who served in the Air Force's SERE training program. The memorandum discussed the psychological effects of SERE training, noting that the waterboard was 100% effective as an interrogation technique, and that the long-term psychological effects of its use were minimal.

[redacted]

Later that afternoon, [redacted] sent Yoo the following email message:

I got a message from [redacted] said the agency wants written approval rather than just oral approval. She said that this did not need to be in the form of a written opinion, but could be some sort of short letter that tells them that they have the go ahead.

Yoo and [redacted] continued working on the second, classified memorandum that evaluated the legality of the specific EITs. That evening, Yoo sent [redacted] the following email message:

> I talked to the white house. They would like the memos done as soon as possible. I think that means you should spend the time over the weekend completing memo no 2 [the classified memorandum on specific techniques], because memo 1 is pretty close and I could finish 1 on Monday.

In a July 26, 2002 email, Yoo asked [redacted] to "stop by and pick up [Philbin's] comments and input them . . . . You also have Mike Chertoff's comments, to input." Two days later, on July 28, 2002, Yoo sent [redacted] a new draft that he stated included "the Philbin, Gonzales and Chertoff comments."

On July 30, 2002, Yoo asked [redacted] by email, "[D]o we know if Boo boo is allergic to certain insects?" [redacted] responded, "No idea, but I'll check with [redacted]" Although there is no record of a reply by [redacted] the final version of the Classified Bybee Memo included the following statement: "Further, you have informed us that you are not aware that Zubaydah has any allergies to insects."

We did not find a record of Philbin's, Gonzales's or Chertoff's comments in OLC's files. Philbin told us that he generally noted his comments in writing on the draft and then discussed them either with Yoo or [redacted] Philbin told OPR he told Yoo that he "did not like the use of the medical benefits statute for construing 'severe pain.'" Philbin Response at 8. He said he thought the clinical terminology of the statute was "imprudent to use in this context," and that it did not provide "useful, concrete guidance concerning what amounts to 'severe pain.'" *Id.* Philbin said this was a practical concern and turned on the fact that there is no readily identifiable level of pain that precedes medical events such as organ failure.

Philbin said he also did not agree with part of the specific intent analysis. He was concerned that it could be read "to suggest that, if an interrogator caused someone severe pain, but did so with the intent of eliciting information, that would somehow eliminate the intent to cause severe pain." *Id.* Philbin said he communicated his concerns to Yoo, who then asked Chertoff to review the memorandum. Philbin recalled that Chertoff said that the memorandum "seemed

okay as a strict statement of the law, but that Chertoff would not want to have to rely on parsing intent that way to a jury." *Id.* Philbin said he still had concerns and did not want to rely on the specific intent analysis.

Philbin also recalled telling Yoo that he thought the discussion of the Commander-in-Chief power should be taken out of the memorandum because it was not necessary to the analysis. Philbin told Yoo he had concerns about the section because the argument was aggressive and went beyond what OLC had previously said about executive power but that it was not "plainly wrong" or indefensible. As noted above, Philbin recalled Yoo's response to his comments was, "they want it in there," which he took as a reference to "whoever had requested" the opinion.

Gonzales told us that, when he reviewed drafts from Yoo, he would typically write his comments on the draft and either give them directly to Yoo, or pass them along to other lawyers, such as Addington or Flanigan, who would forward them to Yoo along with their own comments. Gonzales stated that he has no recollection of reviewing a draft of the Bybee Memo, and that he does not recall if he had any comments. Gonzales commented, however, that Addington was "an active player" in providing his view and input on the draft memorandum. He stated: "I'd be very surprised in David [Addington] did not participate in the drafting of this document."

Yoo told us that he remembered showing Chertoff a draft of the Bybee Memo, and recalls sitting in Chertoff's office and "walking him through" the memorandum. According to Yoo, Chertoff read the memorandum carefully and they discussed it together. Yoo recalled that Chertoff was concerned that the memorandum could be interpreted as providing "blanket immunity."

Chertoff acknowledged that Yoo gave him a draft of the Bybee Memo at some point, and he read it and returned it to Yoo that same day. He remembered discussing the memorandum with Yoo, but said it was not a long or detailed discussion. Chertoff denied that Yoo "walked him through" the document.

Chertoff remembered making two comments about the Bybee Memo's discussion of specific intent. He prefaced those comments by telling Yoo that he had not checked the memorandum's legal research and that he assumed it was

correct. He then told Yoo that although the discussion of specific intent might be correct "in law school," he would not want to defend a case in front of a jury on that basis. He also reportedly emphasized the importance of conducting additional due diligence on the effect of the interrogation techniques. According to Chertoff, he told Yoo that the more investigation into the physical and mental consequences of the techniques they did, the more likely it would be that an interrogator could successfully assert that he acted in good faith and did not intend to inflict severe physical or mental pain or suffering.[57]

With respect to his comments on the Commander-in-Chief section of the Bybee Memo, Chertoff told us, "I think I said in substance that I'm not saying I disagree, but I'm not in a position to sign onto this." As for the discussion of common law defenses, Chertoff stated that he did not "look at it particularly closely."

We were unable to pinpoint exactly when Bybee became involved in the review process. Internal email suggests that he had discussed aspects of the memorandum with [redacted] by July 26, 2002, and Yoo's files included a draft dated July 31, 2002, titled "2340 (JSB Revisions)."[58] On the morning of July 31, 2002, [redacted] told Bybee by email that she had "a couple of questions" about his edits, and later that afternoon, she told Philbin and Bybee that she had left revised drafts in their offices.

Philbin said that Bybee was "very involved" in the review process and "went through multiple drafts," at one point "churning through three drafts with comments on them per day." He said Bybee "was so personally involved, he was kind of taking over." He added that Bybee was so "focused on this personally and making all the changes to the drafts" that he decided to "step out until the end."

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57 The draft that apparently incorporated Chertoff's comments (as well as those of Philbin and Gonzales) reflected some minor changes in the discussion of specific intent, but no major revisions.

58 Based on the revisions indicated by the document's "track changes" feature, we concluded that Bybee's changes to the June 31 draft were not extensive.

Bybee had a poor memory of the drafting process and provided little information about his role. He told us:

> Well, on this matter I reviewed the document from start to finish on more than one – more than one draft, and I reviewed it for logic. You asked whether I would read cases or read statutes. I would sometimes do that.

According to Rizzo, he never met Bybee or discussed the Bybee Memo with him, and "couldn't pick him out in a lineup."

Yoo told us that sometime around the end of July, he briefed Ashcroft and Ciongoli on the Bybee Memo.[59] According to Yoo, he provided Ciongoli and Ashcroft copies of the draft, but the Attorney General did not read it or provide any comments. Ciongoli told us, however, that he recalled a briefing at which Yoo provided a copy of the shorter, classified memorandum that discussed specific interrogation techniques. According to Ciongoli, Ashcroft read the classified memorandum and engaged Yoo in a vigorous discussion of the memorandum's legal reasoning. Ciongoli did not remember any specific questions or comments, but recalled that the Attorney General was ultimately satisfied with the opinion's reasoning and analysis. With respect to waterboarding, Ciongoli recalled that he and Ashcroft concluded that Yoo's position was aggressive, but defensible.

We found two drafts of the Classified Bybee Memo in OLC's files that appeared to include Bybee's handwritten comments in red ink.[60] The comments were all minor and did not materially change the substance of the final opinion. Apart from the revisions displayed in the "track change" feature of the July 31, 2002 draft, we found no record of Bybee's comments on the unclassified Bybee Memo.

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59 According to Yoo, he also briefed then DAG Larry Thompson about the memorandum at some point.

60 Bybee told us that he generally wrote his comments on drafts in red ink. The documents in question bear Bybee's initials on the top of the first pages, along with the date "8/1" and the times "11:00" and "4:45," respectively.

~~TS~~ [redacted] ~~NOFORN~~

[redacted]

Yoo may have provided a draft of the Classified Bybee Memo to the White House on July 31, 2002. In email correspondence on that date, Yoo told [redacted] that he would be leaving for the White House at 11:30 a.m. and asked her to get him "a print out of the classified opinion . . . with a copy to take to the White House." At 12:12 p.m., [redacted] sent Philbin the following email message: "John wanted me to let you know that the White House wants both memos signed and out by COB tomorrow."

[redacted]

[redacted]

~~TS~~ [redacted] ~~NOFORN~~

[redacted]

The Bybee Memo and the Classified Bybee Memo were finalized and signed on August 1, 2002. Ciongoli told us that sometime that day in the late afternoon, he was asked to come to Bybee's office. Bybee, Yoo, Philbin, and [redacted] were all present.[63] According to Ciongoli, Yoo and Bybee described the analysis and conclusions of the Bybee Memo, but he did not recall reading the opinion or giving any comments. Yoo confirmed that Ciongoli was in the room when Bybee signed the opinions, and stated that Ciongoli reviewed the last draft and continued to make edits until the last minute. [redacted] told us she remembers Ciongoli being in the room as they finalized the documents, and stated that he asked them to add language to the Classified Bybee Memo to make it clear that DOJ's approval was limited to the circumstances described in the memorandum, and that the CIA would have to seek DOJ approval if it changed or added EITs. The meeting ended with Bybee signing the opinion, sometime after 10:00 p.m. According to CIA records, the Classified Bybee Memo was faxed to the CIA at 10:30 p.m. on August 1, 2002.

Philbin told us that, at the end of the review process when the opinions were about to be signed, he still had misgivings about the wisdom of including the sections that discussed the Commander-in-Chief power and possible defenses, but

[redacted]

63 This was the first time Ciongoli had ever spoken to Bybee about the interrogation issue.

that he nevertheless advised Bybee that he could sign the opinion. During his OPR interview, Philbin explained his thought process at the time as follows:

> [W]hat matters is you're giving advice about whether or not those things can be done. The conclusion is that these things do not violate the statute. That advice is okay. You've got *dicta* in here about other theories that I think is not a good idea. But given the situation and the time pressures, and they are telling us this has to be signed tonight – this was like at 9 o'clock, 10 o'clock at night on the day it was signed – my conclusion is that's *dicta*. That's not what's supporting this conclusion. I wouldn't put it in there. But I think it is permissible, it's okay for you to sign it.

Philbin said he did not believe that defenses should have been included in the memorandum, and that the analysis should have been limited to what the CIA could do within the law. He said the defenses section "suggests that maybe there is something wrong. You're going to have to use the defenses."

Philbin said he told Yoo that he had concerns about the Commander-in-Chief discussion. He stated: "It was very aggressive. But we had been looking a lot at a Commander-in-Chief authority since the beginning of the war, and I had concerns about it because it was a step beyond things we had said." He told us he advised Yoo to delete the section.

Philbin said he told Bybee that he had concerns about the specific intent analysis, Commander-in-Chief section and the defenses. He told Bybee that the sections were unnecessary, but that he could sign the memoranda. Philbin said he so advised Bybee because he agreed that the ten specific practices approved in the Classified Bybee Memo were lawful, and the unnecessary portions of the Bybee Memo did not affect that conclusion. Philbin added that there was no reasonable basis to believe that the Bybee Memo would be used to justify any operational activity apart from the specific practices authorized in the Classified Bybee Memo.

Yoo defended the inclusion of the Commander-in-Chief section, stating that the section would have been unnecessary if they had been aware of the proposed interrogation techniques, but that they had not had this information until close

to the end. Yoo was asked to explain how the torture statute would interfere with the President's war making abilities, and gave the following answers:

> Q: I guess the question I'm raising is, does this particular law really affect the President's war-making abilities . . . .
>
> A: Yes, certainly.
>
> Q: What is your authority for that?
>
> A: Because this is an option that the President might use in war.
>
> Q: What about ordering a village of resistants to be massacred? . . . . Is that a power that the President could legally –
>
> A: Yeah. Although, let me say this. So, certainly that would fall within the Commander-in-Chief's power over tactical decisions.
>
> Q: To order a village of civilians to be [exterminated]?
>
> A: Sure.

Yoo added that, were he to have had the opportunity to rewrite the Bybee Memo, he would not have deleted the Commander-in-Chief sections or defenses because they were "important and relevant."

On the morning of August 2, 2002, [redacted] informed Yoo by email that the original memoranda were in the DOJ Command Center. Shortly before noon, Yoo emailed [redacted] instructions for delivering copies of the memoranda to the White House, CIA, the AG's office, and the DAG's office.[64] According to CIA records, the agency received a copy of the Bybee Memo by fax at approximately 4:00 p.m. that day.

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[64] In his email, Yoo stated that he would deliver copies of the memoranda to the White House and to "DoD." In another email, Yoo directed [redacted] to send "both memos" to DOD. In his OPR interview, however, Yoo stated that the Defense Department did not receive a copy of the Bybee Memo.

[redacted]

* * *

[redacted]

[redacted]

Four days later, [redacted] told Yoo in an email that she had spoken to [redacted] and that "a cable was sent out last week, following the issuance of the opinions." In his OPR interview, Yoo told us that this email referred "to the CIA then issuing the interrogation instructions to the field."

3. Key Conclusions of the Bybee Memo

The final version of the Bybee Memo made the following key conclusions regarding the torture statute:

1. In order to constitute a violation of the torture statute, the infliction of physical pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Based on the context of the language and dictionary definitions of "pain" and "suffering," severe physical suffering is not distinguishable from severe physical pain. Bybee Memo at 1.

2. The infliction of severe physical pain or severe mental pain or suffering must be "the defendant's precise objective." Even if a defendant knows that severe pain will result from his actions, he may lack specific intent if "causing such harm is not his objective, even though he does not act in good faith." However, a jury might conclude that the defendant acted with specific intent. A good faith belief that conduct would not violate the law negates specific intent. A good faith belief need not be reasonable, but the more unreasonable the belief, the less likely it would be that a jury would conclude that a defendant acted in good faith. *Id.* at 3-5.

3. The infliction of mental pain or suffering does not violate the torture statute unless it results in "significant psychological harm" that lasts "for months or even years . . . such as seen in mental disorders like posttraumatic stress disorder." A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had read professional literature, consulted experts, and relied on past experience to arrive at a good faith belief that his conduct would not result in prolonged mental harm. Such a good faith belief would constitute a complete defense to such a charge. *Id.* at 18, 46.

4. Almost all of the United States court decisions applying the TVPA have involved instances of physical torture, of an especially cruel and even sadistic nature. Thus, "the term 'torture' is reserved for acts of the most extreme nature." *Id.* at 24, 27.

5. "[B]oth the European Court on Human Rights and the Israeli Supreme Court have recognized a wide array of acts that constitute cruel, inhuman, or degrading treatment or punishment, but do not amount to torture. Thus, they appear to permit, under international law, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist." *Id.* at 31.

6. Prosecution of government interrogators under the torture statute "may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war." *Id.* at 2.

7. The common law defenses of necessity and self-defense "could provide justifications that would eliminate any criminal liability" for violations of the torture statute. *Id.* at 46.

4. Key Conclusions of the Classified Bybee Memo

1. The use of ten EITs – (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard – would not violate the torture statute. Classified Bybee Memo at 1-2.

2. All of the EITs, with the exception of the use of insects, have been used on military personnel in SERE training, and no prolonged mental harm has resulted. *Id.* at 4.

3. None of the EITs involves severe physical pain within the meaning of the statute. Some EITs involve no pain. Others may produce muscle fatigue, but not of the intensity to constitute "severe physical pain or suffering." Because "pain or suffering" is a single concept, the "waterboard, which inflicts no pain or actual harm whatsoever, does not . . . inflict 'severe pain or suffering." *Id.* at 10-11.

4. None of the EITs involves severe mental pain or suffering. The waterboard constitutes a threat of imminent death because it creates the sensation that the subject is drowning. However, based on the experience of SERE trainees, and "consultation with others with expertise in the field of

psychology and interrogation, [the CIA does] not anticipate that any prolonged mental harm would result from the use of the waterboard." *Id.* at 15.

5. Based on the information provided by the CIA, DOJ believes "that those carrying out these procedures would not have the specific intent to inflict severe physical pain or suffering" because (1) medical personnel will be present who can stop the interrogation if medically necessary; (2) the CIA is taking steps to ensure that the subject's wound is not worsened by the EITs; and (3) the EITs will contain precautions to prevent serious physical harm. *Id.* at 16.

6. The interrogators do not appear to have specific intent to cause severe mental pain or suffering because they have a good faith belief that the EITs will not cause prolonged mental harm. This belief is based on due diligence consisting of (1) consultation with mental health experts, who have advised the CIA that the subject has a healthy psychological profile; (2) information derived from SERE training; and (3) relevant literature on the subject. "Moreover, we think that this represents not only an honest belief but also a reasonable belief based on the information that you have supplied to us." *Id.* at 17-18.

5. The Yoo Letter (August 1, 2002)

In addition to the Bybee Memo and the Classified Bybee Memo, on August 1, 2002, Yoo signed a six-page unclassified letter, addressed to White House Counsel Gonzales, that discussed whether interrogation methods that did not violate the torture statute would: (1) violate United States obligations under the CAT; or (2) provide a basis for prosecution in the International Criminal Court (ICC) (the Yoo Letter). Yoo concluded that the United States' treaty obligations did not go beyond the requirements of the torture statute and that conduct which did not violate the torture statute could not be prosecuted in the ICC. The Yoo Letter is discussed in greater detail in the Analysis section of this report.

C. Military Interrogation, the March 14, 2003 Yoo Memo to DOD, and the DOD Working Group Report

1. Guantanamo and the Military's Interrogation of Detainees

In January 2002, Taliban and al Qaeda prisoners captured in the war in Afghanistan began arriving at the United States Naval Base at Guantanamo Bay, Cuba. By the end of the year, more than 600 men were reportedly held at the base. According to press accounts and declassified Defense Department documents, the questioning of these prisoners was conducted by two groups with differing goals and approaches to interrogation: the military interrogators of the Army intelligence Joint Task Force 170 (JTF); and members of the military's Criminal Investigative Task Force (CITF), which was composed of criminal investigators and attorneys from the military services, assisted by FBI agents and interrogation experts detailed to the base.

JTF was primarily interested in obtaining intelligence relating to future terrorist or military actions, and promoted the use of aggressive, "battlefield" interrogation techniques adapted from the SERE training program by the Defense Intelligence Agency's Defense Humint Services (DHS). CITF was more focused on criminal prosecution, and argued that conventional, rapport-building interrogation methods advocated by the FBI were the most effective way to obtain information.

[redacted]

[redacted]

On October 11, 2002, JTF's military commander submitted a request for authorization to use non-standard interrogation techniques on three detainees believed to be high-level members of al Qaeda. The techniques were classified into three categories, and were described as follows:

Category I:

1. Yelling at the detainee;
2. Deceiving the detainee by:
   (a) Using multiple interrogators; or
   (b) Posing as interrogators from a country with a reputation for harsh treatment of detainees;

Category II:

1. Placing the detainee in stress positions;
2. Using falsified documents or reports to deceive the detainee;
3. Placing detainee in isolation;

[redacted]

4. Interrogating detainee in non-standard interrogation environments or booths;
5. Depriving detainee of light and auditory stimuli;
6. Hooding detainee during interrogation;
7. Interrogating detainee for twenty-hour sessions;
8. Removing all "comfort items" (including religious items);
9. Switching detainee from hot food to cold rations;
10. Removing all clothing;
11. Forced grooming (shaving facial hair);
12. Exploiting individual phobias (such as fear of dogs) to induce stress;

Category III:

1. Convincing the detainee that death or severe pain is imminent for him or his family;
2. Exposing the detainee to cold weather or water (with medical monitoring);
3. Waterboarding;
4. Using light physical contact, such as grabbing, pushing, or poking with a finger.[66]

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[66] This description is taken from an October 11, 2002 memorandum from Lieutenant Colonel Jerald Phifer to the Commander of JTF, Major General Michael Dunlavey. That and other documents were declassified and released by the Defense Department in June 2004.

[redacted]

JTF's request was forwarded through channels to Defense Secretary Donald Rumsfeld, who approved the use of all of the JTF techniques except the first three in Category III on December 2, 2002.

Members of the CITF at Guantanamo, including FBI and military personnel, objected to the techniques and reported apparent instances of abusive treatment to their superiors. As more fully discussed in the report of the Department's Office of the Inspector General, FBI personnel were ordered not to participate or remain present when aggressive techniques were used.[67]

On December 17, 2002, David Brant, the director of the Naval Criminal Investigative Service (NCIS), a component of the CITF, told the Navy's General Counsel Alberto Mora that detainees at Guantanamo were being subjected to abusive and degrading interrogation techniques. The following day, Mora met again with Brant and with Guantanamo-based NCIS psychologist Michael Gelles, who told him that, although they had not witnessed use of aggressive techniques, they had discovered evidence of their use in interrogation logs and computer records. Brant and Gelles told Mora that they believed the techniques being used on detainees were illegal, dangerous, and ultimately ineffective and counter-productive, but that they had been told by JTF personnel at Guantanamo that the interrogations had been authorized at high levels in Washington.

Mora asked the General Counsel of the Army, Steven Morello, if he was aware of any interrogation abuse at Guantanamo. Morello reportedly showed Mora the official military documents authorizing the techniques, including an October 15, 2002 legal opinion by Lieutenant Colonel Diane Beaver, the legal

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67 One of the military detainees who was reportedly subjected to aggressive techniques over the objections of the FBI was Mohammed Al-Khatani ("Al-Qahtani" in the DOJ OIG Report). According to [redacted] sometime in 2003, John Yoo told her to draft a letter to the Defense Department opining on the legality of the techniques that had been used in Al-Khatani's interrogation. In a May 30, 2003 email, written to Yoo shortly before he left the Department, [redacted] said that she "did not get a chance to draft a letter to DOD re: techniques. My thought is I can draft it when I get back and have Pat [Philbin] sign it." [redacted] told us that she never drafted the letter because she did not receive sufficient information about the interrogation from the Defense Department.

adviser to JTF, which concluded that the techniques were lawful (the Beaver Memo). Morella reportedly added that he had argued against approval, without success.

Mora reviewed the Beaver Memo and concluded that its legal justifications for the techniques were seriously flawed and that the use of some of the JTF techniques would be illegal. After noting his concerns with the Secretary of the Navy, Mora met with DOD General Counsel William Haynes on December 20, 2002. According to Mora, Haynes listened to his objections and told him that he would carefully consider what he had said.

On January 6, 2003, Mora learned from Brant that the abusive interrogations were continuing at Guantanamo. After making his objections known to several other high-ranking Pentagon officials, Mora met again with Haynes on January 8, 2003. According to Mora, he further explained his legal, practical, and policy objections to the program. Haynes reportedly responded that United States officials believed the techniques were necessary to obtain information about future al Qaeda operations.

Sensing that his objections were being ignored, Mora drafted a memorandum to Haynes and to the legal adviser to the Chairman of the Joint Chiefs of Staff, stating his belief that some of the EITs constituted cruel and unusual treatment or torture and that use of the techniques would violate domestic and international law. On January 15, 2003, Mora delivered a draft of the memorandum to Haynes and told him that he would sign it that afternoon unless he heard that use of the techniques in question would be suspended. Later that day, Haynes told Mora that Secretary Rumsfeld was rescinding authorization for the techniques.

In withdrawing the December 2, 2002 approval of all the JTF techniques except the first three in Category III, Rumsfeld ordered Haynes to establish a working group to consider the legal, policy, and operational issues involved in the interrogation of detainees. Pursuant to the Secretary's directive, Haynes assembled a working group consisting of military and civilian DOD personnel. Working Group members included Mora, the general counsel of the other military

branches, representatives of the Pentagon's policy and intelligence components, and representatives of the Joint Chiefs of Staff.

2. Drafting the Yoo Memo

Shortly after the Working Group was formed, Haynes asked Yoo to provide legal advice about interrogation to the Working Group. Yoo told us that he notified Bybee of the request and consulted with the White House. Yoo then began drafting a responsive memorandum. In preparing this memorandum (the Yoo Memo), Yoo's main concern was to ensure that the DOD legal positions were consistent with the Bybee Memo, without revealing any information about the CIA program. According to Yoo, Defense Department personnel were not authorized to know anything about the CIA interrogation program, and the existence of the Bybee Memo had to be kept secret from them.[68]

Yoo assigned [redacted] to serve as OLC's liaison to the Working Group, and both of them subsequently attended meetings to explain OLC's view of the applicable laws to the Working Group. According to Yoo, they did not discuss or provide copies of the Bybee Memo or the Classified Bybee Memo, but the legal

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[68] Evidence suggests that the CIA and the DOD General Counsel's Office had in fact discussed the agency's use of EITs before Yoo was asked to draft the 2003 memorandum. As noted above, on July 26, 2002, the CIA provided OLC copies of two memoranda about the effects of SERE training. Those memoranda, dated July 24 and 25, 2002, were prepared by military personnel at the direction of the DOD OGC and then forwarded to the CIA. OLC cited one of the memoranda in the Classified Bybee Memo to support its finding that the EITs used in the CIA interrogation program did not violate the torture statute. As also noted above, email evidence suggests that Yoo may have provided copies of the Bybee Memo and the Classified Bybee Memo to DOD on August 2, 2002. There is additional evidence, discussed later in this report, that Haynes and Rumsfeld were briefed on the CIA program on January 16, 2003. As we have also discussed, on October 2, 2002, CTC attorney [redacted] briefed JTF personnel at Guantanamo about the CIA's use of EITs and the legal analysis provided by OLC in the Bybee Memo.

In a June 10, 2004 memorandum to the file, then AAG Goldsmith reported talking to John Yoo about oral advice that Yoo may have provided to DOD General Counsel Haynes in November and December 2002. Yoo told Goldsmith that he dimly recalled discussions with Haynes about specific interrogation techniques to be used on a military detainee at that time, but that any advice he gave was "extremely tentative" and that "he never gave Mr. Haynes any advice that went beyond what was contained" in the August 2002 opinions.

advice they provided was identical to what was set forth in the Bybee Memo. At about this time, [redacted] started working on the draft Yoo Memo. Although the Yoo Memo was the only formal advice OLC provided on military interrogation, Yoo and [redacted] consulted with the Working Group as it formulated Defense Department policy.

The Yoo Memo incorporated the Bybee Memo virtually in its entirety, but was organized differently and contained some new material. The memorandum was divided into four parts: (I) the United States Constitution; (II) federal criminal law; (III) international law; and (IV) the necessity defense and self defense.

In Part I, the Yoo Memo discussed the relevance of the United States Constitution to military interrogation, first observing that "Congress has never attempted to restrict or interfere with the President's [Commander-in-Chief] authority . . . ." Yoo Memo at 6. The memorandum concluded that neither the Fifth Amendment Due Process Clause nor the Eighth Amendment prohibition against cruel and unusual punishment applied to the conduct of military interrogations of alien enemy combatants held outside the United States. *Id.* at 10.

Part II of the Yoo Memo prefaced its review of the federal statutes prohibiting assault, maiming, interstate stalking, war crimes, and torture with a discussion of six canons of statutory construction, all of which, the memorandum argued, "indicate that ordinary federal criminal statutes do not apply to the properly-authorized interrogation of enemy combatants" by the military. *Id.* at 11.

In Part III, the Yoo Memo discussed international law. The Bybee Memo's analyses of the CAT and two foreign court decisions – *Ireland v. United Kingdom.* and *PCATI v. Israel* – were incorporated almost verbatim, and the memorandum included a new discussion of customary international law. The memorandum concluded that customary international law did not affect military obligations because it cannot "impose a standard that differs from United States obligations under CAT [and] is not federal law . . . the President is free to override it as his discretion. *Id.* at 2.

Finally, in Part IV, the Yoo Memo reiterated the Bybee Memo's arguments regarding the necessity defense and self defense. The memorandum stated that, even if federal criminal law applied to military interrogations, and even if an interrogation method violated one of those laws, the defense "could provide justifications for any criminal liability." *Id.* at 81.

In the discussion in Part III of the United States' obligations under the CAT, the Yoo Memo noted that, in addition to CAT Article 2's prohibition of torture, Article 16 required the United States to prevent acts of cruel, inhuman, or degrading treatment or punishment. After observing that the United States' reservation to Article 16 had defined such acts as conduct prohibited by the Fifth, Fourteenth, and Eighth Amendments to the United States Constitution, the memorandum discussed what conduct would be covered by Article 16.

With respect to the Eighth Amendment, the memorandum noted that case law generally involved situations where force was used against prisoners or where harsh conditions of confinement had been imposed. In both situations, the memorandum concluded, as long as officials acted in good faith and not maliciously or sadistically, and as long as there was a government interest for the conduct – such as obtaining intelligence to prevent terrorist attacks – the Eighth Amendment prohibitions would not apply to the interrogation of enemy combatants. Yoo Memo at 62, 65.

The Yoo Memo's analysis of the Fifth and Fourteenth Amendments reached a similar result. The memorandum explained that substantive due process protects individuals from "the exercise of power without any reasonable justification in the service of a legitimate governmental objective," and that "conduct must shock the conscience" in order to violate the Constitution. *Id.* at 65 (citations omitted). The "judgment of what shocks the conscience . . . necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them." *Id.* at 67 (citations omitted). After reviewing some of the case law, the memorandum summarized four principles that it concluded would determine whether government conduct would shock the conscience: (1) whether the conduct was without any justification; (2) the government official must have acted with "more than mere negligence"; (3) some physical contact is permitted; and (4) "the

detainee must sustain some sort of injury as a result of the conduct, e.g., physical injury or severe mental distress." *Id.* at 68.

Several members of the Working Group were highly critical of the advice provided by Yoo and [redacted] On or about January 28, 2003, [redacted] met with several members of the Working Group and summarized some of the conclusions in the draft Yoo Memo. She reported back to Yoo by email that some members of the Working Group expressed concern that:

(1) the commander-in-chief section sweeps too broadly;

(2) the necessity defense sweeps too broadly and doesn't make clear enough that it would not apply in all factual scenarios,

(3) the c-in-c argument (as with the other defenses) is a violation of our international obligations.

[redacted] added that she was "not worried about the first two concerns but with respect to the third, I pointed them to national right of self-defense but I sensed serious skepticism." Yoo responded that she should keep "plugging away" and that they would address the concerns in the editing process.

Yoo told us that he had "a lot of arguments" with members of the Working Group who disagreed with OLC's analysis. According to Yoo, he generally responded by pointing out that the criticism involved matters of policy, not legal analysis.

Philbin told OPR that he had concerns about the Yoo Memo and that it was issued without his concurrence. Philbin said Yoo assured him that "none of the expansive analysis in that memo was actually going to be used by DOD and that DOD was approving only a limited set of interrogation practices that would raise no concerns under [the] relevant statutes." Philbin Response at 10-11. Nevertheless, Philbin "was concerned that the Yoo Memo created the potential for DOD to approve additional interrogation practices that might be legally problematic." *Id.*

On March 3, 2003, Yoo instructed [redacted] to send a draft of the Yoo Memo to then CIA General Counsel Scott Muller. According to Yoo, Muller wanted to make sure nothing in the new memorandum detracted from the assurances OLC had provided to the CIA in the Bybee Memo.

Muller reviewed the draft and wrote to [redacted] on March 7, 2003:

[redacted]

Bybee apparently began reviewing drafts of the Yoo Memo sometime before March 4, 2003, when [redacted] sent Bybee and Yoo a draft "with Jay's changes."[69] Email traffic indicates that Bybee, [redacted] and Yoo exchanged several drafts of the Yoo Memo over the next few days.

On March 6, 2003, Haynes sent Yoo a copy of a March 3, 2003 memorandum from Army JAG Major General Thomas J. Romig to Haynes, commenting on a draft of the Working Group report that incorporated OLC's analysis. In his memorandum, Romig stated that he had "serious concerns" about the "sanctioning of detainee interrogation techniques that may appear to violate international law, domestic law, or both." Romig added that the Yoo Memo, which controlled the DOD report's legal analysis, set forth an extremely broad view of the necessity defense that would be unlikely to prevail in United States or foreign

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69 At the time, Bybee had been nominated for a judgeship on the United States Court of Appeals for the Ninth Circuit and had completed his confirmation hearing.

courts. Romig also criticized OLC's view that customary international law cannot bind the United States executive and asserted that the adoption of aggressive EITs would ultimately subject United States military personnel to greater risk.

On March 11, 2003, Yoo received comments on the draft memorandum from Deputy White House Counsel David Leitch. Leitch's comments, which were copied to Gonzales and Addington, were limited and did not address the substance of Yoo's legal analysis.

Bybee was confirmed for his judgeship on March 13, 2003, and sworn in on March 28, 2003. According to [redacted] Bybee was prepared to sign the Yoo Memo, but Yoo persuaded him not to because he was about to assume a judgeship. Bybee told us that he does not remember why Yoo signed the opinion, but that it was not unusual for deputies to sign OLC memoranda. On March 14, 2003, Yoo finalized and signed the Yoo Memo.

3. Key Conclusions of the Yoo Memo

The Yoo Memo incorporated virtually all of the Bybee Memo, and advanced the following additional conclusions of law.

1. The Fifth Amendment Due Process Clause does not apply to military interrogations outside the United States because that amendment was not "designed to restrict the unique war powers of the President as Commander in Chief" and because it does not apply extraterritorially to aliens who have no connection to the United States. Yoo Memo at 6.

2. The Eighth Amendment does not apply to military interrogations because it only applies to persons upon whom criminal sanctions have been imposed. *Id.* at 10.

3. Various canons of statutory construction "indicate that ordinary federal criminal statutes" such as assault, maiming, and interstate stalking "do not apply to the properly-authorized interrogation of enemy combatants by the United States Armed Forces during an armed conflict." *Id.* at 11, 23.

4. The War Crimes Act does not apply to military interrogation of al Qaeda and Taliban prisoners because "they do not qualify for the legal protections under the Geneva or Hague Conventions . . . ." *Id.* at 32.

5. The torture statute does not apply to interrogations conducted at a United States military base in a foreign state, such as Guantanamo. *Id.* at 35.

6. CAT Article 16 does not require nation parties to criminalize acts of cruel, inhuman or degrading treatment or punishment, and does not prohibit such acts "so long as their use is justified by self-defense or necessity." *Id.* at 59.

7. Eighth Amendment jurisprudence does not forbid interrogation techniques that involve "varying degrees of force" as long as the interrogator acts in good faith and not "maliciously and sadistically." Whether force was used in good faith turns "in part on the injury inflicted" and "the necessity of its use." Interrogation methods that involve harsh conditions of confinement do not violate the Eighth Amendment unless they are "wanton or unnecessary." Where the government has an interest in interrogation such as "that which is presented here," subjecting prisoners to such deprivations "would not be wanton or unnecessary." *Id.* at 61-62, 65.

8. Substantive due process under the Fifth and Fourteenth Amendments protects individuals against only the most egregious and arbitrary government conduct, conduct that "shocks the conscience." Four factors are considered in determining whether conduct shocks the conscience: (1) it must be "without any justification, . . . 'inspired by malice or sadism'"; (2) the interrogator must act "with more than mere negligence"; (3) not all "physical contact" is prohibited; and (4) the prisoner "must sustain some sort of injury as a result of the conduct, e.g., physical injury or severe mental distress." *Id.* at 68.

4. The Working Group Report

The April 4, 2003 Working Group Report incorporated substantial portions of the Yoo Memo, in addition to new material from the military lawyers in the

Working Group.[70] The new material included an introduction outlining the background, methodology, and goals of the report, an overview of international law as applied to the military, a review of applicable military law, and a lengthy discussion of policy considerations, including a number of considerations that were specific to the Department of Defense. Imported from the Yoo Memo, with only slight revisions, were discussions of the torture statute,[71] federal criminal statutes, the Commander-in-Chief authority, the necessity defense and self defense, and the CAT Article 16 prohibition of cruel, inhuman, or degrading treatment, as interpreted through the Eighth, Fifth, and Fourteenth Amendments to the United States Constitution. The Working Group Report also included a chart of 35 interrogation techniques that it recommended be approved for use on detainees outside the United States.

D. Implementation of the CIA Interrogation Program

[redacted] Other agency personnel separately told CIA OIG that they were concerned about human rights abuses at CIA facilities. In January 2003, CIA OIG initiated an investigation into CIA detention and interrogation practices, and on May 7, 2004, it issued its report. The facts in the following discussion are based primarily upon that document.

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70 The Working Group Report was originally classified "Secret," but was declassified by the Department of Defense on June 21, 2004 and released to the public. The Yoo Memo was originally classified "Secret," but was declassified by the DOD on March 31, 2008.

71 The report omitted the Bybee Memo's and the Yoo Memo's argument that "severe pain" must rise to the level of the pain of "death, organ failure or serious impairment of body functions."

1. Abu Zubaydah

[redacted] a CIA detention facility [redacted] began using EITs in the interrogation of Abu Zubaydah.[72] According to the CIA OIG Report, [redacted] independent contractor psychologists were assigned to lead the interrogation team, consisting of CIA security, medical, [redacted] personnel.[73] Overall supervision of the facility was the responsibility of a CIA case officer assigned as Chief of Base (COB), who reported to CTC headquarters. CIA OIG Report at ¶¶ 73, 74.

[redacted] psychologist/interrogators administered all of the interrogation sessions involving EITs, which were closely followed by headquarters personnel. [redacted] *Id.*

According to the CIA OIG Report, the interrogation team decided at the outset to videotape Abu Zubaydah's sessions, primarily in order to document his medical condition. CIA OIG examined a total of 92 videotapes, twelve of which recorded the use of EITs. Those twelve tapes included a total of 83 waterboard applications, the majority of which lasted less than ten seconds. [redacted]

On one of the interrogation videotapes, CIA OIG investigators noted that a [redacted] interrogator verbally threatened Abu Zubaydah by stating, "If one child dies in America, and I find out you knew something about it, I will personally cut your mother's throat." [redacted] commented, in its review of the CIA OIG

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[72] The CIA [redacted] to identify specific clandestine facilities, which the agency also refers to as "black sites."

[redacted]

Report, that the threat was permissible because of its conditional nature. *Id.* at ¶ 18.

Apart from the use of the waterboard, the CIA OIG report did not describe the manner or frequency of the EITs that were administered to Abu Zubaydah. The volume of intelligence obtained from Abu Zubaydah reportedly increased after the waterboard sessions, but CIA OIG concluded that it was not possible to determine whether the waterboard or other factors, such as the length of his detention, were responsible.

After the on-site interrogation team determined that Abu Zubaydah had ceased resisting interrogation, they recommended that EITs be discontinued. However, CTC headquarters officials believed the subject was still withholding information, [redacted] Senior CIA officials reportedly made the decision to resume the use of the waterboard [redacted] to assess the subject's compliance. After that session, [redacted] agreed with the on-site interrogators that the subject was being truthful, and no further waterboard applications were administered. [redacted]

According to CIA OIG, an attorney from the CIA General Counsel's Office reviewed the videotapes of Abu Zubaydah's waterboard interrogation and concluded that the applications complied with the guidance obtained from DOJ. However, the CIA OIG investigators who reviewed the same tapes reported that the technique used on Abu Zubaydah was different from the technique used in SERE training and as described in the Classified Bybee Memo. The report noted that, unlike the method described in the DOJ memorandum, which involved a damp cloth and small applications of water, the CIA interrogators continuously applied large volumes of water to the subject's mouth and nose. One of the psychologists involved in the interrogation program reportedly told CIA OIG that the technique was different because it was "for real" and was therefore more "poignant and convincing."

[redacted]

2. Abd Al-Rahim Al-Nashiri

On November 15, 2002, a second prisoner, Abd Al-Rahim Al-Nashiri, was brought to [redacted] facility. [redacted] psychologist/interrogators immediately began using EITs, and Al-Nashiri reportedly provided lead information about other terrorists during the first day of interrogation. On the twelfth day, the psychologist/interrogators applied the waterboard on two occasions, without achieving any results. Other EITs continued to be used, and the subject eventually become compliant. [redacted] 2002, both Al-Nashiri and Abu Zubaydah were moved to another CIA black site, [redacted] CIA OIG Report at ¶ 76.

[redacted]

[redacted]

While EITs were being administered, several unauthorized techniques were also used on Al-Nashiri. Sometime around the end of December, [redacted] debriefer tried to frighten Al-Nashiri by cocking an unloaded pistol next to the prisoner's head while he was shackled in a sitting position in his cell. On what may have been the same day, Al-Nashiri was forced to stand naked and hooded

in his cell while the debriefer operated a power drill, creating the impression that he was about to use it to harm Al-Nashiri. *Id.* at ¶¶ 92, 93.

On another occasion in December 2002, [redacted] debriefer [redacted] told Al-Nashiri that, if he did not talk, his mother and family would be brought to the facility. According to the CIA OIG report, there is a widespread perception in the Middle East that [redacted] intelligence services torture prisoners by sexually abusing female family members in their presence. *Id.* at ¶ 94.

On other occasions, the CIA debriefer blew cigar smoke in Al-Nashiri's face, manhandled him while he was tied in stress positions, and stood on his shackles to induce pain. [redacted]

According to CIA OIG, [redacted] Al-Nashiri [redacted] At some point, [redacted] interrogators determined that he was cooperating and the use of EITs was discontinued.

In January 2003, the CIA's Deputy Director of Operations notified the CIA OIG that CIA personnel had used the above unauthorized interrogation techniques on Al-Nashiri and asked CIA OIG to investigate. As discussed below, DOJ was notified on January 24, 2003.

3. Khalid Sheik Muhammed

EITs were also used on Khalid Sheik Muhammed (KSM), a high-ranking al Qaeda official who, according to media reports, was captured in Pakistan on March 1, 2003, [redacted] to a CIA black site [redacted] CIA officers have been quoted in the media as saying that KSM was defiant to his captors and was extremely resistant to EITs, including the waterboard.

The CIA OIG Report stated that KSM was taken to [redacted] facility for interrogation and that he was accomplished at resisting EITs. He reportedly

[redacted]

underwent [redacted] waterboard sessions [redacted] involving approximately 183 applications, [redacted]

The CIA OIG also reported that on one occasion, one of the CIA psychologist/interrogators threatened KSM by saying that "if anything else happens in the United States, 'We're going to kill your children.'" *Id.* at ¶ 95.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

5. CIA Referrals to the Department

According to a CIA MFR drafted by John Rizzo, on January 24, 2003, Scott Muller (then CIA General Counsel), Rizzo, and [redacted] met with Michael Chertoff, Alice Fisher, John Yoo, and [redacted] to discuss the incidents at [redacted] According to Rizzo, he told Chertoff before the meeting that he needed to discuss "a recent incident where CIA personnel apparently employed unauthorized interrogation techniques on a detainee."

Muller had [redacted] describe the unauthorized EITs that had been used at [redacted] and mentioned that the matter had been referred to the CIA OIG as part of an overall review of the CIA's detention and interrogation policies.

[redacted]

Chertoff reportedly commented that the CIA was correct to advise them because the use of a weapon to frighten a detainee could have violated the law. He stated that the Department would let CIA OIG develop the facts and that DOJ would determine what action to take when the facts were known. According to Rizzo, "Chertoff expressed no interest or intention to pursue the matter of the [redacted]

On January 28, 2003, CIA Inspector General John Helgerson called Yoo and told him that the CIA OIG was looking into the [redacted] matter. According to Helgerson's email message to Rizzo, Yoo "specifically said they feel they do not need to be involved until after the OIG report is completed." Rizzo responded to Helgerson: "Based on what Chertoff told us when we gave him the heads up on this last week, the Criminal Division's decision on whether or not some criminal law was violated here will be predicated on the facts that you gather and present to them."

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Accordingly, we recommend that the declination decision with respect to [redacted] be reexamined. Primarily because of the changed legal landscape, we further recommend that the other declination decisions made by CTS and the EDVA be reexamined as well.

6. Other Findings of the CIA OIG Report

In addition to reporting on specific incidents, the CIA OIG Report made the following general observations:

> The Agency's detention and interrogation of terrorists has provided intelligence that has enabled the identification and apprehension of other terrorists and warned of terrorist plots planned for the United

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78 The EDVA Memorandum was issued after the Bybee Memo had been publicly withdrawn, but before the Supreme Court's decision in *Hamdan*. Accordingly, the prosecutors may have relied upon OLC's earlier determination that the War Crimes Act did not apply to suspected terrorists held abroad. We found no indication, however, that the EDVA declination decisions were revisited after *Hamdan*. In reviewing the declination decisions, the Department will have to determine whether prior OLC opinions and executive orders bar prosecution of these matters.

> States and around the world. The CTC Program has resulted in the issuance of thousands of individual intelligence reports and analytic products supporting the counterterrorism efforts of U.S. policymakers and military commanders.

CIA OIG Report at ¶16.

> Measuring the overall effectiveness of EITs is challenging for a number of reasons including: (1) the Agency cannot determine with any certainty the totality of the intelligence the detainee actually possesses; (2) each detainee has different fears of and tolerance for EITs; (3) the application of the same EITs by different interrogators may have different results; and
> [redacted]

Id. at ¶ 221.

[redacted]

Id. at ¶ 233.

[redacted]

* * *

[redacted]

Id. at ¶¶ 233-235.

E. Reaffirmation of the CIA Program

1. The Question of "Humane Treatment"

In a February 7, 2002 order, the President determined that the armed forces were required to treat detainees humanely. [redacted]

[redacted]

[redacted]

[redacted]

2. The "Bullet Points"

On April 28, 2003, Muller faxed John Yoo a draft document, in bullet point form, captioned "Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel" (the Bullet Points). On the cover sheet, Muller wrote, "I would like to discuss this with you as soon as you get a chance." According to later correspondence by Muller, the Bullet Points were jointly created

by OLC and CTC [redacted] for use by the CIA OIG in connection with its review of the CIA detention and interrogation program.

In her OPR interview, [redacted] confirmed that she received the draft Bullet Points from Muller, and stated that she "reworked" the draft and sent it back to the CIA. She understood that the Bullet Points were drafted to give the CIA OIG a summary of OLC's advice to the CIA about the legality of the detention and interrogation program. [redacted] understood that the CIA OIG had indicated to CTC [redacted] that it might evaluate the legality of the program in connection with its investigation, and that the Bullet Points were intended to demonstrate that OLC had already weighed in on the subject.

[redacted]

[redacted]

[redacted]

The Bullet Points stated that the CAT definition of torture "is identical in all material ways to the definition of torture" in the torture statute; that customary international law imposes no obligations on the United States beyond the CAT; and that the War Crimes Act does not apply to CIA interrogations of al Qaeda

[redacted]

80 Yoo left the Department on May 30, 2003, and [redacted]

members. One bullet point summarized the Bybee Memo's conclusions regarding specific intent as follows:

> The interrogation of al-Qa'ida detainees does not constitute torture within the meaning of [the torture statute] where the interrogators do not have the specific intent to cause "severe physical or mental pain or suffering." The absence of specific intent (i.e., good faith) can be established through, among other things, evidence of efforts to review relevant professional literature, consulting with experts, reviewing evidence gained from past experience where available (including experience gained in the course of U.S. interrogations of detainees), providing medical and psychological assessments of a detainee (including the ability of the detainee to withstand interrogation without experiencing severe physical or mental pain or suffering), providing medical and psychological personnel on site during the conduct of interrogations, or conducting legal and policy reviews of the interrogation process (such as the review of reports from the interrogation facilities and visits to those locations). A good faith belief need not be a reasonable belief; it need only be an honest belief.

Additional paragraphs stated that the interrogation program did not violate the Fifth, Eighth, or Fourteenth Amendments to the United States Constitution, and that the following specific EITs did not "violate any Federal statute or other law": (1) isolation; (2) reduced caloric intake; (3) deprivation of reading material; (4) loud music or white noise; (5) the attention grasp; (6) walling; (7) the facial hold; (8) the facial slap; (9) the abdominal slap; (10) cramped confinement; (11) wall standing; (12) stress positions; (13) sleep deprivation; (14) the use of diapers; (15) the use of harmless insects; and (16) the waterboard. Bullet Points at 2-3.

[redacted] provided a copy of the Bullet Points to the CIA OIG, which incorporated them into its draft report. As discussed below, OLC subsequently disavowed the Bullet Points.

3. The Leahy Letter

On June 20, 2003, Muller and [redacted] met with Gonzales at his office to [redacted]

According to [redacted] MFR, the group recognized that the CIA EITs involved "certain 'stress and duress' measures and physical contact," and "[n]o one suggested that these measures were inconsistent with the statement in the draft letter that the US is complying with Constitutional standards and with Article 16 of the [CAT]." Philbin reportedly confirmed, in response to a direct question from Bellinger, that the EITs authorized by the Department "could be used consistent with CAT and the Constitution."[81] [redacted]

According to Philbin, Muller stated at the meeting that the CIA had relied on the Bullet Points to establish that the EITs were consistent with Article 16. Philbin said he told Muller that the Bullet Points were an unsigned, undated document that was not on OLC letterhead and that he was unsure how they had been prepared. He told Muller that he could not rely on the Bullet Points as an OLC opinion.

The draft response letter was subsequently redrafted by Bellinger and went out under Haynes' signature. The letter advised Senator Leahy that the United

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81 Philbin told OPR that he told the attendees at the meeting that he was not prepared to say that the EITs met the substantive requirements of the Fifth, Eighth, and Fourteenth Amendments because he had not done that analysis. He told them he was prepared to endorse the view that the EITs did not violate those provisions because those provisions did not apply. Philbin asserted that the Fourteenth Amendment applies to state and not federal government; the Eighth Amendment applies to punishment for crimes; and the Fifth Amendment did not apply extraterritorially in this situation at that time.

States Government complies with its domestic and international legal obligations not to engage in torture and does not subject detainees to cruel, inhuman, or degrading treatment or punishment. An internal CIA summary noted that "[t]he letter does not highlight the fact that other nations might define the terms 'cruel, inhuman or degrading treatment or punishment' differently than does the United States."

After the meeting, Muller, [redacted] and Bellinger reportedly remained behind to discuss questions raised about the implementation of the CIA interrogation program that had been raised by the CIA OIG review. Gonzales had previously questioned whether the use of the waterboard during the interrogation of KSM "could be viewed as excessive." The group noted that the Classified Bybee Memo had stated, on page two, that the technique would not be repeated because it loses its effectiveness after several repetitions. Muller and [redacted] told Gonzales, who reportedly agreed, that, "as per standard legal practice, the memorandum provided both a legal 'safe harbor' . . . and a touchstone by which to assess the lawfulness of any future activities that did not fall squarely within the specific facts reflected in the memorandum." They also reportedly agreed that simply because conduct went beyond the "safe harbor" did not necessarily mean that the conduct violated the statute or convention. [redacted]

Muller and [redacted] described for Gonzales the numbers of times the waterboard had been used on KSM and Abu Zubaydah, and "discussed the provisions of the [Classified Bybee Memo] as applied to the actual use of the water board with respect to AZ and KSM. [It was] agreed that the use of the water board in those instances was well within the law, even if it could be viewed as outside the 'safe harbor.'" *Id.* at 3.

[redacted]

4. The CIA Request for Reaffirmation

[redacted]

[redacted]

[redacted]

~~TS~~ [redacted] ~~NOFORN~~

[redacted]

~~TS~~ [redacted] ~~NOFORN~~

[redacted]

[redacted]

F. AAG Goldsmith – Withdrawal of OLC's Advice on Interrogation

After Bybee left the Department in March 2003, OLC's AAG position remained unfilled for several months, reportedly because of disagreement between the White House and the Attorney General's Office over a replacement.[83] The White House offered Goldsmith the position in July 2003, and he began his service as AAG on October 6, 2003. The following day, he was read into the CIA interrogation program by Scott Muller.

1. The NSA Matter

[redacted]

[83] Goldsmith confirmed that when Bybee left OLC, then White House Counsel Gonzales wanted Yoo to take over as AAG. Ashcroft reportedly objected because he thought Yoo was too close to the White House, and recommended his Counselor, Adam Ciongoli, for the job. Ciongoli was reportedly not acceptable to Gonzales, however, because he was too close to Ashcroft. Goldsmith was eventually proposed as a compromise candidate. Goldsmith is not sure who suggested him for the job, but speculated that either Yoo or Haynes might have recommended him. In their OPR interviews, Ciongoli and Gonzales confirmed the general outlines of this account.

[redacted]

Because of the problems with Yoo's NSA opinions, Goldsmith asked Philbin, who was familiar with Yoo's work at OLC, to bring him copies of any other opinions that might be problematic. Philbin gave Goldsmith a copy of the Yoo Memo, which Goldsmith read sometime in December 2003.

Philbin told us that he had concerns about the Yoo Memo because it could be used by DOD to independently approve interrogation techniques that might violate the law. Philbin said that, soon after Yoo's departure from the Department in May 2003, he instructed [redacted] who had recently begun work at the DOD's Office of General Counsel, to instruct GC Haynes that DOD should not rely on the Yoo Memo for any purpose beyond the 24 specific interrogation practices that had been approved.

[redacted]

2. The Withdrawal of the Yoo Memo

Goldsmith's reaction to the Yoo Memo was that it was "deeply flawed,"[85] and his immediate concern was that the Defense Department might improperly rely on the opinion in determining the legality of new interrogation techniques.[86] The broad nature of the memorandum's legal advice troubled him because it could have been used to justify many additional interrogation techniques. As he later explained in an email to other OLC attorneys, he saw the Yoo Memo as a "blank check" to create new interrogation procedures without further DOJ review or approval.[87]

Accordingly, Goldsmith telephoned Haynes in late December 2003 and told him that the Pentagon could no longer rely on the Yoo Memo, that no new interrogation techniques should be adopted without consulting OLC, and that the military could continue to use the noncontroversial techniques set forth in the Working Group Report, but that they should not use any of the techniques requiring Secretary of Defense approval without first consulting OLC. Having

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85 [redacted] told us that after Goldsmith read the Yoo Memo, he told her it was "riddled with error."

86 Goldsmith told us that he approached his review of the Yoo Memo with great caution, because he was reluctant to reverse or withdraw a prior OLC opinion. In reviewing the memorandum, he did not intend to identify any and all possible errors, but was looking for the "really big fundamental mistakes that couldn't be justified and that were perhaps unnecessary."

87 Philbin responded to that email as follows:

> John's March memorandum was not a blank check at least as of the time [redacted] started work at DoD OGC (Summer 2003) because I told her to make sure that they did not go beyond the Rumsfeld approved procedures and did not rely on the memo. This was only an oral caution but please do not sell us short by ignoring it.

Goldsmith answered as follows: "I'm not selling anyone short – It's just that Haynes said he heard nothing about that advice."

allayed his immediate concerns, Goldsmith temporarily set the Yoo Memo aside and continued to deal with what he believed was the more urgent matter – the NSA program.

In early March 2004, the Defense Department told Goldsmith that it wanted to use one of the four extreme techniques to question a detainee. Goldsmith read the Yoo Memo in detail, and after consulting with Philbin, Goldsmith concluded that his initial impression was correct – the memorandum was seriously flawed and would have to be formally withdrawn and replaced.

On Saturday, March 13, 2004, Goldsmith telephoned DAG Comey at home and asked to meet with him that day. Philbin and Goldsmith went to Comey's house and Goldsmith explained the problems he had discovered in the Yoo Memo. Goldsmith told Comey, among other things, that the memorandum's presidential powers analysis was wrong, that there were problems with the discussion of possible defenses, and that the memorandum had arrived at an unduly high threshold for the application of the term "severe pain." Goldsmith added that, generally speaking, the memorandum's legal analysis was loosely done and was subject to misinterpretation.

Comey remembered that Philbin seemed in accord with Goldsmith's comments, and that Philbin said he had advised Yoo to remove the questionable sections from the memorandum. Both Goldsmith and Philbin were friendly with Yoo at the time, and Comey got the impression that they were both embarrassed and disappointed by the "sloppy" legal work they had uncovered.

Shortly after this meeting, Comey told AG Ashcroft that Goldsmith had found problems with the legal analysis in the Yoo Memo and that it would have to be replaced. According to Comey, Ashcroft agreed that any problems with the analysis should be corrected. Sometime in April 2004, Goldsmith began working on a replacement draft for the Yoo Memo, assisted by then Principal Deputy AAG Steve Bradbury and several OLC line attorneys.

[redacted]

[redacted]

3. The CIA OIG Report and the Bullet Points Controversy

On March 2, 2004, Goldsmith received a letter from Muller, asking OLC to reaffirm the legal advice it had given the CIA regarding the interrogation program. Muller specifically asked for reaffirmation of the Yoo Letter, the Bybee Memo, the Classified Bybee Memo, and the Bullet Points.[88]

Goldsmith told us that he was unaware of the Bullet Points until he received Muller's letter, which attached a copy and which asserted that they had been "prepared with OLC's assistance and . . . concurrence . . . in June 2003."[89] Goldsmith was concerned because the Bullet Points appeared to be a CIA document, with no legal analysis and no indication that OLC had ever reviewed its content. He made inquiries, and learned that [redacted] and Yoo had in fact worked on the document.

In late May 2004, the CIA OGC gave OLC a copy of the final May 7, 2004 CIA OIG Report, which included descriptions of the legal advice provided to the CIA by OLC, and which included copies of the Classified Bybee Memo and the

[redacted]

89 According to a CIA MFR prepared by Muller on October 16, 2003, the CIA gave Goldsmith a copy of the Bullet Points when he was briefed into the CIA interrogation program on October 7, 2003.

Goldsmith told us that he did not know what motivated Muller to ask for reaffirmation of the OLC advice at this time. We note, however, that CIA OGC had submitted its comments on the draft CIA OIG report the previous week, on February 24, 2004.

Bullet Points as appendices.[90] On May 25, 2004, Goldsmith wrote to CIA IG Helgerson, asking for an opportunity to provide comments on the report's discussion of OLC's legal advice before the report was sent to Congress.

After reviewing the CIA OIG Report, on May 27, 2004, Goldsmith wrote to Muller and advised him that the report "raised concerns about certain aspects of interrogations in practice." Goldsmith pointed out that the advice in the Classified Bybee Memo depended upon factual assumptions and limitations, and that the report suggested that the actual interrogation practices may have been inconsistent with those assumptions and limitations. The waterboard, in particular, was of concern, in that the CIA OIG Report stated that "the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant."

Goldsmith concluded the letter by recommending that use of the waterboard be suspended until the Department had an opportunity to review the CIA OIG Report more thoroughly. With respect to the other nine EITs, Goldsmith asked Muller to ensure that they were used in accordance with the assumptions and limitations set forth in the Classified Bybee Memo.

[redacted]

During this period, OLC began preparing comments on the CIA OIG Report. OLC and CIA OGC initially contemplated submitting a joint letter to CIA IG Helgerson, and early drafts of the letter included signature blocks for both Muller and Goldsmith.

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[90] OLC's files also include a copy of a January 2004 draft of the CIA OIG Report, with CIA OGC's comments. There is no indication of how or when OLC received this document.

On June 9, 2004, Goldsmith talked to Yoo by telephone about the Bullet Points.[91] With respect to the Bullet Points, Yoo told Goldsmith that, to the extent they may have been used to apply the law to a set of facts, they did not constitute the official views of OLC. Yoo stated that "OLC did not generate the Bullet Points, and that, at most, OLC provided summaries of the legal views that were already in other OLC opinions." Yoo reportedly added that "almost all of the OLC work on the Bullet Points was done by an Attorney [redacted] who could never have signed off on such broad conclusions applying law to fact, especially in such a cursory and conclusory fashion."

On June 10, 2004, Goldsmith wrote to Muller that OLC would not reaffirm the Bullet Points, which "did not and do not represent an opinion or a statement of the views of this Office." Muller responded on June 14, 2004, arguing that the Bullet Points were jointly prepared by OLC and CIA OGC, that OLC knew that they would be provided to the CIA OIG for use in its report, and that they "served as a basis for the 'Legal Authorities' briefing slide used at a 29 July 2003 meeting attended by the Vice President, the National Security Advisor, the Attorney General, who was accompanied by Patrick Philbin, the Director of Central Intelligence, and others."

On June 15, 2004, CIA OGC informed OLC that, because the two offices had different views about the significance of the Bullet Points, OGC would not be a joint signatory to the letter to IG Helgerson.

Goldsmith submitted his comments to Helgerson on June 18, 2004. He asked that two "areas of ambiguity or mistaken characterizations" in the report be corrected. The first related to a description of Attorney General Ashcroft's comments on the "expanded use" of EITs at the July 29, 2003 NSC Principals meeting. Goldsmith explained that the statement was intended to refer to the use

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91 Goldsmith also asked Yoo about some oral advice he had provided to Haynes in connection with DOD's December 2, 2002 decision to use EITs on a detainee at the Guantanamo Bay facility. Yoo reportedly told Goldsmith that he did not know the identity of the detainee (who was probably Mohammed Al-Khatani), but that he dimly recalled discussing specific techniques with Haynes in November and December 2002. Yoo stated that any advice he gave Haynes was "extremely informal," and was clearly "extremely tentative." According to Yoo, he "never gave Mr. Haynes any advice that went beyond what was contained" in the August 2002 opinions.

of approved techniques on other detainees in addition to Abu Zubaydah, not the use of new techniques, and that with respect to the number of times the waterboard had been used on detainees, the "Attorney General expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ's August 2002 [classified] opinion." The second area of disagreement related to the conflicting views of OLC and CIA OGC over the significance of the Bullet Points. Goldsmith asserted that the Bullet Points "were not and are not an opinion from OLC or formal statement of views."

On June 23, 2004, Helgerson transmitted copies of the CIA OIG Report to the Chairs and Ranking Members of the House and Senate Select Committees on Intelligence. In his cover letter, he explained that the report had been prepared without input from DOJ, but that he had attached, with Goldsmith's permission, a copy of DOJ's June 18, 2004 comments and requested changes.

4. Goldsmith's Draft Revisions to the Yoo Memo

The first draft of the replacement memorandum was produced in mid-May 2004, and at least 14 additional drafts followed, with the last one dated July 17, 2004. Beginning with the sixth draft, dated June 15, 2004, specific criticisms of the Yoo Memo were discussed in footnotes. Although the criticism was removed from later drafts, Goldsmith told OPR that it was not removed because of any doubts about its accuracy. Rather, Goldsmith ultimately concluded that it was unnecessary to specifically address the errors. The footnotes in question, which were drafted by Bradbury pursuant to Goldsmith's request, criticized the Yoo Memo as follows:

1. The Yoo Memo "is flawed in so many important respects that it must be withdrawn." June 15, 2004 draft at 1, n.1.

2. The Yoo Memo "contains numerous overbroad and unnecessary assertions of the Commander in Chief power vis-à-vis statutes, treaties and constitutional constraints, and fails adequately to consider the precise nature of any potential interference with that power, the countervailing congressional authority to regulate the matters in question, and the case law concerning the

balance of authority between Congress and the President, *see, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38, 641-46 (1952) (Jackson, J., concurring)." *Id.*[92]

3. Yoo's "sweeping use of the canon against application of statutes to the sovereign outlined in *Nardone v. United States*, 302 U.S. 379 (1937), is too simplistic and potentially erroneous, particularly as applied to the federal torture statute . . . and possibly other criminal statutes." *Id.* at 1-2, n.1.

4. "The memorandum incorrectly concludes, contrary to an earlier opinion of this Office, that the torture statute does not apply to the conduct of the military during wartime." *Id.* at 2, n.1.

"This conclusion contradicted an earlier opinion of this Office, which had concluded that the torture statute 'applies to official conduct engaged in by United States military personnel.' Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* at 25-26 (Mar. 13, 2002). We agree with the March 2002 opinion that Congress's explicit extension of the prohibition of the torture statute to individuals acting 'under color of law' naturally includes military personnel acting during wartime. We therefore disavow the contrary conclusion on this question in [the Yoo Memo]." June 24, 2004 draft at 29-30, n.28.

5. "[T]he memorandum makes overly broad and unnecessary claims about possible defenses to various federal crimes, including torture, without considering, as we must, the specific circumstances of particular cases." June 15, 2004 draft at 2, n.1.

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[92] In a June 30, 2004 email to DOJ attorneys working on a draft reply to a June 15, 2004 letter from the Senate Judiciary Committee, Goldsmith wrote:

> It is my view that the blanket construction of the [Yoo Memo's Commander-in-Chief] section is misleading and under-analyzed to the point of being wrong. I have no view as to whether we say that in this letter, as long as we do not say anything inconsistent with this position.

The Yoo Memo "makes overly broad, unnecessary, and in some respects erroneous claims about possible defenses to various federal crimes that we need not consider here." July 1, 2004 draft at 25, n.27.

6. The Yoo Memo "described the 'severe pain or suffering' contemplated by the torture statute by referring to the level of physical pain 'that would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of body functions.' [Yoo Memo] at 38-39. . . . [T]he effort to tie the severity of physical pain to particular physical or medical conditions is misleading and unhelpful, because it is possible that some forms of maltreatment may inflict severe physical pain or suffering on a victim without also threatening to cause death, organ failure or serious impairment of bodily functions. We have no need to define that line or indeed to say anything more about the meaning of the torture statute, in reviewing the particular interrogation techniques at issue here." June 24, 2004 draft at 28, n.26.

7. The Yoo Memo "asserts that Congress lacks authority to regulate wartime interrogation and, relatedly, that the [Executive Branch] could not enforce any statute that purported to do so. [Yoo Memo] at 4-6, 11-13, 18-19. These assertions, in addition to being unnecessary to support the legality of the techniques swept much too broadly, to the point of being wrong. Congress clearly has some authority to enact legislation related to the interrogation of enemy combatants during wartime, *see, e.g.*, U.S. Const. art. I, § 8, cl. 9 (power to 'define and punish Offenses against the Laws of Nations'), and clearly the Executive Branch can enforce those laws when they are violated. It is true that the Commander-in-Chief has extraordinarily broad authority in conducting operations against hostile forces during wartime . . . and that the Executive Branch has long taken the view that congressional statutes in some contexts unconstitutionally impinge on the Commander-in-Chief Power . . . . To assess the precise allocation of authority between the President and Congress to regulate wartime interrogation of enemy combatants, we would need to analyze closely a variety of factors, including the nature and scope of any potential statutory interference with the Commander in Chief power, the countervailing congressional authority to regulate the matters in question, the case law concerning the balance of authority between Congress and the President, *see, e.g., Public Citizen v. U.S. Department of Justice,*

491 U.S. 440, 482-89, (1989) (Kennedy, J., concurring in the judgement); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38, 641-46 (1952) (Jackson, J., concurring), and the historical practices of the political branches, *cf. Dames & Moore v. Regan*, 453 U.S. 654, 675-83 (1981) – factors that [the Yoo Memo] did not consider and that we view as unnecessary to consider here." *Id.* at 36-37, n.38.

8. "With respect to treaties, [the Yoo Memo] maintains that a presidential order of an interrogation method in violation of the CAT would amount to a suspension or termination of the treaty and thus would not violate the treaty. [Yoo Memo] at 47. It is true that the President has authority, under both domestic constitutional law, *see* Memorandum for Alan J. Kreczko, Special Assistant to the President, and Legal Adviser to the National Security Council, from Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty* at 8 n. 14 (Nov. 25, 1996), and international law, Vienna Convention on the Law of Treaties . . . to suspend treaties in some circumstances. But it is error to say that every presidential action pursuant to the Commander-in-Chief authority that is inconsistent with a treaty operates to suspend or terminate that treaty and therefore does not violate it. It is also unnecessary to consider this issue, because [the techniques] are fully consistent with all treaty obligations of the United States, including the Geneva Conventions and the CAT." *Id.* at 37, n.38.

9. "[The Yoo Memo] states that the Fifth Amendment to the United States Constitution is 'inapplicab[le]' during wartime, particularly with respect to the conduct of interrogations or the detention of enemy aliens. [Yoo Memo] at 9. The memorandum's citations of authority for the proposition that the Fifth Amendment Due Process Clause does not prohibit certain wartime actions by the political branches do not, however, support the broader proposition – a proposition once again not necessary to uphold the techniques in question here – either that the Fifth Amendment is inapplicable in wartime or that it 'does not apply to the President's conduct of a war.' *Cf. Hamdi, supra*, slip op. at 21-32 (plurality opinion of O'Connor, J.)." July 1, 2004 draft at 27, n.30.

Goldsmith left the Justice Department on July 17, 2004, before he was able to finalize a replacement for the Yoo Memo. On July 14, 2004, then Associate Deputy AG Patrick Philbin testified before the House Permanent Select Committee on Intelligence as to the legality of the 24 interrogation methods that had been approved for use by the Defense Department. Sometime thereafter, the Defense Department reportedly informed OLC that it no longer needed a replacement for the Yoo Memo.

5. The Withdrawal of the Bybee Memo

On June 8, 2004, the Washington Post reported that "[i]n August 2002, the Justice Department advised the White House that torturing al Qaeda terrorists in captivity abroad 'may be justified,' and that international laws against torture 'may be unconstitutional if applied to interrogations' conducted in President Bush's war on terrorism, according to a newly obtained memo." On June 13, the *Washington Post* made a copy of the Bybee Memo available on its web site.

Up until this time, Goldsmith's focus had been on the Yoo Memo, rather than the Bybee Memo. Shortly after the Bybee Memo was leaked, Goldsmith was asked by the White House if he could reaffirm the legal advice contained in the Bybee Memo. Because the analysis in that document was essentially the same as the Yoo Memo, which he had already withdrawn, Goldsmith concluded that he could not affirm the Bybee Memo. He consulted with Comey and Philbin, who agreed with his decision, and on June 15, 2004, Goldsmith informed Attorney General Ashcroft that he had concluded that the Department should withdraw the Bybee Memo. Although Ashcroft was "not happy about it," according to Goldsmith, he supported the decision. The following day, June 16, 2004, Goldsmith submitted a letter of resignation to become effective August 6, 2004.

Later that week, Goldsmith notified the White House Counsel's Office that he was planning to withdraw the Bybee Memo. According to Goldsmith, this caused "enormous consternation in the Executive Branch because basically they thought the whole program was in jeopardy," but the White House did not resist his decision.

Goldsmith said he found it "deeply strange" that both the Classified Bybee Memo and the unclassified memoranda were issued on the same day. He told OPR:

> One [the classified memo] is hyper narrow and cautious and splitting hairs and not going one millimeter more than you needed to answer the question. And the other [the unclassified memo] issued the same day is the opposite. It wasn't addressing particular problems. It was extremely broad. It went into all sorts of issues that weren't directly implicated, and issued the same day by the same office.

Bradbury told OPR that he believed it was appropriate to withdraw the unclassified Bybee Memo. He stated that Yoo's view of the Commander-in-Chief powers was "not a mainstream view" and that the memorandum did not adequately consider counter arguments. He commented that "somebody should have exercised some adult leadership in that respect."

Bradbury said part of the problem with Yoo's work on the Commander-in-Chief section was his entrenched scholarly view of the issue. He commented:

> He had a deeply ingrained view of the operative principles. And to the extent there were sources that reflect that view, he may bring them in and cite them and use them. But it's almost as if he could have written that opinion without citation to any sources. And if a court here or a court there or a commentator here or a commentator there takes a different view, that's almost of secondary importance because he had such a firmly held view of what the principles are.
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> In my view, there's something to be said for not being a scholar or professor in this job [in the OLC]. . . . And taking a more practical approach, and one where you don't think you know the answers already, because you haven't got a body of scholarly work, you know, you've already developed on these questions. And I just think that for practical reasons that's healthy.

In the days that followed, there was a great deal of discussion between Department officials, the CIA and the White House about how to proceed. On June 22, 2004, Comey, Goldsmith, and Philbin met with reporters in a not-for-attribution briefing session to explain that the Bybee Memo had been withdrawn. On the same day, White House Counsel Gonzales announced at a press conference that the Bybee Memo had been meant to "explore the limits of the legal landscape," and to his knowledge had "never made it to the hands of soldiers in the field, nor to the president." He acknowledged that some of the conclusions were "controversial" and "subject to misinterpretation."

Goldsmith was determined to complete his replacement for the Yoo Memo before he left the Department, and he also assigned an OLC line attorney to prepare a replacement for the Bybee Memo.[93] At some point during the summer, however, it became apparent that the Yoo Memo could not be replaced by August, and Goldsmith decided to advance his departure date to July 17, 2004.

[redacted]

[93] Several replacement drafts for the Bybee Memo were prepared under Goldsmith's direction, the last of which was dated July 16, 2004.

[redacted]

G. Case-by-Case Approvals and the Levin Memo (December 30, 2004)

When Goldsmith left the Department in August 2006, Dan Levin, who was Counselor to Attorney General Ashcroft at the time, was asked to serve as Acting AAG of OLC. Among other duties, Levin inherited the task of drafting replacements for the Bybee Memo and the Classified Bybee Memo. In addition, he assumed responsibility for evaluating the CIA's pending and future requests for authorization to use EITs at the black sites.[95]

Levin stated that when he first read the Bybee Memo, he remembered "having the same reaction I think everybody who reads it has – 'this is insane, who wrote this?'" He thought the tone was generally inappropriate and the Commander-in-Chief and defenses sections were completely unnecessary. Levin thought an OLC opinion should be a carefully crafted analysis that did not engage in hypothetical and unnecessary analysis, but the Bybee Memo fell far short of that ideal.

[redacted]

[95] Prior to the Bullet Points controversy, the CIA did not seek OLC approval to use EITs on new prisoners brought into the CIA interrogation program, but simply relied on the analysis provided in the Classified Bybee Memo. After Goldsmith disavowed the Bullet Points, however, the agency appears to have sought written approval when it intended to use EITs.

[redacted]

At that time, the Department had advised the CIA that the CAT Article 16 standard of cruel, inhuman, and degrading treatment did not apply to the CIA interrogation program because the activity took place outside territory subject to United States jurisdiction. Levin told us that he and Ashcroft tried to convince the CIA that they were better off relying on the jurisdictional exclusion, rather than asking OLC to hypothetically consider whether the program would meet the

standards of Article 16. The CIA insisted, however, and although Levin left OLC before that question was addressed, he "thought it would be very, very hard to conclude that it didn't violate the cruel, inhuman and degrading [standard], at least unless you came up with an argument for how it meant something different than [what it would mean if applied] to a United States citizen in New York."[96]

Levin and other OLC attorneys met with CTC officers on August 4, 2004, and requested additional information about the waterboarding procedure. CTC [redacted] responded by fax the next day, noting some of the time limitations that the CIA had placed on the use of the waterboard.

[redacted]

Levin also asked the CIA for information about how the sleep deprivation technique was administered. He told us that he was surprised to learn that no one at OLC had previously asked the CIA about the methods used to keep prisoners awake for such extended periods, which was an aspect of the technique that he considered highly relevant to analyzing its effect.[97] He learned that detainees were typically shackled in a standing position, naked except for a diaper, with their hands handcuffed at head level to a chain bolted to the ceiling.

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96 That question was eventually addressed by Bradbury in the Article 16 Memo, which concluded that thirteen CIA EITs, including the waterboard, sleep deprivation and forced nudity, did not "violate the substantive standards applicable to the United States under Article 16 . . . ." Article 16 Memo at 39-40.

97 Similarly, none of the OLC lawyers who worked on the Classified Bybee Memo appears to have asked the CIA how prisoners were induced to maintain stress positions such as "wall standing."

In some cases, a prisoner's hands would be shackled above the head for more than two hours at a time. CIA personnel were expected to monitor the subjects to ensure that they carried all their weight on their feet, rather than hanging from the chains, which could result in injuries. In some cases, a prisoner would be shackled in a seated position to a small stool so that he had to stay awake to keep his balance.

Levin approved the CIA's request to use the waterboard in a letter to Rizzo dated August 6, 2004. Levin wrote to "confirm our advice that, although it is a close and difficult question, the use of the waterboard technique in the contemplated interrogation of [redacted] . . . would not violate any United States statute, including [the torture statute], nor would it violate the United States Constitution or any treaty obligation of the United States."[98] Levin noted that OLC would subsequently provide a legal opinion that explained the basis for his conclusion, and listed certain conditions and assumptions to the approval, which he noted were "consistent with the [Classified Bybee Memo] and with the previous uses of the technique, as they have been described to us."[99]

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98 Although Levin concluded that use of the waterboard was lawful, [redacted]

99 The conditions of Levin's approval were: (1) the use of the technique would conform to the description in Rizzo's August 2, 2004 letter; (2) a physician and psychologist would approve the use of the technique before each session, would be present for the session, and would have the authority to stop the session at any time; (3) there would be no material change in the subject's medical and psychological condition as described in the attachment to Rizzo's letter, with no new medical or psychological contraindications; and (4) consistent with the description in the Classified Bybee Memo, the technique would be administered during a thirty-day period, would be used on no more than fifteen days during that period, would be applied no more than twice on any given day, and the subject would be waterboarded no more than a total of twenty minutes each day.

At the time, Levin planned to issue a replacement for the Classified Bybee Memo, and OLC's files show that he prepared several drafts in August and September 2004, which were circulated to four other OLC attorneys, including Bradbury, who was read into the interrogation program around that time.[100]

[redacted]

Levin continued to work on a replacement for the Classified Bybee Memo, and in late September 2004, he asked CIA attorney [redacted] for more information about the administration of the following EITs: nudity, water dousing, sleep deprivation, and the waterboard. [redacted] responded on October 12, 2004.

On October 18, 2004, [redacted] sent Levin a 28-page document, entitled "OMS [CIA Office of Medical Services] Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention," dated May 17, 2004

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100 The six EITs under consideration in the Levin drafts were dietary manipulation, nudity, abdominal slap, water dousing, sleep deprivation, and the waterboard. The Levin drafts we reviewed concluded that the use of those techniques, subject to limitations and protections described by the CIA, would not constitute torture within the meaning of the torture statute.

[redacted]

(OMS Guidelines). That document included the following observations about the waterboard:

> This is by far the most traumatic of the enhanced interrogation techniques . . . . SERE trainees usually have only a single exposure to this technique, and never more than two . . . .

[redacted]

OMS Guidelines [redacted]

[redacted]

At some point that fall, Comey directed Levin to focus on a replacement for the unclassified Bybee Memo, which he wanted completed by the end of the year. In late November or early December 2004, Levin started working on the unclassified replacement memorandum. Principal Deputy AAG Bradbury prepared an initial draft, using the last draft created under Goldsmith's supervision as a starting point. As the drafting progressed, Goldsmith's draft was

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[102] Levin told us that he got "two rounds of very detailed excellent comments" from the State Department on his classified draft.

changed significantly. Virtually all of OLC's attorneys and deputies were included in the review process, and Levin also sought comments from the Criminal Division, Solicitor General Paul Clement, Philbin, Comey, the White House Counsel's Office, the State Department, the CIA, and the Defense Department.

The Levin Memo deleted the Bybee Memo's discussion of the Commander-in-Chief power because Levin believed it was unnecessary to the analysis, and because Levin considered it to be an enormously complicated question that could not be addressed in the abstract. Levin also deleted the discussion of possible defenses, which he believed was unnecessary and some of which he considered to be clearly wrong.

Levin modified the discussion of specific intent, which he also believed to be wrong. As presented in the Bybee Memo, Levin thought the section "suggested that if I hit you on the head with a . . . hammer, even though I know it's going to cause specific pain, if the reason I'm doing it is to get you to talk rather than to cause pain, I'm not violating the statute. I think that's just ridiculous."

Levin also changed the discussion of "severe mental or physical pain or suffering" by withdrawing and criticizing the Bybee Memo's conclusion that "severe pain" under the torture statute must be the equivalent of pain resulting from organ failure or death. As he recalled, only Patrick Philbin defended the previous analysis, and he told us that the two of them had "spirited discussions" on the subject. Levin disagreed with Philbin in the end, and criticized that argument in the final draft.[103]

The Levin Memo was signed on December 30, 2004, and was posted on the OLC website; Levin continued working on a replacement for the Classified Bybee Memo.

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103 Levin told us that he was unaware that Philbin was the "second deputy" on the Bybee Memo. In a December 21, 2004 email to Levin, Philbin argued that the criticism was not "entirely fair to the authors" of the Bybee Memo because the health benefit statutes could shed light on a "lay person's understanding of what kind of pain would be associated with" death, organ failure, or loss of bodily function.

On December 30, 2004, [redacted] provided Levin a copy of a 20-page document entitled "Background Paper on CIA's Combined Use of Interrogation Techniques." [redacted] On January 15, 2005, [redacted] sent Levin an updated copy (December 2004) of the OMS Guidelines and provided comments on portions of Levin's January 8, 2005 replacement draft of the Classified Bybee Memo.[104]

Levin told us that after Gonzales became Attorney General, he asked Levin to take over Bellinger's job as legal adviser to the NSC. Levin was not interested in the job, but Gonzales, the new National Security Advisor, Stephen Hadley, and White House Counsel Harriet Miers all urged him to take the position. Levin accepted the job, but once he got there, found he had "nothing to do." After about a month, he asked for permission to leave, and returned to private practice.

In describing his work on the issue of EITs, Levin said the CIA never pressured him. Rather, he said it only "made clear that they thought it was important," but that "their view was you guys tell us what's legal or not." He stated, however, that the "White House pressed" him on these issues. He commented: "I mean, a part of their job is to push, you know, and push as far as you can. Hopefully, not push in a ridiculous way, but they want to make sure you're not leaving any executive power on the table."

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[104] All of Levin's drafts that we saw in OLC's files concluded that the use of EITs as described by the CIA was lawful.

H. The Bradbury Memos

When Levin left the Department in early February 2005, Bradbury became OLC's Acting AAG.[105] Bradbury continued to work on a replacement for the Classified Bybee Memo, as well as a second classified memorandum that considered the legality of the combined use of EITs.[106]

Bradbury's point of contact at the CIA for these memoranda was CTC attorney [redacted] Correspondence from [redacted] to Bradbury indicates that the CIA provided its comments on the Combined Techniques Memo to OLC on March 1, 2005.

[redacted]

105 Bradbury was Acting AAG from February 5 to February 14, 2005. He then reverted to Principal Deputy AAG, but no acting AAG was appointed. He again became Acting AAG in June 2005,when his nomination to the position of AAG was submitted to the Senate, until April 27, 2007, when his time as AAG expired without Senate action on his nomination. He again reverted to the position of Principal Deputy AAG, but, again, no acting AAG was appointed.

106 Levin started working on the combined techniques memorandum before he left the Department, but was unable to complete it before his departure.

[redacted]

Bradbury circulated drafts of his memoranda widely within the Department. Both the Office of the Attorney General (OAG) and the Office of the Deputy Attorney General (ODAG) reviewed drafts, as did lawyers from the Department's National Security Division and the Criminal Division. John Bellinger at the State Department and Dan Levin, then at the NSC, were also included in the process. As discussed below, DAG Comey voiced no objections to the 2005 Bradbury Memo, but requested changes in the Combined Techniques Memo, which were not made. Former AAG Levin told us that he passed along comments on the Article 16 Memo to Bradbury, but that he does not remember seeing a final draft of the document.[107]

1. The 2005 Bradbury Memo (May 10, 2005)

The 2005 Bradbury Memo was one of two May 10, 2005 memoranda written to replace the Classified Bybee Memo.[108] The 2005 Bradbury Memo considered whether the use of thirteen specific EITs by the CIA would be "consistent with the federal statutory prohibition on torture" and concluded that, "although extended sleep deprivation and use of the waterboard present more substantial questions . . . none of these [EITs], considered individually, would violate" the torture statute.

The 2005 Bradbury Memo concluded that the use of the following EITs, as proposed by the CIA, would be lawful: (1) dietary manipulation; (2) nudity; (3) attention grasp; (4) walling; (5) facial hold; (6) facial slap or insult slap; (7) abdominal slap; (8) cramped confinement; (9) wall standing; (10) stress positions; (11) water dousing; (12) sleep deprivation (more than 48 hours); and (13) the

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107 Bradbury told us, however, that he remembers personally delivering a copy of the signed Article 16 Memo to Levin in his office at the NSC.

108 The 2005 Bradbury Memo noted that it superseded the Classified Bybee Memo, but added that it "confirms the conclusion of [the Classified Bybee Memo] that the use of these techniques on a particular high value al Qaeda detainee, subject to the limitations imposed herein, would not violate [the torture statute]." 2005 Bradbury Memo at 6, n.9.

waterboard. Each technique was described in the memorandum, along with the restrictions and safeguards the CIA had represented would be implemented with their use.

The memorandum noted at the outset that the CIA had represented that EITs would only be used on "High Value Detainees." Those individuals were defined by the CIA as (1) senior members of al Qaeda or an associated group; (2) who have knowledge of imminent terrorist threats against the United States or who have had direct involvement in planning such terrorist actions; and (3) who would constitute a clear and continuing threat to the United States or its allies if released. 2005 Bradbury Memo at 6.

Following a general discussion of the torture statute, the 2005 Bradbury Memo considered whether each individual technique would cause "severe physical or mental pain or suffering." As a preliminary matter, the memorandum noted that the EITs were developed from SERE training, and recited some of the same statistics regarding the effect of EITs on trainees that had appeared in the Classified Bybee Memo to support the conclusion that SERE EITs did not result in prolonged mental harm. 2005 Bradbury Memo at 29, n.33; Classified Bybee Memo at 5. Although the 2005 Bradbury Memo prefaced its discussion with the qualifying statement, "fully recognizing the limitations of reliance on this experience,"

[redacted]

In evaluating the legality of the first eleven techniques, the memorandum concluded that those EITs clearly did not rise to the level of "severe mental pain or suffering." The memorandum then turned to the two remaining techniques – sleep deprivation and waterboarding.

The discussion of sleep deprivation noted that the Classified Bybee Memo had failed to "consider the potential for physical pain or suffering resulting from the shackling used to keep detainees awake or any impact from the diapering of the detainee" or the possibility of severe physical suffering unaccompanied by severe physical pain. The 2005 Bradbury Memo pointed to information provided by CIA OMS that "shackling of detainees is not designed to and does not result in significant physical pain," reviewed the OMS monitoring procedures, and concluded that "shackling cannot be expected to result in severe physical pain" and that "its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so." 2005 Bradbury Memo at 37. The memorandum also cited OMS data and three books on the physiology of sleep and concluded that sleep deprivation did not result in any physical pain. *Id.* at 36.

On the question of whether sleep deprivation caused severe physical suffering, the 2005 Bradbury Memo noted that, "[a]lthough it is a more substantial question," it "would not be expected to cause 'severe physical suffering.'" *Id.* at 37. The memorandum acknowledged that, for some individuals, the technique could result in "prolonged fatigue, . . . impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision," and concluded that this could constitute "substantial physical distress." *Id.* at 37-38. However, because CIA OMS "will intervene to alter or stop" the technique if it "concludes in its medical judgment that the detainee is or may be experiencing extreme physical distress," the 2005 Bradbury Memo found that sleep deprivation "would not be expected to and could not reasonably be considered specifically intended to cause severe physical suffering in violation of" the torture statute. *Id.* at 39-39. Relying on similar assurances from CIA OMS, and on one medical text, the 2005 Bradbury Memo also concluded that sleep deprivation would not cause "severe mental pain or suffering" within the meaning of the torture statute. *Id.* at 39-40.

With respect to the waterboard, the 2005 Bradbury Memo noted that the "panic associated with the feeling of drowning could undoubtedly be significant" and that "[t]here may be few more frightening experiences than feeling that one is unable to breathe." *Id.* at 42. However, the memorandum noted that, according to OMS, the technique was not physically painful, and that it had been

administered to thousands of trainees in the SERE program.[109] *Id.* Furthermore, "the CIA has previously used the waterboard repeatedly on two detainees, and, as far as can be determined, these detainees did not experience physical pain . . . ." *Id.* Accordingly, "the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause 'severe physical pain.'" *Id.* at 42-43.

The 2005 Bradbury Memo also concluded that the waterboard did not cause "severe physical suffering" because any unpleasant sensations caused by the technique would cease once it was discontinued. Because each application would be limited to forty seconds, the memorandum reasoned, any resulting physical distress "would not be expected to have the duration required to amount to severe physical suffering." *Id.*[110]

The 2005 Bradbury Memo commented that the "most substantial question" raised by the waterboard related to the statutory definition of "severe mental pain or suffering." Noting that an act must produce "prolonged mental harm" to violate the statute, the memorandum again cited the experience of the SERE program and the CIA's experience in waterboarding three detainees to conclude that "the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause 'prolonged mental harm.'" *Id.* at 44.

The 2005 Bradbury Memo referred, in a footnote, to the CIA OIG Report's findings regarding the ~~CIA's~~ previous use of the waterboard, where the OIG had highlighted the lack of training, improper administration, misrepresentation of

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109 The 2005 Bradbury Memo acknowledged that most SERE trainees experienced the technique only once, or twice at most, whereas the CIA program involved multiple applications, and that "SERE trainees know it is part of a training program," that it will last "only a short time," and that "they will not be significantly harmed by the training." 2005 Bradbury Memo at 6.

110 The 2005 Bradbury Memo stated in its initial paragraph that it had incorporated the Levin Memo's general analysis of the torture statute by reference. The Levin Memo, citing dictionary definitions of suffering as a "state" or "condition," concluded that "severe physical suffering" was "physical distress that is 'severe' considering its intensity and duration or persistence [and not] merely mild or transitory." Levin Memo at 12.

expertise, and divergence from the SERE model in the CIA interrogation program. The 2005 Bradbury Memo stated that

> we have carefully considered the [CIA OIG Report] and have discussed it with OMS personnel. As noted, OMS input has resulted in a number of changes in the application of the waterboard, including limits on the frequency and cumulative use of the technique.

Id. at 41, n.51.

Thus, "assuming adherence to the strict limitations" and "careful medical monitoring," the 2005 Bradbury Memo concluded that "the authorized use of the waterboard by adequately trained interrogators and other team members could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering and thus would not violate" the torture statute. *Id.* at 45.

2. The Combined Techniques Memo (May 10, 2005)

The Combined Techniques Memo began by briefly recapping the 2005 Bradbury Memo's conclusions, and stated that it would analyze whether the combined effects of the authorized EITs could render a prisoner unusually susceptible to physical or mental pain or suffering, and whether the combined, cumulative effect of the EITs could result in an increased level of pain or suffering. The memorandum outlined the phases, conditions, and progression of a "prototypical" CIA interrogation, based upon the "Background Paper on CIA's Combined Use of Interrogation Techniques" that the CIA had sent to Levin on December 30, 2004 (CIA Background Paper). The Combined Techniques Memo noted that the waterboard would be used only in certain limited circumstances, and that it may be used in combination with only two EITs: dietary manipulation and sleep deprivation.[111]

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[111] The Combined Techniques Memo noted that the waterboard must be used in combination with dietary manipulation, "because a fluid diet reduces the risks of the technique." Combined Techniques Memo at 16. According to the CIA OMS Guidelines, a liquid diet is imposed [redacted]

The memorandum classified EITs into three categories based on their purpose. The first category, referred to as "conditioning techniques" was designed "to bring the detainee to 'a baseline, dependent state' . . . demonstrat[ing] . . . 'that he has no control over basic human needs . . . .'" Combined Techniques Memo at 5 (quoting CIA Background Paper at 5). The EITs included in this category were forced nudity, sleep deprivation, and dietary manipulation. *Id.*

Techniques in the second category, classified as "corrective techniques," are those that require physical action by the interrogator, and which "are used principally to correct, startle, or . . . achieve another enabling objective with the detainee." *Id.* (quoting CIA Background Paper at 5). This category includes the insult slap, the abdominal slap, the facial hold, and the attention grasp.

The third category, "coercive techniques," includes walling, water dousing, stress positions, wall standing, and cramped confinement. Their use "places the detainee in more physical and psychological stress." *Id.* at 5-6 (quoting CIA Background Paper at 7).[112]

The memorandum then examined whether the combined use of EITs would result in severe physical pain, severe physical suffering, or severe mental pain or suffering. With respect to severe physical pain, the memorandum noted that some of the EITs did not cause any physical pain, and that none of them used individually caused "pain that even approaches the 'severe' level required to violate the [torture] statute . . . ." The memorandum concluded that the combined use of the EITs therefore "could not reasonably be considered specifically intended to . . . reach that level." Combined Techniques Memo at 11-12. Acknowledging that some individuals might be more susceptible to pain, or that sleep deprivation might make some detainees more susceptible to pain, the memorandum described the medical and psychological monitoring procedures that CIA OMS had

[redacted]

112 The waterboard, which was not discussed in the CIA Background Paper or in this section of the Combined Techniques Memo, is another coercive technique, and "is generally considered to be 'the most traumatic of the enhanced interrogation techniques . . . .'" Article 16 Memo at 15 (quoting CIA OMS Guidelines at 17).

represented would be in place for each interrogation session, and observed that interrogation team members were required to stop an interrogation if "their observations indicate a detainee is at risk of experiencing severe physical pain . . . ." *Id.* at 14. The memorandum noted that such procedures were "essential to our advice." *Id.* Thus, the memorandum concluded that the combined use of EITs, as described by the CIA, "would not reasonably be expected by the interrogators to result in severe physical pain." *Id.*

Turning to "severe physical suffering," the Combined Techniques Memo noted that extended sleep deprivation used alone could cause "physical distress in some cases" and that the CIA's limitations and safeguards were therefore important to ensure that it did not cause severe physical suffering. However, it noted that its combined use with other EITs did not cause "severe physical pain," but only increased, "over a short time, the discomfort that a detainee subjected to sleep deprivation experiences." After citing two TVPA cases that described extremely brutal conduct (such as beatings) as torture, the memorandum opined that "we believe that the combination of techniques in question here would not be 'extreme and outrageous' and thus would not reach the high bar established by Congress" in the torture statute. *Id.* at 15.

Noting that sleep deprivation could reduce a subject's tolerance for pain, and that it might therefore increase physical suffering, the memorandum observed:

> [Y]ou have informed us that the interrogation techniques at issue would not be used during a course of extended sleep deprivation with such frequency and intensity as to induce in the detainee a persistent condition of extreme physical distress such as may constitute 'severe physical suffering' within the meaning of [the torture statute.]

Id. at 16. In light of the CIA's monitoring procedure, the memorandum asserted that the use of sleep deprivation would be discontinued if OMS personnel saw indications that it was inducing severe physical suffering.

With respect to the waterboard, the memorandum pointed to the 2005 Bradbury Memo, which concluded that the technique resulted in relatively short periods of physical distress. Because "nothing in the literature or experience"

suggested that sleep deprivation would "exacerbate any harmful effects of the waterboard," or that it would prolong the distress of being waterboarded, or that the waterboard would prolong the effects of sleep deprivation, the Combined Techniques Memo concluded that the combined use of the waterboard, sleep deprivation, and dietary manipulation "could not reasonably be considered specifically intended to cause severe physical suffering within the meaning of" the torture statute. *Id.* at 16-17.

The memorandum then considered whether the combined use of EITs would result in severe mental pain or suffering. Citing past experience from the CIA detention program, the memorandum concluded that there was no medical evidence that sleep deprivation or waterboarding would cause "prolonged mental harm," or that the combined use of any of the other techniques would do so. Again stressing the importance of CIA monitoring and assuming that OMS personnel would intervene if necessary, the memorandum concluded that the combined use of EITs would not result in "severe mental pain or suffering. " *Id.* at 19.

In its concluding paragraph, the Combined Techniques Memo cited "the experience from past interrogations, the judgment of medical and psychological personnel, and the interrogation team's diligent monitoring of the effects" of EITs, and opined that the authorized combined use of these [thirteen] specific techniques by adequately trained interrogators would not violate the torture statute. *Id.*

Philbin told us that he had two major concerns with the Combined Effects Memo and that he told the ODAG that he could not agree with its analysis or conclusion. Philbin said that, as a result of the CIA OIG investigation, significant new information had become available. Philbin noted in his written response:

> For example, it had not been known in 2002 that detainees were kept in diapers, potentially for days at a time. It had also not been known that detainees were kept awake by shackling their hands to the ceiling. . . . Similarly, dietary manipulation and water dousing had not been described to OLC in 2002 and were not even considered in

> the Classified Bybee Memo. All of these factors combined to create a picture of the interrogation process that was quite different from the one presented in 2002.

Philbin Response at 14.

Philbin was also concerned that, under the new reading of the law under the Levin Memo (OLC's determination that, in referring to "severe physical . . . pain or suffering," the torture statute was referring to distinct concepts of "pain" or "suffering," and that if either were inflicted with the necessary intent, a violation could be established), he could not agree with the Combined Techniques Memo that the use of all of the specified practices, taken together, would not violate the statute. *Id.* at 15. Philbin believed that the Combined Effects Memo did not adequately deal with the category of "severe physical suffering." Philbin told OPR:

> [I] did not think the memo provided a sufficient analysis to conclude that depriving a person of sleep for days on end while keeping him shackled to the ceiling in a diaper and at the same time using other techniques on him would not cross the line into producing "severe physical suffering."

Id. at 15. Philbin said he recommended to former DAG Comey that Comey should not concur in the Bradbury Combined Effects Memo.

Former DAG Comey told us that he reviewed and approved the 2005 Bradbury Memo, which found the CIA's proposed use of thirteen EITs, including forced nudity, extended sleep deprivation, and the waterboard to be lawful, but that, after he reviewed the Combined Techniques Memo, he argued that the Combined Techniques Memo should not be issued as written. His main concern was that the memorandum was theoretical and not tied to a request for the use of specific techniques on a specific detainee. Comey believed it was irresponsible to give legal advice about the combined effects of techniques in the abstract.

In an email to ODAG Chief of Staff Chuck Rosenberg dated April 27, 2005, Comey recounted a meeting on April 27, 2005 with Philbin, Bradbury, and AG Gonzales in which Comey expressed his concerns about the memorandum.

Comey wrote:

> The AG explained that he was under great pressure from the Vice President to complete both memos, and that the President had even raised it last week, apparently at the VP's request and the AG had promised they would be ready early this week. He added that the VP kept telling him "we are getting killed on the Hill." (Patrick [Philbin] had previously expressed that Steve [Bradbury] was getting constant similar pressure from Harriet Miers and David Addington to produce the opinions. Parenthetically, I have previously expressed my worry that having Steve as "Acting" – and wanting the job – would make him susceptible to just this kind of pressure.)[113]

After receiving a new draft of the Combined Techniques Memorandum, Comey met with Gonzales on April 26, 2005, and urged him to delay issuance of the memorandum. Comey believed that the AG had agreed with him, and Comey instructed Philbin to stop OLC from issuing it. In the April 27 email to Rosenberg,

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[113] Bradbury told us that Comey's concern that he was susceptible to pressure because he was seeking the President's nomination to be AAG of OLC was incorrect. Bradbury asserted that the President's formal approval of his nomination occurred in early to mid-April 2005, prior to Comey's email. We were unable to confirm this date. In addition, we were unable to ascertain if any pressure was applied to Bradbury prior to the date of his formal nomination.

In the email, Comey also shared concerns expressed by Philbin about whether the memorandum's analysis of combined techniques and "severe physical suffering" was adequate. He wrote that Philbin had told him that Philbin had repeatedly marked up drafts to highlight the inadequacy of the analysis, only to have his comments ignored. However, Bradbury told us that Philbin's concerns centered on the Combined Technique Memo's conclusion, identical to that of the Levin Memo, that "severe physical suffering" was a separate concept from "severe physical pain." Philbin reportedly urged Bradbury to adopt the more permissive view of the Classified Bybee Memo, which had concluded that there was no difference between severe physical pain and severe physical suffering. Bradbury told us that he responded to Philbin's comments by expanding the discussion of severe physical suffering and by further refining the memorandum's analysis, although he did not change his ultimate conclusion that "pain" and "suffering" were distinct concepts.

Comey stated that Philbin reported back that he had spoken to Bradbury, who "seemed 'relieved' that [DOJ] would not be sending out" the memorandum.[114]

Comey also wrote in the April 27 email that the AG had visited the White House that day and "the AG's instructions were that the second opinion was to be finalized by Friday, with whatever changes we thought appropriate."

Philbin told OPR that his advice to Comey that he not concur in the Combined Effects Memo was "certainly not welcome to the White House or the OAG." According to Philbin, in November 2004, he had a private conversation with Addington, who told him that, based on his participation in the withdrawal of Yoo's NSA opinion and the withdrawal of the Bybee Memo, Addington believed that Philbin had violated his oath to uphold, protect, and defend the Constitution of the United States. Addington told Philbin that he would prevent Philbin from receiving any advancement to another job in the government and that he believed that it would be better for Philbin to resign immediately and return to private practice.[115]

In an email dated April 28, 2005 to Rosenberg, Comey recounted a telephone call he had with Ted Ullyot, Gonzales' Chief of Staff, about the imminent issuance of the Combined Techniques Memo. Ullyot had informed Comey that the memorandum was likely to be issued the next day and that he was aware of

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[114] Bradbury told us that he mistakenly understood the instruction to mean that a joint decision had been reached by Gonzales and Comey in consultation with the White House and possibly the CIA, which would involve only a short delay in the issuance of the opinion. According to Bradbury, when he learned that the instruction came from Comey alone and that Comey believed the Combined Techniques Memo should not be issued, he did not consider that to be an acceptable option.

[115] Philbin told OPR that, in the Summer of 2005, then Solicitor General Paul Clement chose Philbin to be the Principal Deputy Solicitor General, AG Gonzales had agreed, and the proposal was sent to the White House personnel office for approval. According to Philbin, Addington strenuously objected to Philbin's appointment and Vice President Cheney personally called AG Gonzales to ask him to reconsider. AG Gonzales agreed and told Philbin that he had decided that Philbin would not receive the job in order to maintain good relations with the White House. Philbin told OPR that he told AG Gonzales that he should have defended him, and AG Gonzales responded that Philbin should resign if he felt that way. Philbin then resigned and returned to private practice.

Comey's concerns about the prospective nature of the opinion. Comey wrote in the email to Rosenberg:

> I responded by telling him that was a small slice of my concerns, which I then laid out in detail, just as I had for the AG. I told him that this opinion would come back to haunt the AG and DOJ and urged him not to allow it. . . . I told him that the people who were applying pressure now would not be here when the shit hit the fan. Rather, they would simply say they had only asked for an opinion. It would be Alberto Gonzales in the bullseye. I told him that my job was to protect the Department and the AG and that I could not agree to this because it was wrong.[116]

Comey further commented in the email:

> Anyhow, that's where we are. It leaves me feeling sad for the Department and the AG. I don't know what more is to be done, given that I have already submitted my resignation. I just hope that when all of this comes out, this institution doesn't take the hit, but rather the hit is taken by those individuals who occupied positions at OLC and OAG and were too weak to stand up for the principles that undergird the rest of this great institution.[117]

Comey told us that there was significant pressure on OLC and the Department from the White House, particularly Vice President Cheney and his staff. Comey said that no one was ever specific about what end result was wanted, but that one would have to "be an idiot not to know what was wanted." Comey said that, in his opinion, Bradbury knew that "if he rendered an opinion

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116 In an April 27, 2005, email to Rosenberg, Comey stated that the AG had instructed that whatever changes were appropriate should be made, but that the memorandum had to be issued by Friday (two days later). Asked if this was an indication that the AG was flexible on the results of the memorandum, Comey answered that it was not. He stated: "This was a way of giving process but in a way that foreclosed real input" because time was too short.

117 Comey told us that he wrote the emails to Rosenberg to memorialize what he considered to be a very important and serious situation. Rosenberg recommended to Comey that he write the emails in order to have a written record of the matter in the Department computer system.

that shut down or hobbled the [interrogation] program," the Vice President and Addington would be "furious."[118] Comey added that people in the Department leadership believed that Levin had not "delivered" on the interrogation program and the result was that Levin was not made OLC AAG.[119]

We asked Bradbury about Comey's objections. He told us that he felt OLC would have been giving incomplete legal advice if it addressed the use of individual techniques without also considering their combined use. He understood Comey's concerns to be over the "optics" of the memorandum, and recalled that Comey asked rhetorically how it would look if the memorandum were made public. Bradbury concluded that Comey's disagreement was a "policy" one and argued that the memorandum should be issued to avoid an incomplete analysis of the issues. Bradbury said he believed that Gonzales considered both arguments and made a decision to go forward.

Bradbury also told us that he neither felt nor received any pressure from the White House Counsel's Office, the Office of the Vice President, the NSC, the CIA, or the AG's Office as to the outcome of his opinions concerning the legality of the CIA interrogation program. He acknowledged that there was time pressure to complete the memoranda, and stated that he believed Comey's comments reflect a confusion between time pressure, which was not at all unusual at OLC, and pressure to reach a certain result, which he vehemently denied was present. Bradbury also strongly denied that his nomination as AAG in any way depended on his finding that the CIA interrogation program was lawful. Bradbury added that, although his nomination was not forwarded to the Senate until June 23, 2005, as noted above, the President had approved his nomination by early to mid-April 2005.

3. The Article 16 Memo by Bradbury (May 30, 2005)

As noted above, OLC's initial advice to the CIA about the CAT Article 16 prohibition of "cruel, inhuman or degrading treatment or punishment," was that Article 16 did not, by its terms, apply to conduct outside United States territory.

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118 Comey Interview, February 24, 2009.

119 *Id.*

However, the CIA (and, according to Bradbury, the NSC Principals) insisted that OLC also examine whether the use of EITs would violate Article 16 if the geographic limitations did not apply.

Article 16 of the CAT required each party to the treaty to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" as defined under the treaty "when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official. . . ."

The memorandum began with an overview of the CIA interrogation program and the guidelines, safeguards, and limitations attached to the use of EITs by the agency. The interrogations of Abu Zubaydah, KSM, [redacted] and Al-Nashiri were briefly described and were cited as examples of the type of prisoner that would be subjected to EITs.

A brief discussion of the effectiveness of the interrogation program followed, based upon: the CIA Effectiveness Memo; the CIA OIG Report; and a faxed memorandum from [redacted] DCI Counterterrorist Center, [redacted] The Article 16 Memo concluded, based primarily on the Effectiveness Memo, that the use of EITs had produced critical information, including "specific, actionable intelligence." Article 16 Memo at 10.

Next, the Article 16 Memo described the three categories of EITs and the thirteen specific EITs under consideration: (1) conditioning techniques (nudity, dietary manipulation, and sleep deprivation); (2) corrective techniques (insult slap, abdominal slap, facial hold, and attention grasp); and (3) coercive techniques (walling, water dousing, stress positions, wall standing, cramped confinement, and the waterboard).

The Article 16 Memo revisited and reaffirmed OLC's conclusion that Article 16 does not apply outside United States territory. In addition, it went on to note that a United States reservation to CAT stated that the United States obligation to prevent "cruel, inhuman or degrading treatment or punishment" was limited to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments" to the United States Constitution.

The Memo concluded that the Eighth and Fourteenth Amendments did not apply in this context. Thus, the only restraint imposed on CIA interrogators by Article 16, according to the memorandum, was the "Fifth Amendment's prohibition of executive conduct that 'shocks the conscience.'" Article 16 Memo at 2.

The memorandum acknowledged that there was no "precise test" for conduct that shocks the conscience, but concluded that, under United States case law, the conduct cannot be constitutionally arbitrary, but must have a "reasonable justification in the service of a legitimate governmental objective." *Id.* at 2-3 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). Another relevant factor was whether

> in light of "traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them," use of the techniques in the CIA interrogation program "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

Article 16 Memo at 3 (quoting *Lewis*, 523 U.S. at 847 n.8).

The Article 16 Memo noted that the CIA EITs would only be used on senior al Qaeda members with knowledge of imminent threats and that the waterboard would be used only when (1) the CIA has "credible intelligence that a terrorist attack is imminent"; (2) there are "substantial and credible indicators that the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and (3) other interrogation methods have failed or the CIA "has clear indications that other . . . methods are unlikely to elicit this information" in time to prevent the attack. *Id.* at 5 (quoting from "Description of the Waterboard," attached to Letter from John Rizzo, Acting General Counsel, Central Intelligence Agency, to Daniel Levin, Acting AAG, OLC at 5 (August 2, 2004)).

As to whether the use of EITs was constitutionally arbitrary, the memorandum cited the government's legitimate objective of preventing future terrorist attacks by al Qaeda and concluded, based on the Effectiveness Memo, that the use of EITs furthered that governmental interest. Article 16 Memo at 29. Again summarizing the limitations and safeguards attached to the use of EITs, the memorandum concluded that the program was "clearly not intended 'to injure [the

detainees] in some way unjustifiable by any government interest.'" *Id.* at 31 (quoting *Lewis,* 523 U.S. at 849).

Finally, the Article 16 Memo considered whether, in light of "traditional executive behavior," the use of EITs constituted conduct that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* (quoting *Lewis*, 523 U.S. at 847 n.8). Conceding that "this aspect of the analysis poses a more difficult question," the memorandum looked at jurisprudence relating to traditional United States criminal investigations, the military's tradition of not using coercive techniques, and "the fact that the United States regularly condemns conduct undertaken by other countries that bears at least some resemblance to the techniques at issue." *Id.*

The memorandum looked briefly at several cases in which the U.S. Supreme Court found that the conduct of police in domestic criminal investigations "shocked the conscience." *See Rochin v. California,* 342 U.S. 165 (1952) (police pumped defendant's stomach to recover narcotics); *Williams v. United States,* 341 U.S. 97 (1951) (suspects were beaten with a rubber hose, a pistol, and other implements for several hours until they confessed); *Chavez v. Martinez,* 538 U.S. 760 (2003) (police questioned a gunshot victim who was in severe pain and believed he was dying). Article 16 Memo at 34.

Although acknowledging that some of the Justices in *Chavez v. Martinez* "expressed the view that the Constitution categorically prohibits such coercive interrogations," the memorandum asserted that the CIA's use of EITs "is considerably less invasive or extreme than much of the conduct at issue in these cases." Article 16 Memo at 33. Moreover, the memorandum drew a distinction between the government's "interest in ordinary law enforcement" and its interest in protecting national security. Because of that distinction, the memorandum stated that "we do not believe that the tradition that emerges from the police interrogation context provides controlling evidence of a relevant executive tradition prohibiting use of these techniques in the quite different context of interrogations undertaken solely to prevent foreign terrorist attacks against the United States and its interests." *Id.* at 35.

The military's long tradition of forbidding abusive interrogation tactics, including specific prohibitions against the use of food or sleep deprivation, was not

relevant, the Article 16 Memo concluded, because the military's regulations and policies were limited to armed conflicts governed by the Geneva Conventions. A policy premised on the applicability of those conventions "and not purporting to bind the CIA," the memorandum stated, "does not constitute controlling evidence of executive tradition and contemporary practice . . . ." *Id.* at 36.

Similarly, the State Department's practice of publicly condemning the use of coercive interrogation tactics by other countries was found to be of little, if any importance. The reports in question, in which the United States strongly criticized countries such as Indonesia, Egypt, and Algeria for using EITs such as "food and sleep deprivation," "stripping and blindfolding victims," "dousing victims with water," and "beating victims," were found by the Article 16 Memo to be "part of a course of conduct that involves techniques and is undertaken in ways that bear no resemblance to the CIA interrogation program." *Id.* at 36. The memorandum also noted that the State Department Reports do not "provide precise descriptions" of the techniques being criticized, and that the countries in question use EITs to punish, to obtain confessions, or to control political dissent, not to "protect against terrorist threats or for any similarly vital government interests . . . ." Nor is there any "indication that [the criticized] countries apply careful screening procedures, medical monitoring, or any of the other safeguards required by the CIA interrogation program." *Id.* at 36-37.

As evidence that the use of EITs was "consistent with executive tradition and practice," the Article 16 Memo cited their use during SERE training. The memorandum acknowledged the significant differences between SERE training and the CIA interrogation program, but balanced those differences against the fact that the CIA program furthered the "paramount interest of the United States in the security of the Nation," whereas the SERE program furthered a less important government interest, that of preparing United States military personnel to resist interrogation. Thus, the memorandum concluded that, when considered in light of traditional executive practice, the CIA interrogation program did not "shock the contemporary conscience." *Id.* at 37-38.

In its final pages, the Article 16 Memo cautioned that, because of "the relative paucity of Supreme Court precedent" and the "context-specific, fact-dependent, and somewhat subjective nature of the inquiry," it was possible that

a court might not agree with its analysis. The memorandum's concluding paragraph reads as follows:

> Based on CIA assurances, we understand that the CIA interrogation program is not conducted in the United States or "territory under [United States] jurisdiction," and that it is not authorized for use against United States persons. Accordingly, we conclude that the program does not implicate Article 16. We also conclude that the CIA interrogation program, subject to its careful screening, limits, and medical monitoring, would not violate the substantive standards applicable to the United States under Article 16 even if those standards extended to the CIA interrogation program. Given the paucity of relevant precedent and the subjective nature of the inquiry, however, we cannot predict with confidence whether a court would agree with this conclusion, though, for the reasons explained, the question is unlikely to be subject to judicial inquiry.

Id. at 39-40.

According to Bradbury, the Article 16 Memo was reviewed by the offices of the Attorney General and the Deputy Attorney General, the State Department, the NSC, CIA, and the White House Counsel's Office. Comey told us that, although he reviewed the 2005 Bradbury Memo and the Combined Techniques Memo, he was not aware of the Article 16 Memo. Levin told us that he reviewed a draft of the Article 16 Memo when he was at the NSC, "and I remember telling [Bradbury] I thought he was just wrong." Levin stated that he gave Bradbury specific comments on the draft, but that he did not remember seeing a final version. However, Bradbury remembered providing a final copy of the opinion to Levin, and told us that, although Levin commented that the CIA interrogation program raised a difficult issue under the substantive Fifth Amendment standard if the same standard were to apply to United States citizens within the United States, he did not tell Bradbury that he thought the opinion was wrong. According to Bradbury, John Bellinger, then at the State Department, reviewed a draft, but "largely deferred to us because it involved analysis of domestic constitutional law." Bellinger told us that, although he did in fact defer to OLC's legal analysis, the Article 16 Memo was a turning point for him. The memo's conclusion that the use of the thirteen EITs – including forced nudity, sleep deprivation and waterboarding

– did not violate CAT Article 16 was so contrary to the commonly held understanding of the treaty that he concluded that the memorandum had been "written backwards" to accommodate a desired result.

4. The 2007 Bradbury Memo

a. Background

In late Fall 2005, congressional efforts to legislate against the abuses that had taken place at Iraq's Abu Ghraib prison intensified. By that time, NSC Advisor Stephen Hadley and NSC attorney Brad Wiegman were negotiating with the Senate over the terms of what would eventually become the Detainee Treatment Act of 2005 (DTA).[120] Bradbury did not participate directly in those negotiations, but advised Wiegman on proposed statutory language.

According to Bradbury, the NSC was worried that the legislation would prevent the CIA from continuing its interrogation program. The CIA was also concerned that the legislation would subject its interrogators to civil or criminal liability.

Bradbury told us that he believed the CIA was also involved in the negotiations with Congress, and that agency representatives may have talked directly to one of the sponsors, Senator John McCain. Although Bradbury was not involved in any of the talks with Senator McCain, he told us that it was his understanding that the CIA removed waterboarding from the list of EITs sometime after those discussions.[121]

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[120] Detainee Treatment Act of 2005, Pub.L. No. 109-148, 119 Stat. 2739 (2005) (codified at 42 U.S.C. § 2000dd). According to Bradbury and to later press accounts, Vice President Cheney and his counsel, David Addington, were involved in earlier discussions with the Senate. After they were unable to block the legislation, the NSC attorneys reportedly took over the negotiations.

[121] Bradbury acknowledged that he was not entirely certain when contacts between McCain and the CIA took place, and stated that they may have occurred in 2006. According to news accounts, McCain met with NSC Advisor Stephen Hadley in late 2006, during negotiations over the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in part at 28 U.S.C. § 2241 & note).

Bradbury told us that, during the negotiations, the NSC unsuccessfully asked the Senate to include an exception for national security emergencies. Despite the threat of a presidential veto, the legislation's sponsors would not agree to that request, and when the law was finally passed on December 30, 2005, few of the concessions sought by the Bush administration had been granted. The administration did gain a provision acknowledging that the advice of counsel defense was available to interrogators, but according to Bradbury, that was simply a restatement of existing case law.

[redacted]

As enacted, the DTA stated that it applied to all detainees in the custody of the United States government anywhere in the world, whether held by military or civilian authorities. Among other things, the DTA barred the imposition of "cruel, unusual, [or] inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution." 42 U.S.C. § 2000dd.

[redacted]

Those seven EITs were forced nudity, dietary manipulation, extended sleep deprivation, the facial hold, the attention grasp, the abdominal slap, and the insult slap.

On June 29, 2006, while Bradbury was drafting an opinion on the use of the EITs, the U.S. Supreme Court handed down its decision in *Hamdan v. Rumsfeld,* holding, among other things, that Common Article 3 of the Geneva Conventions applied to "unlawful enemy combatants" held by the United States government. *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006) (overturning the opinion of the United States Court of Appeals for the D.C. Circuit by a 5-4 vote). *Hamdan* directly contradicted OLC's January 22, 2002 opinion to the White House and the Department of Defense, which had concluded that Common Article 3 did not apply

to captured members of al Qaeda.[122] After *Hamdan*, it was clear that the prohibitions of Common Article 3, including certain specific acts of mistreatment and "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," applied to the CIA interrogation program. It was also apparent that interrogation techniques that violated Common Article 3 would also constitute war crimes under the War Crimes Act, 18 U.S.C. § 2441.

According to Bradbury, officials from the Departments of State, Defense, and Justice met with the President and officials from the CIA and NSC to consider the impact of the Court's decision and to explore possible options. It was clear from the outset that legislation would have to be enacted to address the application of Common Article 3 and the War Crimes Act to the CIA interrogation program.

An interagency effort was immediately launched to draft what would eventually become the Military Commissions Act (MCA) of 2006. The process went quickly, and by early August a draft bill had been completed. According to Bradbury, OLC had a central role in analyzing the legal issues and drafting legislative options, with the assistance of the State Department and the Department of Defense.

John Rizzo told us that the CIA had input into the drafting of the MCA as well. As noted above, the DTA had raised significant questions about the legality of the CIA interrogation program, and *Hamdan* raised additional concerns about "the shifting legal ground" for the program. The CIA reviewed OLC's drafts of the proposed legislation and provided extensive comments during the drafting process.

The MCA was signed into law on October 17, 2006. It included provisions designed to remove the legal barriers to the CIA program that had been created by the DTA and *Hamdan*.

The MCA amended the War Crimes Act by limiting the type of abusive treatment that could be punished as a war crime under federal law. Prior to the MCA, "grave breaches" of Common Article 3 and "[o]utrages upon personal dignity,

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[122] In addition, the Court held that the military commissions established by the President to try captured al Qaeda terrorists were unlawful.

in particular, humiliating and degrading treatment" constituted war crimes. The MCA limited the applicability of the War Crimes Act to "grave breaches" of Common Article 3 and defined "grave breaches" as a limited number of specific acts: torture; cruel or inhuman treatment (defined as "an act intended to inflict severe or serious physical or mental pain or suffering . . . including serious physical abuse"); performing biological experiments; murder; mutilation or maiming; intentionally causing serious bodily injury; rape; sexual assault or abuse; and taking hostages.[123] In addition, the MCA specified that the President had the authority to interpret the applicability of the Geneva Conventions to the CIA interrogation program by executive order. The MCA also granted retroactive immunity to CIA interrogators by providing that it would be effective as of November 26, 1997, the date the War Crimes Act was enacted.

The MCA included one additional prohibition, against "cruel, inhuman or degrading treatment or punishment," defined as "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States . . . ." This provision, which is identical to the DTA's prohibition against cruel, inhumane, or degrading treatment, had the effect of defining violations of Common Article 3 in terms of violations of the DTA. Thus, the language of the DTA and the MCA was identical to the United States reservation to Article 16 of the CAT, which OLC had already determined, in the Article 16 Memo, did not prohibit the use of EITs in the CIA interrogation program.

b. The 2007 Memo

After the MCA was enacted, Bradbury continued working on his memorandum on the legality of the revised interrogation program, consisting of six EITs, that the CIA had proposed following enactment of the DTA. According to Bradbury, the AG's Office, the DAG's Office, the Criminal Division, and the National Security Division were included in the drafting process, as were the State Department, the NSC, and the CIA.

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123 Thus, "outrages upon personal dignity, in particular humiliating and degrading treatment" no longer constituted war crimes as a separate category. Moreover, the MCA forbade federal courts from consulting any "foreign or international source of law" in interpreting the prohibitions of Common Article 3 and the WCA.

[redacted]

On February 9, 2007, John Bellinger, then Legal Adviser to Secretary of State Condoleezza Rice, sent Bradbury an 11-page letter (the Bellinger Letter) that outlined the State Department's objections to Bradbury's draft opinion. The letter focused on the draft's analysis of Common Article 3, and offered the following comments:

- The draft relied too heavily on U.S. law to interpret the terms of Common Article 3, ignoring "well-accepted norms of treaty interpretation" and substituting "novel theories concerning the relevance of domestic law to support controversial conclusions"; Bellinger Letter at 1-2.

- The draft's conclusion that two EITs – forced nudity and extended sleep deprivation – did not violate Common Article 3 was inconsistent with traditional treaty interpretation rules and was inappropriately based on the "shock-the-conscience" standard; *Id.* at 2-3.

- The legislative history of the MCA included statements that suggested a bipartisan consensus that nudity and sleep deprivation constituted grave breaches of Common Article 3; *Id.* at 5.

- The remaining EITs may not be consistent with the requirements of Common Article 3, depending upon what restrictions and safeguards have been instituted by the CIA; *Id.* at 6.

- The practice of treaty partners and decisions of international tribunals indicate that "the world would disagree with the [draft's] interpretations of Common Article 3"; *Id.* at 7.

- The opinion should "assess risks of civil or criminal liability in foreign tribunals" because "foreign courts likely would view some of these EITs as violating Common Article 3 and as war crimes"; *Id.* at 10.

The Bellinger Letter concluded with the following observation:

> While [the draft OLC opinion] does a careful job analyzing the precise meanings of relevant words and phrases, I am concerned that the opinion will appear to many readers to have missed the forest for the trees. Will the average American agree with the conclusion that a detainee, naked and shackled, is not being subject [sic] to humiliating and degrading treatment? At the broadest level, I believe that the opinion's careful parsing of statutory and treaty terms will not be considered the better interpretation of Common Article 3 but rather a work of advocacy to achieve a desired outcome.

Id. at 11.

Bradbury responded on February 16, 2007, with a 16-page letter challenging Bellinger's criticism (the Bradbury Letter). He reproached Bellinger for taking positions that were inconsistent with his previous support of the CIA program when he was NSC Legal Adviser, and observed that the NSC Principals had previously approved the same EITs that Bellinger now described as humiliating and degrading within the meaning of Common Article 3. Bradbury addressed Bellinger's comments in detail, and rejected almost all of them, including his criticism of forced nudity and extended sleep deprivation.

[redacted]

Bradbury's memorandum was issued on July 20, 2007, contemporaneously with President Bush's executive order holding that the CIA's detention and interrogation program was in compliance with Common Article 3 of the Geneva Convention. The memorandum was divided into four parts: (I) a brief history of the CIA program, including the six proposed EITs and the safeguards and restrictions attached to their use by the CIA; (II) the legality of the use of EITs under the War Crimes Act; (III) the legality of the use of EITs under the DTA; and

(IV) the status of EITs under Common Article 3 of the Geneva Convention. After 79 pages of analysis, relying in part on the reasoning and conclusions of the 2005 Bradbury Memo, the Combined Techniques Memo, and the Article 16 Memo, the 2007 Bradbury Memo concluded that the use of the six EITs in question did not violate the DTA, the War Crimes Act, or Common Article 3.

In concluding that the six EITs did not violate the DTA, the memorandum incorporated much of the Article 16 Memo's "shock the conscience" analysis, including the balancing of government interests, examination of "traditional executive behavior," and consideration of whether the conduct was "arbitrary in the constitutional sense."[124] 2007 Bradbury Memo at 30-31.

On April 12, 2007, and again on August 2, 2007, Bradbury testified before the Senate Select Committee on Intelligence (SSCI) in classified and unclassified hearings on the CIA's interrogation program. He presented the OLC's interpretation of the three new legal requirements discussed above: the DTA; the War Crimes Act; and Common Article 3. He explained that the DTA prohibited only methods of interrogation that "shock the conscience" under the "totality of the circumstances." He stated that a key part of this inquiry was whether the conduct is "arbitrary in the constitutional sense," meaning whether it is justifiable by the government interest involved. Bradbury emphasized that, with regard to the CIA interrogation program, the government interest was of the "highest order." Bradbury April 12, 2007 SSCI Testimony at 2-3.

Bradbury testified that the War Crimes Act differed from the torture statute because, although the torture statute prohibited "prolonged mental harm," the War Crimes Act prohibits only "serious and non-transitory mental harm (which need not be prolonged.)" *Id.* at 4. He commented that, therefore, under the new standard "we're looking for some combination of duration and intensity" rather than for "duration under the "prolonged" mental harm standard of the torture statute. *Id.*

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[124] The 2007 Bradbury Memo again cited the CIA Effectiveness Memo to support its conclusion that the use of EITs was not arbitrary. 2007 Bradbury Memo at 31.

Finally, Bradbury explained that, consistent with the views of international tribunals, Common Article 3's prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment," does not contain a "freestanding prohibition on degrading or humiliating treatment." *Id.* Instead, to violate Common Article 3, humiliating and degrading treatment must rise to the level of an "outrage upon personal dignity." *Id.*

Bradbury prepared a four-page set of "Points Regarding Specific Enhanced Interrogation Techniques" for his testimony, summarizing OLC's analysis and findings regarding specific interrogation techniques under the new legal standards. The talking points outlined OLC's reasons for concluding that nudity, sleep deprivation, and dietary manipulation were permissible techniques under the torture statute, the War Crimes Act, and Common Article 3.

III. ANALYSIS

A. The Bybee Memo's Flaws Consistently Favored a Permissive View of the Torture Statute[125]

Because the withdrawal of two OLC opinions – the Bybee and Yoo Memos – by the same administration within such a short time was highly unusual, and because of the criticisms leveled at them by the OLC attorneys who withdrew and amended them, we initially focused on those two memoranda and on the sections of those memoranda that were set aside or modified by the Department in 2004. We found the withdrawal of certain arguments and conclusions of law by the Department to be significant, but we did not limit our review to those areas. Rather, we examined the memoranda in their entirety in light of the drafters' professional obligations set out above.

As discussed in the following sections, we found errors, omissions, misstatements, and illogical conclusions in the Bybee Memo. Although some of those flaws were more serious than others, they tended to support a view of the

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[125] As noted earlier in this report, Yoo's March 14, 2003 memorandum to Haynes incorporated the Bybee Memo in its entirety, with very few changes. Thus, our conclusions with respect to the Bybee Memo, as set forth below, apply equally to the Yoo Memo. Moreover, former AAG Goldsmith and other OLC attorneys identified significant errors in the Yoo Memo's legal analysis, which we have described earlier in this report.

torture statute that allowed the CIA interrogation program to go forward, and their cumulative effect compromised the thoroughness, objectivity, and candor of OLC's legal advice. We discuss below several areas of the Bybee Memo that, when viewed together, support our conclusion that the Yoo and Bybee Memos did not represent thorough, objective, and candid legal advice.

We did not attempt to determine and did not base our findings on whether the Bybee and Yoo Memos arrived at a correct result. Thus, the fact that other OLC attorneys subsequently concluded that the CIA's use of EITs was lawful was not relevant to our analysis. Rather, we limited our review to whether the legal analysis and advice set forth in the Bybee and Yoo Memos were consistent with applicable professional standards.

Our view that the memoranda were seriously deficient was consistent with comments made by some of the former Department officials we interviewed, even though those individuals would not necessarily agree with some of our findings in this matter. Levin stated that when he first read the Bybee Memo, "[I had] the same reaction I think everybody who reads it has – 'this is insane, who wrote this?'" Jack Goldsmith found that the memoranda were "riddled with error," concluded that key portions were "plainly wrong," and characterized them as a "one-sided effort to eliminate any hurdles posed by the torture law." Bradbury told us that Yoo did not adequately consider counter arguments in writing the memoranda and that "somebody should have exercised some adult leadership" with respect to Yoo's section on the Commander-in-Chief powers. Mukasey acknowledged that the Bybee Memo was "a slovenly mistake," even though he urged us not to find misconduct.

1. Specific Intent

We found that OLC's advice concerning the specific intent element of the torture statute was incomplete in that it failed to note the ambiguity and complexity of this area of the law. We also found that, notwithstanding certain qualifications included in the Bybee Memo and the Yoo Memo, OLC's advice erroneously suggested that an interrogator who inflicted severe physical or mental

pain or suffering on an individual would not violate the torture statute if he acted with the goal or purpose of obtaining information.

We based our conclusions on the totality of OLC's legal advice to the CIA on this subject, including the legal analysis of the Bybee Memo, the Classified Bybee Memo, Yoo's July 13, 2002 letter to John Rizzo on the elements of the torture statute, and the June 2003 CIA bullet points that were drafted in part and reviewed in their entirety by Yoo and [redacted] We also based our conclusion on the contemporaneous interpretation of the advice by the CIA, and by Department of Justice lawyers who later reviewed it in 2004.

[redacted]

When the Bybee Memo was issued a few weeks later, it included a more extensive discussion of the specific intent element. The memorandum's conclusions were based primarily upon *United States v. Carter*, 530 U.S. 255 (2000), in which the Court explained the difference between general and specific intent through the example of a person who robs a bank not intending to keep the money, but in order to be arrested and returned to prison, where he could be treated for alcoholism. In that example, the Court explained, the defendant would have only had general intent because he did not intend to permanently deprive the bank of its money. Based on *Carter*, the Bybee Memo concluded that, in theory, "knowledge alone that a particular result is certain to occur does not constitute specific intent." Bybee Memo at 4.

The Bybee Memo also cited *United States v. Bailey*, 444 U.S. 394 (1980), in which the Court noted that the law of homicide distinguishes between a person who knows that someone will be killed as a result of his conduct and a person who acts with the specific purpose of taking another's life. Turning to another Supreme Court case, *Vacco v. Quill*, 521 U.S. 793 (1997), where the Court considered whether a law barring assisted suicide was constitutional, the Bybee Memo quoted the following excerpt from the Court's discussion of the difference between assisted suicide and the withdrawal of life-sustaining treatment: "the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of' their unintended but foreseen consequences." Bybee Memo at 4 (quoting *Vacco* at 802-03). Based on those sources, the Bybee Memo concluded:

> Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good

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126 The letter closed with: "[a]s you know, our office is in the course of finalizing a more detailed memorandum opinion analyzing section 2340. We look forward to working with you as we finish that project. Please contact me or [redacted] if you have any further questions."

> faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control.

Bybee Memo at 4. The memo noted that, notwithstanding the above, a jury could infer from factual circumstances that a defendant had specific intent to do an act.

The Bybee Memo then stated that "a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent. . . . Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct. . . . A good faith belief need not be a reasonable one." *Id.* at 4-5 (citations omitted). Again, the memo noted that, as a practical matter, a jury would be unlikely to acquit where a defendant held an unreasonable belief, and that "a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief." *Id.* at 5.

The Classified Bybee Memo summarized the specific intent element of the torture statute as follows:

> As we previously opined, to have the required specific intent, an individual must expressly intend to cause such severe pain or suffering. We have further found that if a defendant acts with the good faith belief that his actions will not cause such suffering, he has not acted with specific intent. A defendant acts in good faith when he has an honest belief that his actions will not result in severe pain or suffering. Although an honest belief need not be reasonable, such a belief is easier to establish where there is a reasonable basis for it. Good faith may be established by, among other things, the reliance on the advice of experts.

Classified Bybee Memo at 16 (citation to Bybee Memo and citations to cases omitted).

The memorandum continued: "Based on the information you have provided us, we believe that those carrying out these procedures would not have the specific intent to inflict severe physical pain or suffering. The objective of these techniques is not to cause severe physical pain." *Id.*

The Classified Bybee Memo also summarized some of the information provided to OLC by the CIA concerning the medical supervision and monitoring of interrogation, the views of experts about the effects of EITs, the experience of SERE training, and the CIA's review of relevant professional literature. In the context of severe mental pain or suffering, it offered the following legal advice:

> As we indicated above, a good faith belief can negate [specific intent]. Accordingly, if an individual conducting the interrogation has a good faith belief that the procedures he will apply, separately or together, would not result in prolonged mental harm, that individual lacks the requisite specific intent. This conclusion concerning specific intent is further bolstered by the due diligence that has been conducted concerning the effects of these interrogation procedures.

Classified Bybee Memo at 17.

In conclusion, the Classified Bybee Memo restated its findings on specific intent as follows:

> Reliance on this information about Zubaydah and about the effect of the use of these techniques more generally demonstrates the presence of a good faith belief that no prolonged mental harm will result from using these methods in the interrogation of Zubaydah. Moreover, we think that this represents not only an honest belief but also a reasonable belief based on the information that you have supplied to us. Thus, we believe that the specific intent to inflict prolonged mental [sic] is not present, and consequently, there is no

specific intent to inflict severe mental pain or suffering. Accordingly, we conclude that on the facts in this case the use of these methods separately or [sic] a course of conduct would not violate [the torture statute].

Classified Bybee Memo at 18.

[redacted]

The June 2003 CIA Bullet Points, which were drafted in part and reviewed in their entirety by [redacted] and Yoo, included the following regarding the negation of specific intent by good faith:

> The interrogation of al-Qa'ida detainees does not constitute torture within the meaning of [the torture statute] where the interrogators do not have the specific intent to cause "severe physical or mental pain or suffering." The absence of specific intent (i.e., good faith) can be established through, among other things, evidence of efforts to review relevant professional literature, consulting with experts, reviewing evidence gained from past experience where available (including experience gained in the course of U.S. interrogations of detainees), providing medical and psychological assessments of a detainee (including the ability of the detainee to withstand interrogation without experiencing severe physical or mental pain or suffering), providing medical and psychological personnel on site during the conduct of interrogations, or conducting legal and policy reviews of the interrogation process (such as the review of reports from the interrogation facilities and visits to those locations). A good faith belief need not be a reasonable belief; it need only be an honest belief.

The CIA Bullet Points do not mention the one qualification to the good faith defense cited in the Bybee Memo – that although a good faith belief need not be reasonable, the defense is "more compelling" when it is reasonable.

In his OPR interview, Yoo stated that he relied on [redacted] for the specific intent section of the Bybee Memo, and that he only "looked at the cases quickly." His sense at the time was "that the Supreme Court's doctrine in the area [was] messed up," and that the *Carter* case was "confusing." He asked [redacted] "to try to take those cases and try to figure out what, you know, from reading that, those cases which seemed not very clear, what the law really is on specific intent at that time."

Yoo also discussed the issue with Chertoff and with persons outside of government who had expertise in criminal law. According to Yoo, they told him "that they thought the specific intent standard, this idea of specific intent was awfully confused, and it was kind of a we-know-it-when-we-see-it kind of thing." This was the first time Yoo had ever dealt with the question of specific intent, and he "was very surprised to see that the Supreme Court cases were so confused about it." He also remembered reading a law review article or treatise, possibly LaFave & Scott, that discussed "how they're not sure what the exact definition of specific intent is."

We asked Yoo about criticism that the Bybee Memo could be interpreted as saying that if an interrogator's motive was to obtain information, rather than to

inflict pain, he would not have the necessary specific intent to violate the torture statute.[127] We pointed to the following sentence from the Bybee Memo:

> Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.

Bybee Memo at 4.

Yoo told us that he remembered discussing this point with [redacted] and that he thought the sentence was included to answer the question, "what if someone causes severe pain, but wasn't trying to cause severe pain when they were doing the interrogation." He conceded that "the sentence is just not clear" and that it did not address that issue; but explained that the next sentence in the Bybee Memo ("Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control") clarified what they intended to say because "it says, a defendant is guilty only if he acts with the express purpose of inflicting severe pain or suffering on the person."[128] Yoo also included qualifying language that made it clear that notwithstanding legal theory, as a practical matter a jury could infer specific intent from a defendant's actions.

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127 *See, e.g.*, Andrew C. McCarthy, *A Manufactured Scandal*, National Review Online, June 25, 2004, http://www.nationalreview.com/mccarthy/mccarthy200406250856.asp ("the 'specific objective' qualification [in the Bybee Memo] seems especially unworthy, conflating the separate legal (and common sense) issues of intent and motive").

128 In light of the sentence that preceded it, it was not apparent to us how this sentence clarified what Yoo told us he intended to say – that there is a difference between acting "with the express purpose of inflicting severe pain or suffering on the person" and "accidentally causing the pain."

We asked current and former Department attorneys about this section of the Bybee Memo. Levin told us that he thought the Bybee Memo's analysis on this point was wrong because:

> it sort of suggested that if I hit you on the head with a, you know, steel hammer, even though I know it's going to cause specific pain, if the reason I'm doing it is to get you to talk rather than to cause pain, I'm not violating the statute. I think that's just ridiculous. . . . It's just not the law. I mean, as far as I can tell, it's just not the law.

Accordingly, the Levin Memo stated explicitly that "there is no exception under the statute permitting torture to be used for a 'good reason'" and "a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute." Levin Memo at 17 (citing *Cheek v. United States*, 498 U.S. 192, 200-01 (1991)).

Philbin told us that he:

> did not agree with part of the specific intent analysis to the extent it could be read to suggest that, if an interrogator caused someone severe pain, but did so with the intent of eliciting information, that would somehow eliminate the intent to cause severe pain. Mr. Philbin thought that such reasoning was incorrect. . . . Mr. Philbin believes he informed Jay Bybee that he did not agree with this aspect of the specific intent analysis, but he explained that he considered it unnecessary *dicta* because none of the conclusions in the Classified Bybee Memo turned on it.

Philbin Response at 8-9.

The OLC Attorney [redacted] assigned to review and redraft the Bybee Memo in June 2004 also concluded that the specific intent discussion could be read as

conflating intent and motive, as evidenced by the following email comment to Philbin on June 20, 2004:

> The way the section reads now, you're left wondering whether someone could ever be charged under the statute if the purpose of the acts was to gather information.

The same OLC attorney commented a few days later to Goldsmith:

> One particular area that I wanted to [draw] your attention to is the requirement of specific intent. I have added a paragraph cautioning that you can be liable under the statute if you specifically intend to cause severe harm even if the intent to cause harm is not your only intention or ultimate motivation. The way it reads now makes you wonder whether this is just an anti-sadism statute.

Based on the above comments, and based on our reading of the Bybee Memo, we concluded that the memorandum erroneously suggested that an interrogator who inflicted severe physical or mental pain or suffering on an individual would not violate the torture statute if he acted with the goal or purpose of obtaining information.

We also concluded, based on our review of the Bybee Memo, that its erroneous view was supported by an over-simplification of this difficult area of the law. As the Levin Memo observed, "[i]t is well recognized that the term 'specific intent' is ambiguous and that the courts do not use it consistently." Levin Memo at 16 (citing 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003)). The Levin Memo concluded that it would not be "useful to try to define the precise meaning of 'specific intent'" in the torture statute, and disavowed the Bybee Memo's conclusions, adding that "it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture." Levin Memo at 16-17.

The Supreme Court has commented more than once on the imprecision of the terms "specific intent" and "general intent." In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court noted that "[f]ew areas of criminal law

pose more difficulty than the proper definition of the *mens rea* required for any particular crime" and that the distinction between specific and general intent "has been the source of a good deal of confusion" *Id.* at 403.[129]

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), the Court commented on "'the variety, disparity and confusion' of judicial definitions of the 'requisite but elusive mental element' of criminal offenses." *Id.* at 444 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). In another case, the Court noted that jury instructions on the meaning of specific intent have "been criticized as too general and potentially misleading" and that a "more useful instruction might relate specifically to the mental state required under [the statute in question] and eschew use of difficult legal concepts like 'specific intent' and 'general intent.'" *Liparota v. United States*, 471 U.S. 419, 433 n.16 (1985).

The *Bailey* Court noted, "the ambiguous and elastic term 'intent' [has tended to be replaced] with a hierarchy of culpable states of mind . . . , commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence." *Bailey*, 444 U.S. at 403-04 (citing W. LaFave & A. Scott, Handbook on Criminal Law 194 (1972) and American Law Institute, Model Penal Code § 2.02 (Prop. Off. Draft 1962)).

The meaning of specific intent may vary from statute to statute. For example, in evaluating the mental state required to prove a violation of 18 U.S.C. § 664 (theft or embezzlement from employee benefit plan), one appellate court

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129 The Court quoted the following passage from LaFave & Scott's treatise on criminal law:

> Sometimes "general intent" is used in the same way as "criminal intent" to mean the general notion of *mens rea*, while "specific intent" is taken to mean the mental state required for a particular crime. Or, "general intent" may be used to encompass all forms of the mental state requirement, while "specific intent" is limited to the one mental state of intent. Another possibility is that "general intent" will be used to characterize an intent to do something on an undetermined occasion, and "specific intent" to denote an intent to do that thing at a particular time and place.

Bailey, 444 U.S. at 403 (quoting W. LaFave & A. Scott, Handbook on Criminal Law § 28, 201-02 (1972)).

found that "[t]he specific intent required . . . includes *reckless disregard* for the interests of the plan." *United States v. Krimsky*, 230 F.3d 855 860-61 (6th Cir. 2000) (emphasis added). *See United States v. Woods*, 877 F.2d 477, 480 (6th Cir.1989) (specific intent in cases involving willful misapplication of bank funds in violation of 18 U.S.C. § 656 "exists whenever the officer acts knowingly or with reckless disregard of the bank's interests and the result of his conduct injures or defrauds the bank"); *United States v. Hoffman*, 918 F.2d 44, 46 (6th Cir.1991) (district court correctly instructed the jury that reckless disregard is equivalent to intent to injure or defraud).

As noted above, Yoo acknowledged in his OPR interview that the law in this area was "confusing" and "messed up," but that he "looked at the cases quickly" and was willing to rely upon a relatively inexperienced, junior OLC attorney to "try to figure out . . . what the law really is on specific intent . . . ."

Some of the Bybee Memo's analysis was oversimplified to the point of being misleading. The first paragraph of the Bybee Memo's discussion of specific intent cited *Ratzlaf v. United States*, 510 U.S. 135 (1994), as an example of what was required to show specific intent:

> For example, in *Ratzlaf* . . . , the statute at issue was construed to require that the defendant act with the "specific intent to commit the crime." (Internal quotation marks and citation omitted.) As a result, the defendant had to act with the express "purpose to disobey the law" in order for the *mens rea* element to be satisfied. . . .

Bybee Memo at 3 (citing and quoting *Ratzlaf*, 510 U.S. at 141). The Bybee Memo clearly implied that the Court had considered the meaning of specific intent and had concluded that it required an express purpose to disobey the law on the part of the defendant.

However, the *Ratzlaf* decision did not address the meaning of "specific intent" in a general sense. The statute under review in that case penalized "willful violations" of the Treasury Department's cash transaction reporting regulations, and the only question before the Court was the meaning of the term "willful." *Ratzlaf*, 510 U.S. at 136-37 and 141-49. In that context, the Court ruled that the term "consistently has been read by the Courts of Appeals to require both

'knowledge of the reporting requirement' *and* a 'specific intent to commit the crime,' *i.e.*, 'a purpose to disobey the law.'" *Id.* at 141 (italics in original).

Yoo has argued that *Ratzlaf* was used properly "as an *example* of a statute that was construed to require specific intent [because] the willfulness requirement at issue in *Ratzlaf is*, in fact, a specific intent requirement." Yoo Response at 29 n.15 (emphasis in original). However, although "willfulness" can be characterized as a form of specific intent, specific intent to inflict severe pain or suffering has nothing to do with "willfulness." Rather, "willfulness" "'carv[es] out an exception to the traditional rule' that ignorance of the law is no excuse." *Bryan v. United States*, 524 U.S. 184, 195 (1998). Thus, a statute that specifies a defendant must act "willfully" "require[s] that the defendant have knowledge of the law" he is charged with violating. *Id.* As used in *Ratzlaf* and other cases involving highly technical tax or currency regulations, "willfulness" is considered a "heightened *mens rea*" standard, even compared to the way "willfulness" is applied in other, less complex statutes. *Id.* at 194-195, 195 n.17.

In his response to OPR, Bybee similarly characterized the "willfulness" requirement of *Ratzlaf* as "a specific intent to violate the currency structuring law." Thus, he argued, the Bybee Memo's statement that the defendant in *Ratzlaf* "had to act with the express 'purpose to disobey the law' in order for the *mens rea* element to be satisfied" was accurate in a literal sense because "the law" in that sentence referred to the currency structuring law. Bybee claimed that, because the Bybee Memo did not "seek to extend *Ratzlaf* to other statutory regimes," and because the memorandum did not say elsewhere that the torture statute requires a defendant to act with a specific intent to violate the law, the citation to *Ratzlaf* was proper.

However, *Ratzlaf* was cited in a section of the Bybee Memo devoted to the elements of the torture statute, in a paragraph that began by noting that "[the torture] statute requires that severe pain and suffering must be inflicted with specific intent," and which proposed a general definition of "specific intent," relying on *Carter* and Black's Law Dictionary. *Ratzlaf* was cited in that same paragraph as an example of how the Supreme Court had construed specific intent, and the Bybee Memo did not identify or describe the "statute at issue" in that

case. Based on that context, we concluded that the Bybee Memo misleadingly suggested that, in order to violate the torture statute, a defendant would have to act with a "purpose to disobey the law."[130]

This was stated more explicitly in the July 28, 2002 draft of the Bybee Memo, which concluded the discussion of *Ratzlaf* quoted above with the following comment:

> In other words, the intent to achieve the *actus reus* of a crime is not sufficient to satisfy a specific intent standard, but rather a defendant must have knowledge of the legal prohibition established by the criminal statute *and* the purpose to violate that prohibition.

July 28, 2002 draft at 3 (citation to *Ratzlaf* omitted) (emphasis in original). As a general statement of the law, this was clearly wrong, and was deleted from the final draft. However, as the introductory phrase "in other words" signifies, it represented a restatement of the memorandum's preceding analysis, which remained unchanged in the final draft.

We also found that the Bybee Memo's discussion of a potential good faith defense to violations of the torture statute was incomplete. The memorandum characterized the good faith defense as: "a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent." Bybee Memo at 4. The memorandum added that even an unreasonable belief could constitute good faith, but cautioned that a jury would be unlikely to acquit a defendant on the basis of an unreasonable, but allegedly good faith belief. *Id.* at 5. Thus, the memorandum concluded, "a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief." *Id.*

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130 If the Bybee Memo had disclosed that *Ratzlaf* construed a currency structuring statute that required a showing of "willfulness," a form of specific intent that requires proof of the defendant's knowledge of the law he is accused of violating, the citation would not have been misleading, but the case's relevance to the torture statute, which does not include an element of willfulness, would have been hard to discern.

The Bybee Memo cited three cases in support of its conclusion that the good faith defense would apply to prosecutions under the torture statute, but did not point out that the good faith defense is generally limited to fraud or tax prosecutions. *See* Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, *Federal Jury Practice and Instructions* § 19.06 (5th ed. 2000 & 2007 Supp.) (*Federal Jury Instructions*)("The defense of good faith is discussed in the context of mail, wire, and bank fraud, and in tax prosecutions, infra.").[131] The Bybee Memo did not address the possibility that a court might refuse to extend the good faith defense to a crime of violence such as torture.

The availability of good faith as a defense to torture is not a foregone conclusion. For example, in *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983), the defendant argued that he was entitled to a good faith instruction relating to the charge that he willfully and specifically intended to export firearms. *Id.* at 974. The court of appeals disagreed, noting that the defendant had failed to demonstrate that he was entitled to the defense and that "[s]uch an unwarranted extension of the good faith defense would grant any criminal *carte blanche* to violate the law should he subjectively decide that he serves the government's interests thereby." *Id.* at 975.

The Bybee Memo also failed to advise the client that under some circumstances, a prosecutor can challenge a good faith defense by alleging willful blindness, or conscious or deliberate ignorance or avoidance of knowledge that would negate a claim of good faith. *See, e.g., United States v. Goings*, 313 F.3d 423, 427 (8th Cir. 2002) (court properly gave willful blindness instruction where defendants claimed they acted in good faith but evidence supported inference that they "consciously chose to remain ignorant about the extent of their criminal behavior"); *United States v. Duncan*, 850 F.2d 1104, 1118 (6th Cir. 1988) (reversing for failure to give requested instruction but observing that the trial court could have instructed the jury "on the adverse effect 'willful blindness' must have on a good faith defense to criminal intent"). Thus, a CIA interrogator who argued that

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131 Bybee Memo at 4-5. The cases cited in the Bybee Memo included two mail fraud cases and one prosecution for failure to file tax returns. In his response to OPR, Bybee stated that the Bybee Memo "openly disclosed that most of its cited cases were 'in the context of mail fraud.'" In fact, the Bybee Memo only disclosed that one of the three cases was decided "in the context of mail fraud."

his good faith belief in the benign effect of EITs negated the specific intent to torture could have faced a challenge to his defense on willful blindness grounds.

In his comments on a draft of this report, Yoo argued that our criticism was unfounded because the Third Circuit, in *Pierre v. Attorney General*, 528 F.3d 180, 190 (3d Cir. 2008) (*en banc*) ruled, in interpreting the CAT specific intent requirement in the context of an immigration matter, that willful blindness can be used to establish knowledge but not specific intent. However, we did not assert that the government could establish a defendant's specific intent through a willful blindness theory. We stated that a willful blindness instruction might be granted under some circumstances to counter a defendant's claim that he held a good faith belief – based on knowledge obtained from the CIA – that the use of EITs would not result in the infliction of severe mental or physical pain or suffering. Moreover, *Pierre* was decided long after the Bybee Memo was issued, and has no bearing on whether its authors presented a thorough view of the law at that time.[132]

Bybee stated that it was reasonable for him to assume that at least one of the memorandum's recipients, Alberto Gonzales, a former judge on the Texas Supreme Court, was aware of the willful blindness instruction, "since it is a standard doctrine in the law." Nevertheless, a thorough, objective, and candid discussion of a possible good faith defense to torture would have analyzed possible problems with the defense.

The cursory qualifications contained in the Bybee Memo – that, as a practical matter, a jury could infer specific intent from factual circumstances or would be unlikely to acquit a defendant who held an unreasonable belief that he acted in good faith – were insufficient to counteract the incomplete analysis and erroneous implications of the Bybee Memo's analysis. Moreover, OLC's advice to the CIA on specific intent and good faith was not limited to the Bybee Memo. In the Yoo Letter, the Classified Bybee Memo, and the CIA Bullet Points, OLC

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132 Similarly, although *Pierre* and other appellate cases decided after issuance of the Bybee and Yoo Memos have narrowly interpreted specific intent as it applies to CAT Article 3 immigration matters, those cases are not relevant to whether the OLC attorneys presented a thorough, objective, and candid analysis of the law in 2002 and 2003.

presented an unqualified, oversimplified view of the law without acknowledging potential problems.

2. Severe Pain

The Bybee Memo's definition of "severe pain" as necessarily "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" was widely criticized, both within and outside the Department. Goldsmith and Levin explicitly rejected that formulation and characterized the reasoning behind it as illogical or irrelevant.[133]

The Bybee Memo began its discussion of "severe pain" by noting that the torture statute only applied to the infliction of pain or suffering that was "severe." It quoted several dictionary definitions of "severe" and concluded that "the adjective 'severe' conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure." Bybee Memo at 5.

The Bybee Memo went on to state that "Congress's use of the phrase 'severe pain' elsewhere in the United States Code can shed more light on its meaning. . . . Significantly, the phrase 'severe pain' appears in statutes defining an emergency medical condition for the purpose of providing health benefits." *Id.* (citation omitted). The memorandum then cited several nearly identical statutes that defined the term "emergency medical condition" and quoted from one of them as follows:

> [An emergency medical condition is one] manifesting itself by acute symptoms of sufficient severity (including *severe pain*) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate

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133 Various commentators described the definition as: "absurd," David Luban, *Liberalism, Torture, and the Ticking Bomb*, in The Torture Debate in America 58, (Karen J. Greenberg ed., 2006); based on "strained logic," George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. Nat'l Security L. & Pol'y 409, 434 (2005); or "bizarre," Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memo*, 1 J. Nat'l Security L. & Pol'y 455, 459 (2005) ("This claimed standard is bizarre for a number of reasons. In the first place, organ failure is not necessarily associated with pain at all. In addition, this legal standard is lifted from a statute wholly unrelated to torture.").

> medical attention to result in — (i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part . . . .

Bybee Memo at 5-6 (citing and quoting 42 U.S.C. § 1395w-22(d)(3)(B)) (emphasis added in Bybee Memo).

The discussion concluded with the statement that "'severe pain,' as used in [the torture statute] must rise to a similarly high level – the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions – in order to constitute torture." Bybee Memo at 6. The Bybee Memo restated that conclusion several times, with slight variations:

- In the introduction at page 1 ("Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death");
- In the summary of Part I at page 13 ("The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result");
- In the introduction to Part IV at page 27 (torture is "extreme conduct, resulting in pain that is of an intensity often accompanying serious physical injury"); and
- In the conclusion at page 46 ("Severe pain : . . must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure").

We found several problems with the Bybee Memo's analysis. In the first place, the medical benefits statutes in question do not associate severe pain with "death," "organ failure," or "permanent damage." The language used by Congress

was "serious jeopardy," "serious impairment of bodily functions," and "serious dysfunction of any bodily organ or part." We asked Yoo why OLC changed the words of the statute. He offered the following explanation:

> I don't think that was an effort to try to change it. I think that was just an effort to, you know, sort of paraphrase what the statutory language was. . . . I don't think there was anything, any effort to make it a different or higher standard.

We noted, however, that the words chosen to paraphrase the statute tended to heighten the severity of the listed consequences. In the Bybee Memo, "serious jeopardy" became "death," "serious dysfunction of any bodily organ" became "organ failure," and "serious impairment of bodily functions" became "permanent damage." Thus, we concluded that, contrary to Yoo's denial, the reason the authors of the Bybee Memo rephrased the language of the statutes was to add further support to their "aggressive" interpretation of the torture statute.

Second, the benefits statutes do not define or even describe "severe pain." They simply cite severe pain as one of an unspecified number of symptoms that would lead a prudent layperson to believe that serious health consequences are likely to result from a failure to provide immediate medical attention.

Finally, the Bybee Memo's use of the medical benefits statutes was illogical. When we asked Yoo to describe the pain of death, he replied, "Well, I think I assume that's very painful, but I don't know." We concluded that the intensity of pain that accompanies organ failure or death has no commonly understood meaning and had no practical value in explaining the meaning of "severe pain."

Levin told us that, although he thought it was reasonable for the authors of the Bybee Memo to look to other statutes for the meaning of "severe pain," their use of the health benefits statutes "just didn't make sense." The Levin Memo specifically rejected the Bybee Memo's analysis, stating, "We do not believe that [the medical benefits statutes] provide a proper guide for interpreting 'severe pain' in the very different context of the prohibition against torture in sections 2340-2340A." Levin Memo at n.17.

Philbin defended the legal reasoning behind the use of the medical benefits statutes, but told us that he advised Yoo against including the argument in the Bybee Memo. In his OPR interview, Philbin stated that his "practical lawyer's instinct" told him that "optically," it was better not to use the "kind of gruesome language" of the Bybee Memo to describe the consequences of severe pain. He also stated that the memorandum's characterization of severe pain was "not very accurate, not very helpful." In written comments on a draft of this report, Philbin stated that he "did not think the terms of the medical benefit statutes actually provided useful, concrete guidance concerning what amounts to 'severe pain' [because] there is no readily identifiable level of pain that precedes medical events such as 'organ failure.'" Philbin Response at 8.

Similarly, Bradbury told us that the Bybee Memo's analogy of pain equivalent to organ failure or death "is fairly meaningless" because there are many forms of death and organ failure that are not associated with pain.

Goldsmith commented as follows on the Bybee Memo's analysis of "severe pain":

> It is appropriate, when trying to figure out the meaning of words in a statute, to see how the same words are defined or used in similar contexts. But the health benefit statute's use of "severe pain" had no relationship whatsoever to the torture statute. And even if it did, the health benefit statute did not define "severe pain." . . . It is very hard to say in the abstract what the phrase "severe pain" means, but OLC's clumsy definitional arbitrage didn't seem even in the ballpark.

Goldsmith, *The Terror Presidency* at 145.

In Goldsmith's and Bradbury's draft revisions to the Yoo Memo, they described the use of the medical benefits statutes as:

> misleading and unhelpful, because it is possible that some forms of maltreatment may inflict severe physical pain or suffering on a victim without also threatening to cause death, organ failure or serious impairment of bodily functions.

The Bybee Memo's definition could be interpreted as advising interrogators that they may legally inflict pain up to the point of organ failure, death, or serious physical injury.[134] Indeed, as discussed above, drafts of the Bybee Memo explicitly stated that the torture statute only outlaws the intentional infliction of pain that "is likely to be accompanied by serious physical injury, such as damage to one's organs or broken bones." Although, in the final drafts, the authors modified the language by stating that severe pain must be "equivalent to" pain "so severe that death, organ failure, or permanent damage" is likely to result, the difference between the two formulations is minor. Whether severe pain is described as pain that is likely to result in injury, or as "equivalent" or "akin" to pain that is likely to result in injury, an interrogator could still draw the erroneous conclusion that pain could be inflicted as long as no injury resulted.

Bybee has asserted that "no rational interrogator" could interpret the Bybee Memo as advising that he could "legally inflict pain up to the point of organ failure, death, or serious physical injury." Yoo argued that the advice was "written to guide a very small and quite sophisticated legal audience, not for any 'interrogators' in the field . . . ." In light of those comments, it is worth noting that

[redacted]

134 *See, e.g.*, Andrew C. McCarthy, *A Manufactured Scandal*, National Review Online, June 25, 2004, (to "equate 'severe physical pain' with pain 'like that accompanying death . . .' would suggest that any pain which is not life-threatening cannot be torture").

The only legal authority cited by the Bybee Memo to justify its use of the medical benefits statute was *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), cited after the statement, "Congress's use of the phrase 'severe pain' elsewhere in the United States Code can shed more light on its meaning [in the torture statute]." *Casey* appears to have been inserted in response to Yoo's comment, on the June 26, 2002 draft, that they should "cite and quote S.Ct. for this proposition." The following language from *Casey* was quoted in a parenthetical:

> [W]e construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.[135]

Casey, 499 U.S. at 100 (citing 2 J. Sutherland, Statutory Construction § 5201 (3d ed. 1943) (discussing the *in pari materia* doctrine of statutory construction).[136]

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135 The quoted excerpt omitted a qualifying introductory phrase, "*Where a statutory term presented to us for the first time is ambiguous*, we construe . . . ." *Casey*, 499 U.S. at 100. (emphasis added). Thus, the Bybee Memo should have demonstrated that the term "severe pain" was ambiguous before turning to other statutory sources. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1999) (first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning, and the inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent).

One way of establishing that "severe pain" was ambiguous would have been to cite inconsistent definitions. *See MCI v. ATT*, 512 U.S. 218, 227 (1994) ("Most cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries."). In *Casey*, the Court assessed the meaning of a statute's attorney's fees provision by turning to similar provisions in other statutes and by reviewing some of the prior judicial decisions that had interpreted those provisions. The Court found that the language in question had a clearly accepted meaning in judicial and legislative practice and that it was plain and unambiguous. *Casey*, 499 U.S. at 98-101.

As the Levin Memo noted, however, any difficulty in interpreting the term "severe pain" is more properly attributable to the subjective nature of physical pain, rather than ambiguous language. *See* Levin Memo at 8 n.18 (citing and quoting Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993).

136 The *in pari materia* doctrine is described as follows: "The intent of the legislature when a statute is found to be ambiguous may be gathered from statutes relating to the same subject matter – statutes *in pari materia*." 2 J. Sutherland, Statutory Construction at § 5202. However,

In his OPR interview, Bybee defended the use of the medical statutes as follows:

> I think that we ought to look to any tools we can to try to understand by analogy what the term "severe pain" means, and by looking to the medical emergency provisions, these are not statutes, we haven't made an *in pari materia* argument here, we aren't arguing that Congress knew what it said in 42 U.S.C., and that it incorporated that deliberately here, it's taken that phrase out of . . . the CAT statute, but both the Levin memorandum and our memorandum reflect, there was a great deal of concern on the part of the United States at the drafting of CAT that these terms were not specific, that they didn't have any meaning in American law, and there was even some concern that the statute might be void for vagueness. We're struggling here to try and give some meaning that we can work with because we had an application that we were also required to make at this time, and we couldn't discuss this just simply as a philosophical nicety; we had real questions before us.

Interpreting ambiguous statutory language by analogy to unrelated but similar legislation is a recognized technique of statutory construction. *See, e.g., Dep't of Energy v. Ohio,* 503 U.S. 607 (1992); *Firstar Bank v. Faul,* 253 F.3d 982, 991 (7th Cir. 2001); *Doe v. DiGenova,* 779 F.2d 74, 83 (D.C. Cir. 1985). *See also* Sutherland at § 53:03.[137] However, where courts look to unrelated statutes for

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as noted in a later edition of Sutherland's treatise, N. Singer, Sutherland on Statutes and Statutory Construction (6th ed. 2000) (Sutherland), "The adventitious occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will normally not justify applying the rule." Sutherland at § 51.03 (quoting *Sylvestre v. United States*, 771 F. Supp. 515 (D. Conn. 1990)).

137 Sutherland describes the interpretive relevance of unrelated statutes as follows:

> On the basis of analogy the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to *similar persons, things, or relationships.* By referring to other *similar* legislation, a court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or several statutes to a *similar* statute

guidance in interpreting ambiguous language, there is generally a logical basis for doing so. In some cases, the unrelated statute is helpful because it defines or gives context to the term, or because the term in the unrelated statute has been interpreted by the courts. *See, e.g., Carcieri v. Salazar*, __ U.S. __, 129 S. Ct. 1058, 1064 (2009) (definition of term is consistent with interpretations given to the word by Court with respect to its use in other statutes); *Dep't of Energy v. Ohio*, 503 U.S. at 607, 621-22 (reviewing examples of usage of term in other contexts); *Casey*, 499 U.S. at 99-100. In other cases, the unrelated statutes are similar in purpose or subject matter. *See, e.g., Doe v. DiGenova*, 779 F.2d 74, 83 (D.C. Cir. 1985) (incorporation of identical or similar language from an act with a related purpose evidences some intention to use it in a similar vein); *Stribling v. United States*, 419 F.2d 1350, 1352-53 (8th Cir. 1969) (where interpretation of particular statute at issue is in doubt, express language and legislative construction of another statute not strictly *in pari materia* but employing similar language and applying to similar persons, things or cognate relationships may control by force of analogy).

However, "borrowing from an unrelated statute . . . is a relatively weak aid given that Congress may well have intended the same word to have a different meaning in different statutes." *Firstar*, 253 F.3d at 991. *See*, Sutherland at § 53:05 ("The interpretation of one statute by reference to an analogous but unrelated statute is considered an unreliable means of discerning legislative intent.") (footnote and citations omitted).

Even in those instances where courts refer to language in completely dissimilar statutes to interpret an ambiguous term, there is some logical basis for doing so. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) (the Court concluded that the word "contract" in the Federal Arbitration Act, 9 U.S.C. § 2, included contracts that later prove to be void, in part because

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> of doubtful meaning, the court not only is able to give effect to the probable intent of the legislature, but also to establish a more uniform and harmonious system of law. *It is useful to look to the function of statutes having similar language to determine if there is a possibility of reference. It also follows that the usefulness of the rule is greatly enhanced where analogy is made to several statutes or a statute representing general legislation.*

Sutherland at § 53.03 (footnotes and citations omitted) (emphasis added).

"contract" is used "elsewhere in the United States Code to refer to putative agreements, regardless of whether they are legal").[138]

The fact that the medical benefits statutes were neither related, similar, nor analogous to the torture statute, coupled with the fact that they did not in fact define, explain or interpret the meaning of "severe pain," undermined their utility in interpreting the torture statute and led us to conclude that the Bybee Memo's reliance on those statutes was unreasonable. The occurrence of the phrase "severe pain" in the medical benefits statute provided little or no support for the conclusion that "severe pain" in the torture statute must rise to the level of pain associated with "death, organ failure, or serious impairment of body functions."

3. Ratification History of the United Nations Convention Against Torture

The Bybee Memo cited the ratification history of the CAT in support of its conclusion that the torture statute prohibited "only the most extreme forms of physical or mental harm." Bybee Memo at 16. Drawing primarily on conditions that were submitted to the Senate Foreign Relations Committee by the Reagan administration during the CAT ratification process, the Bybee Memo concluded that "severe pain" under the CAT is "in substance not different from" pain that is "excruciating and agonizing."[139]

The memorandum did not disclose that those conditions were never ratified by the Senate, in part because, "[t]hose conditions, in number and substance, created the impression that the United States was not serious in its commitment to end torture worldwide." S. Exec. Rep. No. 101-30 at 4. In reaction to criticism

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[138] In *Buckeye*, however, the Court did not rely solely upon similar language in dissimilar statutes. That opinion relied primarily on the way the word "contract" was used in the same section of the same statute. *Id.* at 448. The Court's reference to unrelated statutes appeared in a footnote that reinforced its conclusion, as stated in the text of the opinion, that "[b]ecause the sentence's final use of 'contract' so obviously includes putative contracts, we will not read the same word earlier in the same sentence to have a more narrow meaning." *Id.*

[139] *Id.* at 19. The Levin Memo rejected that conclusion, noting that the Reagan administration proposal was "'criticized for setting too high a threshold of pain,' and was not adopted." Levin Memo at 8 (citation and footnote omitted).

from human rights groups, the American Bar Association, and members of the Senate Foreign Relations Committee, the first Bush administration acknowledged that the Reagan administration understanding regarding the definition of torture, which included the phrase "excruciating and agonizing physical or mental pain or suffering," could be seen as establishing "too high a threshold of pain for an act to constitute torture," and deleted that language from the proposed conditions. *Id.* at 9; *Convention Against Torture: Hearing Before the Senate Comm. On Foreign Relations,* 101st Cong. 8-10 (1990) (CAT Senate Hearing) (testimony of Hon. Abraham D. Sofaer, legal adviser, U.S. Department of State).

The Bybee Memo mentioned the revision but minimized its importance, stating that "it might be thought significant that the Bush administration's language differs from the Reagan administration understanding" because it was changed "in response to criticism" that the language "raised the bar for the level of pain . . . ." Bybee Memo at 18. However, the Bybee Memo dismissed the differences as "rhetorical," and asserted that the revisions "merely sought to remove the vagueness created by [the] concept of 'agonizing and excruciating' mental pain." *Id.* at 18-19. The Bybee Memo concluded that:

> [t]he Reagan administration's understanding that the pain be "excruciating and agonizing" is in substance not different from the Bush Administration's proposal that the pain must be severe. . . . The Bush understanding simply took a rather abstract concept – excruciating and agonizing mental pain – and gave it a more concrete form.

Bybee Memo at 19.

It is inaccurate to suggest that the Reagan administration language was changed simply to clarify the definition of mental pain. Although that was one reason for the revisions, that aspect was addressed by adding a detailed definition of mental pain or suffering to the understanding. It is clear from the ratification history that the first Bush administration's proposed definition of severe physical pain or suffering, which deleted the phrase "excruciating and agonizing," was included in response to criticism that the United States had adopted "a higher, more difficult evidentiary standard than the Convention required" and to ensure that the United States proposal did "not raise the high threshold of pain already

required under international law . . . ." CAT Senate Hearing at 9-10 (Sofaer testimony). Thus, the understanding that was ratified by the Senate only referred to the infliction of "severe" physical pain.

Finally, we concluded that the Bybee Memo's emphasis on the Reagan administration's proposed conditions was misplaced because those conditions were never ratified by the Senate, and, unlike the Bush administration's conditions, therefore, have no effect on the United States' obligations under the CAT. *See* Restatement (Third) of Foreign Relations Law of the United States § 314, cmt. a and b. (1987) (reservations and understandings are effective only if ratified or acceded to by the United States with the advice and consent of the Senate).

4. United States Judicial Interpretation

Part III of the Bybee Memo stated accurately that "[t]here are no reported prosecutions under [the torture statute,]" and went on to discuss federal court decisions under the Torture Victim Protection Act (TVPA). Bybee Memo at 22. However, the memorandum ignored a relevant body of federal case law that has applied the CAT definition of torture in the context of removal proceedings against aliens. Moreover, the Bybee Memo's discussion of TVPA cases focused on the more brutal examples of conduct courts have found to be torture, and downplayed less severe examples in the reported decisions.

a. Implementation of Article 3 of the Convention Against Torture

When Congress implemented Article 3 of the CAT, which prohibits the expulsion of persons "to another State where . . . [they] would be in danger of being subjected to torture," it directed the responsible agencies to prescribe regulations incorporating the CAT definition of torture. 8 U.S.C. § 1231 note (2000). Those regulations are at 8 C.F.R. § 208.18(a) (Department of Homeland Security), and 22 C.F.R. § 95.1(b) (State Department) (the CAT regulations). Like the CAT, the CAT regulations distinguish between torture and cruel, inhuman, and degrading treatment. 8 C.F.R. § 208.18(a)(2) ("Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.").

At the time the Bybee Memo was being drafted, some courts had already interpreted the CAT regulations' definition, providing additional examples of how courts have distinguished between torture and less severe conduct. *See, e.g., Al-Saher v. I.N.S.*, 268 F.3d 1143 (9th Cir. 2001);[140] *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016 (9th Cir. 2000) (also stating that the prohibition on torture is a *jus cogens* norm that can "never be abrogated or derogated" and that acts of Congress must be construed consistently with that prohibition); *Khanuja v. I.N.S.*, 11 Fed. Appx. 824 (9th Cir. 2001) (unpublished).[141]

The Bybee Memo's failure to discuss the CAT regulations was a relatively minor omission, and we note that the case law and CAT regulations are generally consistent with the Bybee Memo's uncontroversial conclusion that torture is an aggravated form of cruel, inhuman, and degrading treatment. We note the omission here because of our determination that OLC's interpretation of the torture statute in the context of the CIA interrogation program demanded the highest level of thoroughness, objectivity, and candor.

b. The Torture Victim Protection Act

In its discussion of cases decided under the TVPA, the Bybee Memo pointed out that the TVPA's definition of torture, which closely follows the CAT definition, required the intentional infliction of "severe pain or suffering . . . whether physical or mental," and concluded that TVPA cases would therefore be useful in determining what acts constituted torture. Bybee Memo at 23 n.13. The memorandum also asserted that courts in TVPA cases have not engaged in lengthy analyses of what constitutes torture because "[a]lmost all of the cases involve physical torture, some of which is of an especially cruel and even sadistic

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140 Although *Al-Saher* and another immigration case were listed and briefly described in the appendix to the Bybee Memo, the CAT regulations were not cited or discussed.

141 At our December 31, 2008 meeting with AG Mukasey and DAG Filip, Filip, a former federal district court judge, stated that he thought OPR attorneys faced possible sanctions under Ninth Circuit Rule 36-3 for citing the *Khanuja* decision. That rule states that unpublished Ninth Circuit decisions are not precedent and that they "may not be cited to the courts of this circuit" except under certain specified conditions. We do not agree that the rule forbids Department attorneys from discussing unpublished Ninth Circuit decisions in executive branch legal memoranda or reports. Moreover, the case is cited here not as precedent, but as an example of a judicial decision that applied the CAT regulations and which was available to the drafters of the Bybee Memo.

nature." *Id.* at 24. As support, the memorandum cited one district court case, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), and described the brutal physical treatment that the court found to constitute torture in that case.[142] Bybee Memo at 24-27. Seven additional TVPA cases and seven other cases discussing torture in the context of the Alien Tort Claims Act, the Foreign Sovereign Immunities Act, or CAT Article 3, were summarized in an appendix to the memorandum.[143]

Acknowledging that the courts have not engaged "in a careful parsing of the statute," but have simply recited the definition of torture and concluded that the described acts met that definition, the Bybee Memo proposed that the reason for the lack of detailed analysis was because only "acts of an extreme nature" that were "well over the line of what constitutes torture" have been alleged in TVPA cases. *Id.* at 27. Thus, the memorandum asserted, *Mehinovic* "and the other TVPA cases generally do not approach [the lowest] boundary [of what constitutes torture]." *Id.*

That statement was inaccurate. In fact, conduct far less extreme than that described in *Mehinovic* was held to constitute torture in two of the TVPA cases cited in the appendix to the Bybee Memo. In *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001), the district court held that imprisonment for five days under extremely bad conditions, while being threatened with bodily harm, interrogated, and held at gunpoint, constituted torture with respect to one claimant. Other plaintiffs in that case, imprisoned for much longer periods under similar or worse conditions, were also found to have stated claims for torture under the TVPA. *Id.* at 25. The court made no findings regarding severe pain and only general findings of psychological harm in concluding that the claimants were

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142 The Bybee Memo noted that the plaintiffs in *Mehinovic* were severely and repeatedly beaten with bats and other weapons, were forced to endure games of Russian roulette, had their teeth pulled, and were subjected to several other forms of brutal treatment. Bybee Memo at 24-26.

143 *Mehinovic* appears to have been added in response to the following comment from Yoo on the May 23, 2002 draft of the Bybee Memo: "discuss in the text a few of what we consider the leading cases from the appendix, to demonstrate how high the bar is to meet the definition of torture." *Mehinovic* was not one of the cases listed in the appendix and none of those cases was discussed in the text of the Bybee Memo.

entitled "to compensation for their mental and physical suffering during their incarceration, since their release, and in the future." *Id.*

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78 (D.D.C. 2001), *aff'd in part, rev'd in part, vacated in part* 326 F.3d 230 (D.C. Cir. 2003), the district court held, without detailed analysis, that the plaintiff had stated a claim for torture under the TVPA by alleging:

> that she was "interrogated and then held incommunicado," "threatened with death by representatives of the defendant if [she] moved from the quarters where [she was] held," and "forcibly separated from her husband . . . [and unable] to learn of his welfare or his whereabouts . . . ." [144]

Those district court cases contradict the Bybee Memo's assertion that the reason the courts had not carefully parsed the meaning of torture under the TVPA was because the acts under consideration were "so shocking and obviously incredibly painful."

In his response to OPR, Bybee maintained that the Bybee Memo's discussion of *Mehinovic* was not misleading because it disclosed "that a single beating [in *Mehinovic*] sufficed to constitute torture" and because it acknowledged "that a single incident can constitute torture." In fact, the Bybee Memo stated

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144 *Id.* at 88 (quoting from plaintiff's complaint). Although *Simpson* was subsequently reversed because the acts alleged were not "unusually cruel or sufficiently extreme and outrageous as to constitute torture" within the meaning of the TVPA, the Court of Appeals' decision was issued on April 22, 2003, after the Bybee and Yoo Memos had been issued. *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d at 234.

that the district court "would have been in error" if it found a single blow, in isolation, constituted torture, and that:

> to the extent the [*Mehinovic*] opinion can be read to endorse the view that this single act and the attendant pain, considered in isolation, rose to the level of "severe pain or suffering," we would disagree with such a view based on our interpretation of the criminal statute.

Bybee Memo at 27.

5. International Decisions

Part IV of the Bybee Memo discussed the decisions of two foreign tribunals: the European Court of Human Rights (European Court), in *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (*Ireland v. U.K.*); and the Supreme Court of Israel, in *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999) (*PCATI v. Israel*). That discussion began with the reminder that, "[a]lthough decisions by foreign or international bodies are in no way binding authority upon the United States, they provide guidance about how other nations will likely react to our interpretation of the CAT and [the torture statute]." Bybee Memo at 27. After referring in the next paragraph to the European Court and the European Convention on Human Rights and Fundamental Freedoms (European Convention), the memorandum stated that European Convention decisions concerning torture "provide a useful barometer of the international view of what actions amount to torture." *Id.* at 28.

Despite those statements, the memorandum made no further reference to international opinion. The Bybee Memo did claim, however, that the international cases discussed in Part IV "make clear that while many of these [enhanced interrogation] techniques may amount to cruel, inhuman or degrading treatment, they do not produce pain or suffering of the necessary intensity to meet the

definition of torture" and that the cases "permit, *under international law*, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist." *Id.* at 2, 31 (emphasis added).[145]

a. *Ireland v. the United Kingdom*

The Bybee Memo's discussion of *Ireland v. U.K.* consisted of a detailed description of five interrogation techniques that the European Court found did not rise to the level of torture: wall standing (a stress position); hooding; subjection to noise; sleep deprivation; and deprivation of food and drink. Bybee Memo at 27-29. The memorandum also noted that the court found other abusive techniques, such as beating prisoners, not to constitute torture. *Id.* at 29.

The opinion reviewed and reversed portions of the report and findings of the European Commission of Human Rights (the Commission), which initially investigated the Irish government's complaint, held evidentiary hearings and interviewed witnesses. In its report, the Commission unanimously found that the combined use of the five interrogation techniques in question violated the European Convention's ban on torture. *Ireland v. U.K.* at ¶ 147(iv).

We found that the Bybee Memo ignored several important facts surrounding the decision. First, the respondent government, the United Kingdom, did not contest the Commission's findings that the interrogation techniques constituted torture. *Id.* at ¶ 8(b). Second, prior to the Commission's investigation, the government of the United Kingdom formed a committee to review the interrogation techniques in question. The committee's majority report concluded that the techniques "need not be ruled out on moral grounds." A minority report took the opposite view. However, both the majority and minority reports concluded that

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[145] The suggestion that the two cases support an aggressive interpretation of what constituted torture "under international law" was inaccurate. A thorough examination of what is permissible under international law would have required, at a minimum, a discussion of: (1) all relevant international treaties, agreements, and declarations (including, in addition to the European Convention and the CAT, the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Political and Civil Rights, and related reports and studies); (2) the doctrine of *jus cogens*; and (3) the laws, practices, and judicial decisions of other nations. *See* Restatement (Third) of Foreign Relations Law of the United States at § 102 (summarizing the sources of international law).

the methods were illegal under domestic law. *Id.* at ¶ 100. Third, following publication of the committee's report and prior to the European Commission's investigation, the United Kingdom renounced further use of the techniques in question. *Id.* at ¶¶ 101, 102, 135. Fourth, the case was decided by a 17-judge panel of the European Court. Four of those judges dissented from the court's opinion, writing separately that they believed the techniques in question constituted torture. *Id.*, Separate Opinions of Judges Zekia, O'Donoghue, Evrigenis and Matscher. Finally, although the majority of the European Court found that the techniques did not constitute torture, it nevertheless found that their use violated the European Convention. *Id.* at ¶ 168.

A thorough, objective, and candid examination of *Ireland v. U.K.* would have mentioned some or all of the above facts.[146] It would also have considered a body of post-*Ireland* case law from the European Court, in which the meaning of cruel, inhuman, and degrading treatment and torture has been discussed further.[147] *E.g., Selmouni v. France,* (25803/94) [1999] ECHR 66 (28 July 1999); *Aydin v. Turkey,* (23178/94) [1997] ECHR 75 (25 September 1997); *Aksoy v. Turkey,* (21987/93) [1996] ECHR 68 (18 December 1996). The failure to discuss *Selmouni* is significant, as that case cited the CAT's definitions of torture and cruel, inhuman, and degrading treatment. *Selmouni* at ¶ 100. *Selmouni* also included the following statement:

> [C]ertain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in [the] future. . . . [T]he increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

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146 The Bybee Memo's use of *Ireland v. U.K.* is discussed in Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House,* 105 Colum. L. Rev. 1681, 1705-06 (2005).

147 Much of that case law in fact supports the uncontroversial conclusion that the term "torture" should be applied to more severe forms of cruel, inhuman and degrading treatment. *See, e.g., Aksoy v. Turkey,* (21987/93) [1996] ECHR 68 (18 December 1996) at ¶ 63.

Selmouni at ¶ 101. Thus, *Selmouni* raised questions about the continuing validity of the European Court's findings in *Ireland v. U.K.* A thorough, objective, and candid assessment of the law would have included a discussion of that case.

b. *Public Committee Against Torture in Israel v. Israel*

The Bybee Memo cited *PCATI v. Israel* as further support for the proposition that there is "a wide array of acts that constitute cruel, inhuman, or degrading treatment or punishment, but do not amount to torture." Bybee Memo at 31. In that case, the Israeli court examined five physical interrogation techniques, similar to the techniques examined in *Ireland v. U.K.*, and concluded that all of the techniques were illegal and could not be used by the Israeli security forces to interrogate prisoners. *PCATI v. Israel* at ¶¶ 24-31.[148]

The Bybee Memo acknowledged that the court did not address whether the techniques amounted to torture, but claimed that the opinion "is still best read as indicating that the acts at issue did not constitute torture." Bybee Memo at 30. The following reasons were given for this conclusion:

- "[T]he court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture."
- The court "even relied on [*Ireland v. U.K.*] for support and it did not evince disagreement with that decision's conclusion that the acts considered therein did not constitute torture."
- "The court's descriptions of and conclusions about each method indicate that the court viewed them as merely cruel, inhuman or degrading but not of the sufficient severity to reach the threshold of torture."

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[148] The techniques were: (1) shaking; (2) "the Shabach" (a combination of hooding, exposure to loud music, and stress positions); (3) the "Frog Crouch" (a stress position); (4) excessive tightening of handcuffs; and (5) sleep deprivation. Bybee Memo at 30.

- The court "concluded that in certain circumstances [interrogators] could assert a necessity defense. CAT, however, expressly provides that '[n]o exceptional circumstance whatsoever, . . . or any other public emergency may be invoked as a justification of torture.' CAT art. 2(2). Had the court been of the view that the . . . methods constituted torture, the Court could not permit this affirmative defense under CAT. Accordingly, the court's decision is best read as concluding that these methods amounted to cruel and inhuman treatment, but not torture."

Id. at 30-31.

An examination of the court's opinion in *PCATI v. Israel* led us to conclude that the Bybee Memo's assertions were misleading and not supported by the text of the opinion. The court's opinion was limited to three questions: (1) whether Israel's General Security Service (GSS) was authorized to conduct interrogations; (2) if so, whether the GSS could use "physical means" of interrogation, including the five specific techniques; and (3) whether the statutory necessity defense of the Israeli Penal Law could be used to justify advance approval of prohibited interrogation techniques. *PCATI v. Israel* at ¶ 17.

After determining that the GSS was authorized to interrogate prisoners, the court considered the methods that could be used to interrogate terrorist suspects. The court stated that, although the "law of interrogation" was "intrinsically linked to the circumstances of each case," two general principles were worth noting. *Id.* at ¶ 23.

The first principle was that "a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever." *Id.* The court added that Israeli case law prohibits "the use of brutal or inhuman means," and values human dignity, including "the dignity of the suspect being interrogated." *Id.* (citations and internal quotation marks omitted). The court noted that its conclusion was consistent with international treaties that "prohibit the use of torture, 'cruel,

inhuman treatment' and 'degrading treatment'." *Id.*[149] Accordingly, "violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice." *Id.* The court cited as a second principle, that some discomfort, falling short of violence, is an inevitable consequence of interrogation. *Id.*

After stating these general principles, the court considered the legality of each of the five techniques. In describing the GSS's use of the interrogation methods, the court observed that some of the techniques caused "pain," "serious pain," "real pain," or "particular pain and suffering"; that they were "harmful" or "harmed the suspect's body"; that they "impinge[d] upon the suspect's dignity" or "degraded" the suspect; or that they harmed the suspect's "health and potentially his dignity." *Id.* at ¶¶ 24-30. However, the court did not attempt to categorize any of the techniques as "torture" or "cruel, inhuman and degrading" treatment and did not define those terms or refer to other sources' definitions. The court simply concluded in each instance that the practice was "prohibited," "unacceptable," or "not to be deemed as included within the general power to conduct interrogations." *Id.*

Turning to the final issue, the court noted that, although the question of whether the necessity defense could be asserted by an interrogator accused of using improper techniques was open to debate, the court was "prepared to accept that in the appropriate circumstances, GSS investigators may avail themselves of the necessity defence, if criminally indicted." *Id.* at ¶¶ 34, 35. The court made it clear, however, that this was not the question that was under consideration. *Id.* at ¶ 35. At issue was whether Israel's statutory necessity defense could be invoked to justify advance authorization of otherwise prohibited interrogation techniques in emergency situations. *Id.* The court concluded that the statute could not be so used. *Id.* at ¶ 37.

The Bybee Memo's assertion that the court's opinion in *PCATI v. Israel* is "best read" as saying that EITs do not constitute torture was not based on the language of the opinion. The Israeli court did not consider whether the techniques constituted torture or cruel, inhuman and degrading treatment. There was therefore no basis for the Bybee Memo's statement that "the court carefully

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[149] The court added: "These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing." *Id.*

avoided describing any of these acts as having the severity of pain or suffering indicative of torture" or that the court's "descriptions of and conclusions about each method indicate that the court viewed them as merely cruel, inhuman or degrading but not of the sufficient severity to reach the threshold of torture." Bybee Memo at 30.

One of Yoo's comments on an early draft of the Bybee Memo indicates that the authors knew the Israeli court's opinion did not provide direct support for their position. In his comments, Yoo wrote to [redacted] "[i]sn't there some language in the opinion that we can characterize as showing that the court did not think the conduct amounted to torture?" [redacted] responded, "Unfortunately, no."

We concluded that the Bybee Memo's argument on this issue was not based on the actual language and reasoning of the court's opinion, and was intended to advance an aggressive interpretation of the torture statute.

6. The Commander-in-Chief Power and Possible Defenses to Torture

The last two sections of the Bybee Memo, addressing the President's Commander-in-Chief power (Part V) and possible defenses to the torture statute (Part VI), differ in one important respect from the preceding sections. Although earlier sections interpreted the applicability of the torture statute to government interrogators and posited that the bar was very high for violations of the torture statute, the last two sections asserted that there were circumstances under which acts of outright torture could not be prosecuted.

In 2004, these parts of the Bybee Memo were characterized by Department and White House officials as "over-broad," "irrelevant," and "unnecessary," and were disavowed shortly after the memorandum was leaked to the press. Even before the memorandum was made available to the public, OLC AAG Goldsmith concluded that the reasoning in those sections was erroneous.[150] When the Levin Memo appeared in late 2004, it referred briefly to Parts V and VI of the Bybee

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150 Goldsmith initially reviewed and withdrew the Yoo Memo, which incorporated the arguments and reasoning of the Bybee Memo.

Memo, noted that those sections had been superseded, and concluded that further discussion was unnecessary. Levin Memo at 2.

Although portrayed as unnecessary and irrelevant, the sections were essential to what Goldsmith characterized as "get-out-of-jail-free cards," a "golden shield" for the CIA, and an "advance pardon." Goldsmith, *The Terror Presidency,* at 96-97, 162. In addition, he commented:

> In their redundant and one-sided effort to eliminate any hurdles posed by the torture law, and in their analysis of defenses and other ways to avoid prosecution for executive branch violation of federal laws, the opinions could be interpreted as if they were designed to confer immunity for bad acts. Its everyday job of interpreting criminal laws gives OLC the incidental power to determine what those laws mean and thus effectively to immunize officials from prosecutions for wrongdoing.

Id. at 149-150. Goldsmith also expressed concern that the Yoo Memo was a "blank check" for the military to engage in interrogation techniques beyond those specifically approved by OLC.[151]

We asked the OLC attorneys who worked on the Bybee Memo why the two sections were added to the memorandum shortly before it was signed. [redacted] told us that she did not know why the sections were added, but believed it was to give the client "the full scope of advice." Yoo stated that he was "pretty sure" they were added because he, Bybee, and Philbin "thought there was a missing element to the opinion." However, Philbin recalled that he told Yoo the sections should be removed, and that Yoo responded, "[T]hey want it in there." Yoo conceded, however, that the CIA may have indirectly given him the idea to add the two sections by asking him what would happen if an interrogator "went over the line." Bybee had no recollection of how the two sections came to be added, did not remember discussing their inclusion with Yoo or Philbin, and did not remember reviewing a draft that did not contain them.

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151 Despite these and other highly critical public and private remarks, Goldsmith's stated in his memorandum to Associate Deputy AG Margolis that he never believed that the analysis in the opinions "implicated any professional misconduct." Goldsmith June 5, 2009 Memorandum to Margolis at 1.

John Rizzo told us that the CIA did not ask OLC to include those sections and that he did not remember if he saw them before the final draft appeared. Alberto Gonzales did not recall how the sections came to be added to the Bybee Memo, but mentioned that David Addington had a general interest in the powers of the Commander-in-Chief and may have had some input into the memorandum.

David Addington testified before the House Judiciary Committee that Yoo met with him and Gonzales at the White House Counsel's Office and outlined for them the subjects he planned to address in the Bybee Memo, including the constitutional authority of the President apart from the statute and possible defenses to the statute. Addington testified that he did not advocate any position at the meeting, but that he responded to Yoo's outline by saying, "Good, I'm glad you're addressing these issues." Later in the hearing, however, Addington stated, "In defense of Mr. Yoo, I would simply like to point out that is what his client asked him to do."[152]

As discussed above, the two sections were drafted after the Criminal Division told the CIA, on July 13, 2002, that it would not provide an advance declination for the CIA's use of EITs.[153] On July 15, 2002, Yoo told [redacted] that he did not plan to address the Commander-in-Chief power or defenses in the memorandum and told her to note in the memorandum that those issues were not discussed because OLC had not been asked to address them. On July 16, 2002, Yoo and [redacted] met at the White House with Gonzales, Addington, and possibly Flanigan to discuss the memorandum. The next day, July 17, [redacted] and Yoo began working on those two new sections. Based on this sequence of events, it appears likely that the sections were added, following a discussion among the OLC and White House lawyers, to achieve indirectly the result desired by the client –

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[152] There were no follow up questions or further testimony regarding who asked Yoo to address those issues. In their responses to OPR, Yoo and Bybee argued that Addington was Yoo's "client," and because Addington testified that Yoo did "what his client asked him to do," Addington's testimony establishes that he personally asked Yoo to add the sections. Although that is a possible interpretation, it appears to be inconsistent with Addington's earlier testimony that it was Yoo who announced that he would address the subject and that Addington simply agreed that it was a good idea. It is also inconsistent with Yoo's sworn statement to OPR.

[153] Sometime between July 13 and 16, at Chertoff's direction, [redacted] drafted a letter dated July 17, 2002, from Yoo to Rizzo, stating that the Department would not provide an advance declination, but Yoo apparently never signed or sent the letter.

immunity for those who engaged in the application of EITs – after Chertoff refused to provide it directly.

Yoo denied to OPR that the sections provided blanket immunity to CIA agents who violated the torture statute, although he conceded that he may have added the discussions in response to a question from the CIA about what would happen if an interrogator went "over the line." He also acknowledged that the section had "implications for the Criminal Division, which is, you know, why I showed it to Mike Chertoff and had him review it." Yoo asserted, however, that the Commander-in-Chief defense could not be invoked by a defendant unless there was an order by the President to take the actions for which the defendant was charged. Yoo admitted, however, that the Bybee Memo did not specify that the use of the Commander-in-Chief defense required a presidential order. He stated: "I'm pretty sure we would have made it clear. I don't know – we might have made it clear orally."

Philbin told OPR that he was not aware of any evidence of intent to provide immunity to CIA officers.

a. The President's Commander-in-Chief Power

As discussed above, Bradbury commented that Yoo's approach to the issue of Commander-in-Chief powers reflected a school of thought that is "not a mainstream view" and did not adequately consider counter arguments. Levin commented that he did not believe it was appropriate to address the question of Commander-in-Chief powers in the abstract and that the memorandum should have addressed ways to comply with the law, not circumvent it. Goldsmith believed that the section was overly broad and unnecessary, but also that it contained errors and constituted an "advance pardon."

The legal conclusion of Part V is stated conditionally in several places (the torture statute "may be" or "would be" unconstitutional under the circumstances), but is expressed without qualification elsewhere (the statute "must be construed"

not to apply; the factors discussed "preclude an application" of the statute; and the Department "could not enforce" the statute).

The memorandum's reasoning with regard to the Commander-in-Chief power can be summarized as follows:

- The United States is at war with al Qaeda. Bybee Memo, Part V. A.
- The President's Commander-in-Chief power gives him sole and complete authority over the conduct of war. *Id.* at Part V. B.
- Statutes should be interpreted to avoid constitutional problems, and a criminal statute cannot be interpreted in such a way as to infringe upon the President's Commander-in-Chief power. *Id.* at Part V. B.
- Accordingly, OLC must construe the torture statute as "not applying to interrogations undertaken pursuant to [the
- President's] Commander-in-Chief authority." Part V. B.
- In addition, the detention and interrogation of enemy prisoners is one of the core functions of the Commander-in-Chief. *Id.* at Part V. C.
- "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." Part V. C.
- Therefore, prosecution under the torture statute "would represent an unconstitutional infringement of the President's authority to conduct war." *Id.* at Part V. C.; Introduction; Conclusion.

The argument assumed, without explanation or reference to supporting authority, that enforcing the statutory prohibition against torture would interfere with the interrogation of prisoners during wartime. This proposition is not stated directly, and in fact, the word "torture" does not appear in Part V. Instead, the discussion is framed in terms of the President's "discretion in the interrogation of enemy combatants," or interrogation methods that "arguably" violate the statute.[154]

Torture has not been deemed available or acceptable as an interrogation tool in the Anglo-American legal tradition since well before the drafting of the United States Constitution. *See, e.g., A v. Secretary of State for the Home Department* [2005] UKHL 71 at ¶¶ 11-12 (H.L.) (discussing English common law's rejection of interrogation by torture and Parliament's abolition in 1640 of royal prerogative to interrogate by torture);[155] Waldron, *Torture and Positive Law* at 1719-20 (discussing Anglo-American legal system's "long tradition of rejecting torture and of regarding it as alien to our jurisprudence"); Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment,* 31 Pepp. L. Rev. 661, 673-79 (2004) (discussing the views of the framers of the Constitution on interrogation by torture).

The Bybee Memo cited no authority to suggest that the drafters of the Constitution (or anyone else) believed or intended that the President's Commander-in-Chief powers would include the power to torture prisoners during times of war to obtain information. Thus, the Bybee Memo's conclusion that the torture statute "does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority" was wrong and most certainly did not constitute thorough, objective, and candid legal advice. Bybee Memo at 35.

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[154] The tone of this section of the Bybee Memo is noticeably argumentative, and in many respects resembles a piece of advocacy more than an impartial analysis of the law. For example, at one point, the memorandum refers to the torture statute as an "unconstitutional . . . law[] that seek[s] to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States." Bybee Memo at 39. Bradbury characterized this section as "overly tendentious and one-sided." Goldsmith found the Yoo and Bybee Memos "tendentious in substance and tone." Goldsmith, *The Terror Presidency* at 151.

[155] The House of Lords opinion is available online at www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm.

The Bybee Memo also asserted that the President alone has the constitutional authority to interrogate enemy combatants and that any attempt by Congress to regulate military interrogation thus "would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." Bybee Memo at 39. This conclusion, which was specifically rejected by Bradbury in his January 15, 2009 memorandum, was not based on a thorough discussion of all relevant provisions of the Constitution. Among the enumerated powers of Congress are the following:

> To define and punish Piracies and Felonies committed on the high seas, and *Offences against the Law of Nations*;
>
> To declare War, grant Letters of Marque and Reprisal, and *make Rules concerning Captures on Land and Water* . . . .
>
> To make Rules for the Government and *Regulation of the land and naval Forces* . . . .
>
> To provide for *organizing, arming, and disciplining, the Militia* . . . .

U.S. Const., art. I, § 8 (emphasis added).

Congress has exercised the above powers to regulate the conduct of the military and the treatment of detainees in a number of ways, including enactment of the Articles of War, the Uniform Code of Military Justice, the War Crimes Act, and, more recently, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. The Bybee Memo should have addressed the significance of the enumerated powers of Congress before concluding that the President's powers were exclusive.[156]

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156 In Part V, the Bybee Memo cited a previous OLC memorandum that discussed the Captures Clause. Bybee Memo at 38 (citing Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations* (March 13, 2002) (the Bybee Transfer Memo) at 5-7). The Bybee Transfer Memo asserted that under the Constitution, "captures" were limited to the capture of property, not persons, and that Congress therefore had no authority to make rules concerning captures of persons. Bybee Transfer Memo at 5.

Goldsmith singled out "the unusual lack of care and sobriety" of the legal analysis of this section. Goldsmith, *The Terror Presidency* at 148. He added that:

> OLC might have limited its set-aside of the torture statute to the rare situations in which the President believed that exceeding the law was necessary in an emergency, leaving the torture law intact in the vast majority of instances. But the opinion went much further. "*Any* effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President," the August 2002 memo concluded. *This extreme conclusion has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law.*

Id. at 148-49 (emphasis in original).

In the draft of OPR's report that was reviewed by Yoo and Bybee, we noted that the Bybee Transfer Memo's conclusion was flawed because it inaccurately discussed a historical source, failed to acknowledge other historical sources that contradicted its thesis, and summarily asserted that an adverse Supreme Court case had been wrongly decided. Bybee responded that he was "wholly justified in relying on what was then good law," *i.e.*, an OLC opinion that he himself signed five months earlier.

As discussed above, on January 15, 2009, OLC's outgoing Principal Deputy AAG, Steven Bradbury issued a Memorandum for the Files *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (January 15, 2009). That memorandum announced that the Bybee Transfer Memo and four other previous OLC opinions concerning "the allocation of authorities between the President and Congress in matters of war and national security" did not "currently reflect, and have not for some years reflected, the views of OLC." Bradbury cited numerous historical sources that contradicted the Bybee Transfer Memo's view of the Captures Clause, noted that the historical examples cited in the Bybee Transfer Memo did "not support that opinion's assertion that an 'unbroken historical chain' recognizes 'exclusive Presidential control over enemy soldiers,'" and cited a Supreme Court case (the same case that the Bybee Transfer Memo asserted was wrongly decided) in support of the conclusion that the Captures Clause does in fact grant Congress power over the detention and capture of enemy prisoners. January 15, 2009 Memo at 6 & n.2.

Accordingly, we concluded that the Bybee Memo's brief reference to the Bybee Transfer Memo did not constitute an adequate consideration of the relevance of the Captures Clause to the power of Congress to outlaw torture in the context of the CIA interrogation program.

Bradbury and Goldsmith, as well as commentators and other legal scholars, criticized the Bybee Memo for failing to discuss *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the leading Supreme Court case on the distribution of governmental powers between the executive and the legislative branches. *See, e.g.*, Luban, *Liberalism, Torture, and the Ticking Bomb* at 68; Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. Nat'l Sec. L. & Pol'y 455, 461 (2005). Although arguments can be made for or against the applicability of *Youngstown* to the question of the President's power to order the torture of prisoners during war, a thorough, objective, and candid discussion would have acknowledged its relevance to the debate.[157]

Finally, in its discussion of presidential powers, the Bybee Memo neglected to acknowledge the Executive's duty to "take Care that the Laws be faithfully executed. . . ." U.S. Const., art. II, § 3. Under the Constitution, international treaties "shall be the supreme Law of the Land . . . ." U.S. Const. art. VI. Before interpreting the Commander-in-Chief clause in such a way as to bar enforcement of a federal criminal statute implementing an international treaty, the authors of the Bybee Memo should have considered an alternate approach that reconciled the Commander-in-Chief clause with the Take Care clause.[158]

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157 Bybee told us that the Bybee Memo was "quite consistent" with *Youngstown*, and stated that:

> [w]e recognized that we're in Category 3, Congress has enacted a statute that might interfere with the Commander in Chief's authority and Justice Jackson's analysis sharpens the issues; it doesn't answer the question; you still have to define what is the substantive content of the vesting clause of Article II, and what is the substantive content of conferring the Commander-in-Chief authority on the President.

158 As a matter of constitutional interpretation, the Commander-in-Chief clause should not have been considered in isolation from the Take Care clause. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."); *Cohens v. Virginia*, 19 U.S. 264, 393 (1821) (It is the duty of the Court "to construe the constitution as to give effect to both [arguably inconsistent] provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument."); *Prout v. Starr*, 188 U.S. 537, 543 (1903) ("The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.").

In his response to OPR's report, Bybee repeatedly asserted that the Bybee Memo was written for "sophisticated executive branch attorneys" and, as such, did not always explain basic concepts. Bybee wrote: "OLC attorneys were asked to answer difficult issues in a direct and succinct manner, and it is unreasonable to expect them to survey the case law in a manner more appropriate for a law review article." Bybee Response at 43.

Thus, Bybee argued that the recipients of the Bybee Memo "did not need a primer on the separation of powers.". Bybee Response at 70. Specifically, Bybee asserted that the "decision not to reiterate" *Youngstown* was appropriate. *Id.* at 64. This assertion is belied by the fact that Goldsmith – a "sophisticated executive branch attorney," and an expert in this area – found that the memorandum was "flawed in so many respects that is must be withdrawn." Goldsmith commented in his first draft of a replacement memorandum that the Yoo Memo contained "numerous overbroad" assertions in the Commander-in-Chief section, and specifically pointed out that it failed to consider adequately "case law such as *Youngstown Sheet & Tube Co. v. Sawyer*." June 15, 2004 draft at 1, n.1 (citation omitted). Goldsmith also told others in the Department that it was his view that the Commander-in-Chief section was "misleading and under-analyzed to the point of being wrong." June 30, 2004 email. As such, we reject Bybee's assertion that the memorandum, although not as "fulsome" as it could have been, was sufficient for the audience for which it was intended.

Bybee also disputed that the Commander-in-Chief section in effect constituted an advance declination for future violations of the torture statute. Bybee stated:

> The Commander-in-Chief section never advised CIA officials that they would be immune from prosecution no matter what they did. To the contrary, the [Bybee Memo] explained that this section was only addressed to interrogations "ordered by the President" and to the interrogations "he believes necessary to prevent attacks upon the United States."

The Bybee Memo did not, in fact, make it clear that its conclusion that the torture statute could not be constitutionally applied to the CIA interrogation program was conditioned on the issuance of a direct order from the president. When Bybee was asked in his initial interview about whether a direct presidential

order was required, he answered: "Well, we haven't explored that in this memorandum. . . . That is not addressed here. We haven't reached that level of specificity." Nowhere in the Commander-in-Chief section does OLC lay out such a requirement. In fact, the sole reference to the requirement is made indirectly in the introduction to the Defenses Section, which follows the Commander-in-Chief section ("We have also demonstrated that Section 2340A, as applied to interrogations of enemy combatants ordered by the President pursuant to his Commander-in-Chief power would be unconstitutional." Bybee Memo at 39). We found this single reference did not adequately inform the reader that OLC's analysis may have assumed the existence of a presidential order.

When we asked Yoo why he did not explicitly state in the Bybee Memo that the torture statute would be unconstitutional only if the President directly ordered the CIA to torture a prisoner, he commented:

> I do think that orally we told [the CIA] that this is, you know, this argument to be triggered – if it's not in the opinion itself, that the argument to be triggered requires the President's direct approval. . . . I do remember we talked about it because we, I think Jay, Pat and I talked about, you know, the sort of chain of command issues and whether this defense could be claimed by people lower down. I don't know if we made a conscious decision to include it or not include it for, I don't know, appearance reasons, or whether – I do know we talked about it and that was sort of the conclusion we came to is that this was something the President would have to approve, and that it wasn't something that could just be claimed by everybody lower down, because then it would sort of be this kind of general immunity from everything anybody ever did.[159]

From Yoo's statement, we concluded that, although Yoo was aware of the possibility that that the Bybee Memo could become "this kind of general immunity from everything anybody ever did," he failed to clarify that his conclusions regarding the unconstitutionality of the torture statute presumed the existence of a direct presidential order.

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159 Yoo added that he did not believe it was a problem if the requirement of a direct presidential order was not included in the Bybee Memo because he thought it would be "perfectly clear for people who work in this area."

b. Criminal Defenses to Torture

The last section of the Bybee Memo discussed possible defenses to violations of the torture statute and concluded that, "even if an interrogation method might violate [the torture statute], necessity or self-defense could provide justifications that would eliminate any criminal liability." Bybee Memo at 46. Although the memorandum suggested that its analysis was based upon "[s]tandard criminal law defenses," *Id.* at 39, we found that not to be the case. At various points, the memorandum advanced novel legal theories, ignored relevant authority, failed to adequately support its conclusions, and relied on questionable interpretations of case law.[160]

(1) The Necessity Defense

The Bybee Memo concluded: "We believe that a defense of necessity could be raised, under the current circumstances, to an allegation of a Section 2340A violation." Bybee Memo at 39. The Bybee Memo based its definition of the necessity defense on two treatises, the Model Penal Code and LaFave & Scott's treatise on criminal law. One U.S. Supreme Court decision, *United States v. Bailey*, 444 U.S. 394 (1980), was cited for the proposition that "the Supreme Court has recognized the defense," but was not discussed further. Bybee Memo at 40. No other case law was cited or discussed.

A prosecution for violations of the torture statute would take place in federal district court, and the relevant controlling judicial authority would be the opinions of the U.S. Supreme Court or the U.S. Circuit Courts of Appeals.[161] At the time the Bybee Memo was drafted, the Supreme Court had discussed the necessity

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160 See Luban, *Liberalism, Torture, and the Ticking Bomb* at 62-67, for a critique of the Bybee Memo's analysis of self-defense and necessity. That article was expanded upon in a subsequent book by the same author, *Legal Ethics and Human Dignity* (2007), at pp.162-205, which raised several of the issues discussed in this report.

161 Venue for violations of the torture statute could lie in any judicial district. *See* 18 U.S.C. § 3238 (venue for offenses committed out of the jurisdiction of any particular state or district shall be in the district where the defendant is first brought, in the district of the defendant's last known residence, or in the District of Columbia).

defense in two opinions: *United States v. Bailey*, 444 U.S. 394 (1980), and *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

In *Bailey*, the Court was asked to consider whether the common law defenses of necessity or duress were available to a defendant charged with escaping from a federal prison. The Court briefly discussed the nature of the defense at common law, but concluded that there was no need to consider the availability or the elements of a possible necessity or duress defenses because "[u]nder any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail." *Bailey* 444 U.S. at 410 (quoting LaFave & Scott). The Court held that because the crime of escape was a continuing offense, the defendant would have to prove that he had made an effort "to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force." *Id.* at 415. Based on the record before it, the Court concluded that the defendant could not meet his burden and that the necessity defense was therefore unavailable. *Id.*

In *United States v. Oakland Cannabis Buyers' Cooperative*, the respondent contended that, "because necessity was a defense at common law, medical necessity should be read into the Controlled Substances Act," and suggested that *Bailey* had established that the necessity defense was available in federal court. *Oakland* 532 U.S. at 490. The Court disagreed, noting that, although *Bailey* had "discussed the possibility of a necessity defense without altogether rejecting it," the respondent was "incorrect to suggest that *Bailey* has settled the question whether federal courts have authority to recognize a necessity defense not provided by statute. . . . It was not argued [in *Bailey*], and so there was no occasion to consider, whether the statute might be unable to bear any necessity defense at all."[162]

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162 *Id.* at 490 & n.3. The Court revisited this issue in *Dixon v. United States*, 548 U.S. 1 (2006), which discussed both *Bailey* and *Oakland*. In *Dixon*, the Court assumed that a defense of duress would be available to a defendant charged with a firearms violation. *Id.* at 6. The Court ruled that the defense would be an affirmative one, which the defendant must prove by a preponderance of the evidence, and concluded that there was no indication that Congress intended the government to bear the burden of disproving the defense beyond a reasonable doubt. *Id.*

The Bybee Memo did not cite or discuss *Oakland,* and apart from stating that the *Bailey* Court had "recognized" the necessity defense, no federal judicial opinions were cited or discussed. Although the *Oakland* Court's comments about *Bailey* were arguably *dictum* (as were the *Bailey* Court's comments about the necessity defense), the Court's opinion nevertheless explicitly rejected the very proposition for which the Bybee Memo cited *Bailey.*

During his interview with OPR, Yoo acknowledged that he was not familiar with the Court's decision in *Oakland.* He also told us that "what we did is looked at the standard criminal law authorities and, you know, didn't, you know, Shepardize all the authorities that we used."[163]

A large body of relevant federal case law on the necessity defense existed at the time the Bybee Memo was being drafted. Opinions discussing and setting forth the elements and limitations of the necessity defense were available from every federal judicial circuit except the Federal Circuit (which does not hear criminal cases). *E.g., United States v. Maxwell,* 254 F.3d 21 (1st Cir. 2001); *United States v. Smith,* 160 F.3d 117 (2d Cir. 1998); *United States v. Paolello,* 951 F.2d 537 (3d Cir.1991); *United States v. Cassidy,* 616 F.2d 101 (4th Cir.1979); *United States v. Gant,* 691 F.2d 1159 (5th Cir. 1982); *United States v. Singleton,* 902 F.2d 471 (6th Cir.1990); *United States v. Mauchlin,* 670 F.2d 746 (7th Cir. 1982); *United States v. Griffin,* 909 F.2d 1222 (8th Cir.1990); *United States v. Schoon,* 971 F.2d 193 (9th Cir.1991) *cert. denied,* 504 U.S. 990 (1992); *United States v. Turner,* 44 F.3d 900 (10th Cir. 1995); *United States v. Bell,* 214 F.3d 1299 (11th Cir. 2000); *United States v. Bailey,* 585 F.2d 1087 (D.C. Cir. 1978), *rev'd, United States v. Bailey,* 444 U.S. 394 (1980); *United States v. Gaviria,* 116 F.3d 1498 (D.C. Cir. 1997).[164] *See also Federal Jury Instructions* at § 19.02 (surveying federal jury

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[163] Judge Bybee was unaware of the *Oakland* decision when the memorandum was drafted, but told us that because *Oakland* came close to overruling *Bailey* but did not actually do so, it was not necessary to discuss it in the memorandum. He did not know whether Yoo and [redacted] were aware of *Oakland,* or simply overlooked it. [redacted] refused to discuss the legal research and analysis that went into the Bybee Memo saying, "[T]he document speaks for itself."

[164] A Westlaw search in the "ALLFEDS" data base for "necessity /1 defense & before 4/2002" yielded 454 cases. Although many of those cases were not on point (for example, cases dealing with the doctrines of business or medical necessity), the search identified *Oakland Cannabis Buyers' Cooperative* and dozens of relevant opinions of the United States Circuit Courts of Appeals, including all of the cases cited above except *Paolello* (which refers to the defense as the

instructions and case law for coercion and duress defenses, including the necessity and justification defenses).

During his OPR interview, Bybee stated that a discussion of existing federal case law on the necessity defense was not needed in the Bybee Memo because the reported cases were "far afield" from a "ticking time bomb" situation.

Yoo told us:

> [W]e were trying to articulate what the . . . federal common law defense was generally, and we used the standard authorities to do that. . . . But the other thing was that other situations that would have arisen would just be so different than this one, because this was a case, this necessity defense in the context of torture, is such a sort of well-known, well-discussed hypothetical that, you know – like I say, that's almost all the writing about this hypothetical circumstances are written about is necessity and self-defense.[165]

A review of the cases mentioned above and other judicial opinions reveals that the elements of the necessity defense in federal court differ from the elements set forth in the Bybee Memo. Although the defense varies slightly among the circuits, most courts have endorsed the following elements:

> (1) the defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;[166]

"justification defense"). Several federal cases were also cited in the treatises relied upon by the Bybee Memo.

165 Yoo appears to have had a limited knowledge of criminal law, and may not have known that federal courts had considered the necessity defense in many reported decisions. In his OPR interview, Yoo stated that he told [redacted] to look at "every state court case" on the necessity defense "because that's the only way it would come up."

166 A few federal courts have adopted a "choice of evils" analysis similar to the "balancing of harms"described in the first element of the MPC definition. *See, e.g., United States v. Turner*, 44 F.3d at 902.

(2) the defendant did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

(3) the defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and

(4) a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.

See, e.g., United States v. Singleton, 902 F.2d at 472-73.[167]

A thorough, objective, and candid discussion of the necessity defense in the context of the CIA interrogation program would have included an element-by-element analysis of how the defense would be applied to a government interrogator accused of violating the torture statute. Such an analysis would have identified the following issues.

The first element of the defense, as noted above, requires a defendant to demonstrate as a preliminary matter that he (or arguably, a third party) faced an immediate, well-grounded threat of death or serious injury. The Bybee and Yoo Memos briefly acknowledged this issue, but did not explain how a government interrogator with a prisoner in his physical custody would make such a showing. *See, e.g., United States v. Perrin*, 45 F.3d 869, 874 (4th Cir. 1995) ("It has been only on the rarest of occasions that our sister circuits have found defendants to be in the type of imminent danger that would warrant the application of a justification defense"); *see also Singleton*, 902 F.2d at 472 (noting the infrequency with which a defense of justification is appropriate); *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989) (generalized fears will not support a defense of justification); *United States v. Panter*, 688 F.2d 268, 269 (5th Cir. 1982) (reversing a conviction for illegal possession of a firearm based on finding that possession of the firearm occurred "in the actual, physical course of a conflict" when defendant, after being

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167 In some cases involving escape from prison or unlawful possession of a firearm, the courts have added a fifth element – that the defendant did not maintain the illegal conduct any longer than necessary. *See e.g., Singleton*, 902 F.2d at 473 (*citing Bailey*, 444 U.S. at 399).

stabbed three times, discovered a gun lying within reach).[168]

Another element of the federal defense that merited a more complete discussion was the requirement that a defendant prove that he had no reasonable, legal alternative to violating the law. As one court noted:

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168 The Bybee Memo, in Part IV (International Decisions), briefly alluded to the "ticking time bomb" scenario. Bybee Memo at 31 n.17 (stating that the Israeli Supreme Court "drew upon the ticking time bomb hypothetical proffered by the [Israeli security service] as a basis for asserting the necessity defense . . . . Under those circumstances, the court agreed that the necessity defense's requirement of imminence . . . would be satisfied."). As noted above, in their OPR interviews, Bybee and Yoo both referred to the ticking time bomb hypothetical as support for their analysis of the necessity defense.

The ticking time bomb scenario is frequently advanced as moral or philosophical justification for interrogation by torture. *See, e.g.*, Eric A. Posner and Adrian Vermeule, *Terror in the Balance, Security, Liberty, and the Courts* 196-197 (2007); Alan M. Dershowitz, *Why Terrorism Works, Understanding the Threat, Responding to the Challenge* 132-163 (2002). However, other scholars have argued that the scenario is based on unrealistic assumptions and has little, if any, relevance to intelligence gathering in the real world. *See, e.g.*, Luban, *Liberalism, Torture, and the Ticking Bomb* at 68; Kim Lane Sheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. Nat'l Security L. & Pol'y 285, 293-95, 337-40 (2005); Henry Shue, *Torture*, 7 Phil. & Pub. Aff. 124-43 (1978). Reliance upon the scenario has been criticized because it assumes, among other things: (1) that a specific plot to attack exists; (2) that it will happen within hours or minutes; (3) that it will kill many people; (4) that the person in custody is known with absolute certainty to be a perpetrator of the attack; (5) that he has information that will prevent the attack; (6) that torture will produce immediate, truthful information that will prevent the attack; (7) that no other means will produce the information in time; and (8) that no other action could be taken to avoid the har Association for the Prevention of Torture, *Defusing the Ticking Bomb Scenario* (2007) (available at http://www.apt.ch/component/option,com_docman/task,cat_view/gid,115/Itemid,59/lang,en/).

To our knowledge, none of the information presented to OLC about Abu Zubaydah, KSM, Al-Nashiri, or the other detainees subjected to EITs approached the level of imminence and certainty associated with the "ticking time bomb" scenario. Although the OLC attorneys had good reasons to believe that the detainees possessed valuable intelligence about terrorist operations in general, there is no indication that they had any basis to believe the CIA had specific information about terrorist operations that were underway, or that posed immediate threats.

Moreover, any reliance upon the "ticking time bomb" scenario to satisfy the imminence prong of the necessity defense would be unwarranted in this instance, as the EITs under consideration were not expected or intended to produce immediate results. Rather, the goal of the CIA interrogation program was to condition the detainee gradually in order to break down his resistance to interrogation.

> The defense of necessity does not arise from a "choice" of several sources of action; it is instead based on a real emergency. It may be asserted only by a defendant who was confronted with a crisis as a personal danger, a crisis that did not permit a selection from among several solutions, some of which would not have involved criminal acts.

United States v. Lewis, 628 F.2d 1276, 1279 (10th Cir.), *cert. denied*, 450 U.S. 924 (1980); *see also United States v. Gaviria*, 116 F.3d at 1531 (defendant had ample opportunities to inform others of a threat to his daughter that caused him to participate unwillingly in a drug conspiracy distribution ring); *United States v. Jeanrette*, 744 F.2d 817, 820-21 (D.C. Cir. 1984) (congressman who claimed he accepted bribe only because he feared he was dealing with mobsters may not raise duress defense because he had opportunity to notify law enforcement officials during two days between agreeing to take bribe and actually taking it), *cert. denied*, 471 U.S. 1099 (1985).[169]

> The *Bailey* Court also stressed this element:
>
> Under any definition of these defenses [of duress or necessity] one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.

Bailey, 444 U.S. at 410 (citing LaFave & Scott at 379).[170] Thus, a government official charged with torture would have the burden of proving that no other method of persuasion or interrogation or any other way of getting information

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169 Although the Bybee Memo did cite LaFave & Scott's version of this element, it distilled the treatise's analysis, which included citations to six federal cases (including *Bailey*) to one short sentence: "the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm." Bybee Memo at 40 (apparently referring to, but failing to cite, LaFave & Scott at 638).

170 *See The Diana*, 74 U.S. (7 Wall) 354, 361 (1869) (for the necessity defense to be available, the case must be one of "absolute and uncontrollable necessity; and this must be established beyond a reasonable doubt . . . . Any rule less stringent than this would open the door to all sorts of fraud.").

would have prevented the harm in question. The Bybee Memo did not explain how an interrogator could prove this element.

A similar issue is raised by the fourth element of the defense – that there be a direct causal relationship reasonably anticipated between the criminal action taken and avoidance of the threatened harm. Thus, a defendant would have to prove, by a preponderance of the evidence, that he reasonably anticipated that torture would produce information directly responsible for preventing an immediate, impending attack in a real-world situation.[171]

The only other aspect of the necessity defense that was discussed in detail by the Bybee Memo was LaFave & Scott's observation that the "defense is available 'only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values.'" Bybee Memo at 41 (quoting LaFave & Scott at 629).[172] As LaFave & Scott's treatise explains, when a criminal statute

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171 Bybee responded to this statement by claiming that the Bybee Memo did discuss "the ticking time bomb scenario as precisely such a real world situation." He cited as an example a footnote in the Bybee Memo's discussion of *PCATI v. Israel*. However, that footnote simply summarized the ticking time bomb hypothetical discussed in the Israeli court's decision. Bybee Memo at 31 n.17. Bybee offered a second example of a "real world" ticking time bomb scenario by claiming that:

> the OLC attorneys working on the [2002] Memo had been briefed on the apprehension of Jose Padilla on May 8, 2002. Padilla was believed to have *built and planted* a dirty bomb . . . *in New York City*.

Bybee Response at 74 n.6 (emphasis added). Bybee did not cite a source for that statement, but it is inconsistent with press accounts and with former Attorney General Ashcroft's announcement at a press conference that Padilla "was *exploring a plan* to build and explode a radiological dispersion device, or 'dirty bomb,' *in the United States*." (http:edition.cnn.com/transcripts/0206/10/bn.02.html (emphasis added).

172 Although LaFave & Scott cited only state statutes for this proposition, it is likely that a federal court asked to permit the defense in a prosecution under the torture statute would consider, as an initial matter, whether the defense was contemplated by Congress when it enacted the law. *See Bailey*, 444 U.S. at 415 n.11 (recognizing "that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law . . . and that therefore a defense of duress or coercion may well have been contemplated by Congress when it enacted" the prison escape statute). *But see Oakland*, 532 U.S. at 490 n.3 (pointing out that the *Bailey* Court refused to balance the harms of the proposed necessity defense and that "we are construing an Act of Congress, not drafting it.").

expressly provides that a necessity defense is prohibited, or conversely, that it is available, the statute's determination is controlling. LaFave & Scott at 629.

The Bybee Memo advanced two arguments in favor of the proposition that Congress intended the necessity defense to be available to persons charged with violating the torture statute. First, the memorandum stated:

> Congress has not explicitly made a determination of values vis-à-vis torture. In fact, Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense.

Bybee Memo at 41.

In a footnote, the memorandum explained that argument as follows: the definition of torture in the CAT only applied when severe pain is inflicted for the purpose of obtaining information or a confession. *Id.* at n.23. Therefore:

> One could argue that such a definition represented an attempt to to [sic] indicate that the good of of [sic] obtaining information . . . could not justify an act of torture. In other words, necessity would not be a defense.

Id.

The memorandum then reasoned that when Congress defined torture under the torture statute and did not include the the CAT requirement that pain be inflicted for the purpose of obtaining information or a confession, it intended "to remove any fixing of values by statute." *Id.* Therefore, according to the Bybee Memo, Congress intended to allow defendants charged with torture to raise the necessity defense. *Id.*

That argument depends on the following series of assumptions, none of which is supported by the ratification history of CAT or the legislative history of the torture statute: (1) the CAT definition's reference to the purpose of torture was intended to signal that the necessity defense was unavailable; (2) Congress

interpreted the definition as such a signal; and (3) Congress adopted a broader definition of torture than the CAT definition in order to indicate that the necessity defense should remain available under United States law.

However, if Congress had intended to allow the necessity defense to apply to the torture statute, it could have made an explicit statement to that effect, rather than relying on attorneys and judges in future criminal prosecutions to discern a hidden reason for its decision to broaden the scope of the definition of torture. Moreover, the argument's underlying assumption – that the wording of the CAT definition was "an attempt to indicate" that necessity should not be a defense to torture – is unwarranted, as the treaty explicitly stated elsewhere that necessity was not a defense to torture. CAT art. 2(2).

In support of its second argument for concluding that Congress intended to allow the necessity defense to apply to the torture statute, the Bybee Memo cited CAT article 2(2). The memorandum reasoned that Congress was aware of article 2(2), "and of the [Model Penal Code] definition of the necessity defense that allows the legislature to provide for an exception to the defense, [but] Congress did not incorporate CAT article 2.2 into [the torture statute]." Bybee Memo at 41 n.23. Congress's failure to prohibit explicitly the defense, the memorandum concluded, should be read as a decision by Congress to permit the defense. *Id.*

The Bybee Memo failed to point out, however, that the fact that Congress has not specifically prohibited a necessity defense does not mean that it is available. *Oakland,* 532 U.S. at 491 n.4 ("We reject the Cooperative's intimation that elimination of the defense requires an explicit statement.") (citation and internal quotation marks omitted).

Moreover, the Bybee Memo's argument depends on the assumption that Congress intended to enact implementing legislation for one section of CAT that was inconsistent with the clear terms of another section. The memorandum did not address the possibility that a court might conclude that the torture statute should be interpreted in a manner that is consistent with article 2(2)'s prohibition of the necessity defense.[173] *See, e.g., Filartiga v. Pena-Irala,* 630 F.2d at 887 n.20

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[173] The authors of the Bybee Memo recognized the logic of such an argument when it supported a permissive view of the torture statute. In Part IV of the Bybee Memo (International Decisions), in arguing that harsh Israeli interrogation methods did not constitute torture, the

(referring to "the long-standing rule of construction first enunciated by Chief Justice Marshall: 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .'" (citing and quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 34, 67 (1804)). *See also* Restatement (Third) of Foreign Relations Law of the United States at § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

More importantly, the Bybee Memo's discussion of congressional intent ignored directly relevant material in the ratification history of the CAT that undermined or negated its position. As the drafters of the Bybee Memo knew, but did not discuss in the memorandum, the Reagan administration's proposed conditions for ratification of the CAT included the following understanding:

> The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others.

S. Exec. Rep. No. 101-30 at 16.

The first Bush administration deleted that understanding from the proposed conditions, with the following explanation:

> Paragraph 2 of Article 2 of the Convention states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." *We accept this provision, without reservation.* As indicated by President Reagan when he transmitted the Torture Convention to the Senate, no circumstances can justify torture.
>
> The Reagan administration, without in any way narrowing the prohibition on torture, had thought it desirable to clarify that the

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authors concluded that the court must have interpreted Israeli law in a manner consistent with the prohibition of CAT article 2(2). Bybee Memo at 31.

> Convention does not preclude the availability of relevant common law defenses, including self-defense and defense of others. *That is, the Convention does not prevent a person from acting in self-defense, as long as he does not torture.* While there was no opposition to this concept, substantial concern was expressed that if this understanding were included in the instrument of ratification, *it would be misinterpreted or misused by other states to justify torture in certain circumstances.* We concluded that this concern was justified and therefore reviewed whether the understanding was necessary. We decided it was not, since nothing in the Convention purports to limit defenses of actions which are not committed with the specific intent to torture. *We would not object to your including this letter in the Senate report on the Convention, so that U.S. courts are clear on this point.*

S. Exec. Rep. No. 101-30 at 40-41 (App. B) (Correspondence from the Bush Administration to Members of the Foreign Relations Committee, Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Senator Pressler (April 4, 1990) (emphasis added) (Mullins Letter)).

Yoo and [redacted] knew that the Bush administration had withdrawn the Reagan administration's understanding on self-defense and defense of others. On July 31, 2002, [redacted] wrote to Yoo:

> Something we don't mention in our discussion of defense is the fact [that] the Reagan administration had submitted an understanding with respect to justification defenses that the Bush administration dropped. . . . The Bush Administration explained the decision to drop this understanding as follows: "Upon reflection, this understanding was felt to be no longer necessary." Thoughts on whether we should include this and, if so, where?

Yoo responded:

> I guess we should drop a footnote. In terms of whether it is no longer necessary, is there any further explanation given by the Bush administration[?] It could be because it was felt to be understood that the treaty did not preclude those defenses.

[redacted] replied:

> I just looked through the hearing on the Convention – Sofaer's prepared testimony states that one [of] "the basic obligations of a state party" to the Convention was "[t]o make clear that torture cannot be justified and that no order from a superior or office or public authority may be invoked as a justification of torture." Sen. Exec. Rep. 101-30, at 7. He later describes the Reagan administration understanding as "widely misunderstood." But that's all I've found on it.

Neither the Bybee Memo nor the Yoo Memo acknowledged this issue in their discussions of common law defenses. A copy of the full Senate Executive Report cited above, including the Mullins Letter, was among the documents provided to us by OLC in a folder labeled "[redacted] - Hard Drive and Hard Copy Files."

The Bybee Memo also failed to consider the possibility that a court might consult additional relevant statements from the Executive Branch, such as the State Department's initial report to the United Nations Committee Against Torture, documenting United States implementation of the CAT (prepared *"with extensive assistance from the Department of Justice"*) (emphasis added). That report included the following statement:

> No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a "state of public emergency") or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension.

United States Department of State, Initial Periodic Report of the United States of America to the UN Committee Against Torture at ¶ 6 (October 15, 1999).[174]

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[174] In its 2005 report to the Committee Against Torture, the United States reaffirmed its position that "[n]o circumstance whatsoever . . . may be invoked as a justification for or defense to committing torture." United States Department of State, Second Periodic Report of the United

A court might also be influenced by the strong judicial condemnation of torture in other federal cases. For example, in interpreting CAT Article 3, one court wrote:

> The individual's right to be free from torture is an international standard of the highest order. Indeed, it is a *jus cogens* norm: the prohibition against torture may never be abrogated or derogated. We must therefore construe Congressional enactments consistent with this prohibition.

Cornejo-Barreto, 218 F.3d at 1016. *Accord, e.g., Filartiga*, 630 F. 2d at 884.

We also concluded that a thorough, objective, and candid discussion of the relevant case law would have noted that although the necessity defense has been considered by the federal courts on many occasions, it has rarely been allowed to be presented to a jury. *See Oakland* 532 U.S. at 491 n.4 ("we have never held necessity to be a viable justification for violating a federal statute") (citation to *Bailey* omitted). In most reported cases, courts have found, as in *Bailey*, that the defendant would be unable to prove the elements of the defense. *See., e.g., Singleton*, 902 F.2d at 472 (noting that a defense of justification is infrequently appropriate).

(2) Self Defense

The Bybee Memo's discussion of self-defense exhibits some of the same shortcomings as its treatment of the necessity defense. The description of the doctrines of self-defense and defense of others was based on secondary authorities – LaFave & Scott and the Model Penal Code. There was no analysis or discussion of how the defense has been applied in federal court, and no review of federal jury instructions for the defense.[175] In addition, as discussed above, significant aspects of the CAT ratification history relating to the availability of the defense were ignored.

States of America to the UN Committee Against Torture at ¶ 6 (June 29, 2005).

[175] The memorandum did mention one federal case, *United States v. Peterson*, 483 F.2d 1222, 1228-29 (D.C. Cir. 1973), but only to quote its summary of what Blackstone wrote about self-defense in the mid-eighteenth century.

The memorandum presented a two-page summary of the common law doctrines of self-defense and the defense of others, and acknowledged that the situation under consideration differed from "the usual self-defense justification" because it involved inflicting injury on a prisoner in custody, who posed no personal threat to the interrogator.[176] Bybee Memo at 44. However, the memorandum asserted that "leading scholarly commentators believe that interrogation of such individuals using methods that might violate [the torture statute] would be justified under the doctrine of self-defense . . . ." *Id.* Thus, terrorists who help create a deadly threat "may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion . . . ." *Id.*

The only authority cited for this proposition was a law review article: Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280 (1989). The author of that article was one person, not "leading scholarly commentators, or "some commentators," as he was described in the Bybee Memo.

We found evidence that Yoo knew he was exaggerating the legal authority for this argument and consciously chose to conceal that fact. The "track changes" feature of a February 2003 draft of the Yoo Memo (which incorporated the Bybee Memo's discussion of self-defense nearly verbatim) indicates that Bybee questioned at that time whether the reference to "commentators" should be plural. In response, the phrase "leading scholarly commentators" was changed to "some leading scholarly commentators" and a citation to another article from the same issue of the *Israel Law Review* was added: Alan M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists – and to Lie About It?* 23 Israel L. Rev. 192, 199-200 (1989) (the Dershowitz article). Yoo Memo at 79. The Yoo Memo cited

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176 In his response, Bybee claimed that "the [Bybee] Memo qualified its analysis by saying that self-defense 'would not ordinarily be available to an interrogator accused of torturing a prisoner who posed no personal threat to the interrogator.' Standards Memo [Bybee Memo] at 44." Bybee Response at 73. The quoted sentence does not appear in the Bybee Memo. Rather, the sentence is from OPR's draft report and Bybee mistakenly attributed it to the Bybee Memo.

In fact, the Bybee Memo stated that "this situation is different from the usual self-defense justification" but that "[u]nder the present circumstances, . . . even though a detained enemy combatant may not be the exact attacker . . . he still may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution." Bybee Memo at 44.

the Dershowitz article with the signal, "*see also,*" indicating that the "[c]ited authority constitutes additional source material that supports the proposition." The Bluebook: A Uniform System of Citation R.1.2(a) at 23 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

However, the Dershowitz article does not address the doctrine of self-defense; it discusses the possible application of the broader necessity defense to interrogators charged with using illegal methods and systematically committing perjury to conceal the practice. In the passage cited by the Yoo Memo, Dershowitz stated:

> I lack the information necessary to reach any definitive assessment of whether the GSS [Israeli General Security Service] should be allowed to employ physical pressure in the interrogation of some suspected terrorists under some circumstances. (I am personally convinced that there are some circumstances – at least in theory – under which extraordinary means, including physical pressure, may properly be authorized; I am also convinced that these circumstances are present far less frequently than law enforcement personnel would claim.) My criticism is limited solely to the dangers inherent in using – misusing in my view – the open-ended "necessity" defense to justify, even retroactively, the conduct of the GSS.

Dershowitz article at 199-200 (footnote omitted).[177] We reviewed the Dershowitz article in its entirety and concluded that it offers no support for the statement that violations of the torture statute "would be justified under the doctrine of self-defense."[178]

Furthermore, Professor Moore's article was a theoretical exploration of the morality of torturing terrorists to obtain information. The article cited more

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177 We concluded that this was the paragraph cited by Yoo, as it continues from page 199 to page 200.

178 The Dershowitz article briefly alluded to self-defense twice: once, in order to contrast the "subjective perceptions and priorities" of the necessity defense with the "established rules of action and inaction" of the self-defense doctrine, Dershowitz article at 196-197; and again, in a footnote, to explain when a prisoner being tortured out of "necessity" might be able to invoke the right of self-defense as justification for resisting his interrogators. *Id.* at 198 n.17.

scholarly and philosophical works than legal authorities, and made no attempt to summarize or analyze United States law. The arguments adopted by the Bybee Memo were based on hypothetical situations proposed by Moore or other legal theorists, and clearly represented Moore's personal views, which he did not claim were supported by legal authority. *See id.* at 322-33.[179] Thus, the Bybee Memo's conclusion that "a detained enemy combatant . . . may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution," Bybee Memo at 44, had no basis in the law; it was a novel argument that the authors misrepresented as a "standard" criminal law defense.[180]

The Bybee Memo presented another novel interpretation of the common law doctrine of self-defense, based on the principle that a nation has the right to defend itself in time of war and "the teaching of the Supreme Court in *In re Neagle*, 135 U.S. 1 (1890)." Bybee Memo at 44. According to the Bybee Memo, *Neagle* held that Deputy U.S. Marshal Neagle, "an agent of the United States and of the executive branch, was justified in [killing a man who attacked U.S. Supreme Court Justice Stephen Field] because, in protecting Justice Field, he was acting pursuant to the executive branch's inherent constitutional authority to protect the United States government." *Id.* at 44-45.

However, *Neagle* did not hold that the officer's action was justified by the President's authority to protect the government. The case involved an appeal from the U.S. Court of Appeals for the Ninth Circuit, which, pursuant to a writ of *habeas corpus* filed after Neagle was arrested on state homicide charges, ordered his release from county jail. At the time, the federal *habeas corpus* statute applied to prisoners held in custody for, among other things, "an act done in pursuance of the laws of the United States." *Neagle* 135 U.S. at 40-41. The sole question

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179 The author's conclusions were introduced with the phrases "to my mind," and "[m]y own answer to this question is . . . ." *Id.* at 323.

180 As discussed earlier, the ratification history of the CAT shows that the first Bush administration, which submitted the reservations, understandings, and declarations to CAT that were ratified by the Senate, did not view self-defense to acts of torture as a possible defense. As the State Department explained in correspondence to Senator Pressler, "[b]ecause the [CAT] applies only to custodial situations, i.e., when the person is actually under the control of a public official, the legitimate right of self-defense is not affected by the Convention." S. Exec. Rep. No. 101-30 at 40 (App. B).

before the Court was whether Neagle was acting "in pursuance of the laws of the United States" when he shot and killed Justice Field's attacker.[181] *Id.*

The county sheriff, represented by the California Attorney General, argued that Neagle was not acting pursuant to federal law because no federal statute authorized a U.S. Marshal to protect federal judges. The Court rejected that argument, stating that "[w]e cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death . . . ." *Id.* at 67.[182]

The Court then noted that a federal statute granted United States Marshals the same powers as state law enforcement personnel, and that California law directed sheriffs to "prevent and suppress all . . . breaches of the peace." *Id.* at 68. Because a California sheriff would have had the power to do what Neagle did, the Court reasoned, "under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction." *Id.* at 76. We found no support in *Neagle* for the proposition advanced in the Bybee Memo that the right to defend the national government "can bolster and support an individual claim of self-defense in a prosecution . . . ." Bybee Memo at 44.[183]

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181 Justice Field "did not sit at the hearing of this case and took no part in its decision." *Neagle*, 135 U.S. at 76.

182 This passage was quoted in the Bybee Memo to support its argument that an interrogator could defend himself against a charge of torture "on the ground that he was implementing the Executive Branch's authority to protect the United States government." Bybee Memo at 45.

183 *Neagle's* value as a criminal law precedent is arguably limited by the unusual factual background of the case. *See Neagle* 135 U.S. at 56 ("The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject"). Nevertheless, Bybee and Yoo argue that they appropriately relied upon *Neagle* because it has been cited in other OLC opinions to support the general proposition that the President has the inherent power to protect U.S. personnel and property. However, none of those OLC opinions relied solely on *Neagle*, or cited it to support a proposition comparable to the Bybee Memo's theory that the President's inherent power to protect a federal judge "can bolster and support an individual claim of self-defense in a prosecution" for torture. Bybee Memo at 44.

The Bybee Memo went on to discuss the nation's right to defend itself against armed attack, citing the United States Constitution, Article 51 of the United Nations Charter, and several U.S. Supreme Court cases. Bybee Memo at 45. Based on those authorities, the memorandum concluded:

> If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate [the torture statute], he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network. In that case, we believe that he could argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack. This national and international version of the right to self-defense could supplement and bolster the government defendant's individual right.

Id. at 46.

The authorities upon which this conclusion was based either spoke in general terms of national defense or addressed the law of war, not the domestic criminal law of the United States.[184] The Bybee Memo did not explain how those authorities would apply to a criminal prosecution, or how they would "bolster" an individual defendant's claim of self-defense in federal court. Like the preceding statements, this conclusion was a novel argument for the extension of the law of self-defense, without any direct support in the law, and without disclosure of its unprecedented, novel nature.

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184 One of the cited cases, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), held that the Fourth Amendment to the United States Constitution did not apply to the search of property in a foreign country owned by a non-resident alien. *Id.* at 261. The page cited by the Bybee Memo included a passing reference to the fact that the "United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security." *Id.* at 273. The case did not discuss the doctrine of self-defense.

7. Conclusion

For the reasons cited above, we found that the Bybee and Yoo Memos contained seriously flawed arguments and that they did not constitute thorough, objective or candid legal advice.[185]

B. The Legal Analysis Set Forth in the Bybee Memo Was Inconsistent with the Professional Standards Applicable to Department of Justice Attorneys.[186]

Yoo and Bybee told us that OLC was asked to provide a candid assessment of how the torture statute would apply to the use of EITs, and that no one at the White House or the CIA ever pressured them to approve the use of EITs or to provide anything other than an objective analysis of the law. They also maintained that their analysis was a fair and objective view of the torture statute's meaning and that they never intended to arrive at a preordained result. Despite these assertions, we concluded that the memoranda did not represent thorough, objective, and candid legal advice, but were drafted to provide the client with a legal justification for an interrogation program that included the use of certain EITs.

As an initial matter, we found ample evidence that the CIA did not expect just an objective, candid discussion of the meaning of the torture statute. Rather, as John Rizzo candidly admitted, the agency was seeking maximum legal protection for its officers, and at one point Rizzo even asked the Department for an advance declination of criminal prosecution. The CIA did not develop EITs with the limitations of the torture statute in mind; rather, it adopted them from the SERE program, which incorporated many of the techniques used by totalitarian

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185 We note that none of the attorneys involved in drafting the Bybee and Yoo Memos asserted that they did not have sufficient time to complete the memoranda or that time pressures affected the quality of their work. Yoo told us that they had a "fairly lengthy" period of time to complete the unclassified Bybee Memo. [redacted] also stated that she had sufficient time to devote to her projects. We also note that, after the issuance of the Bybee Memos, the OLC had approximately six additional months to produce the Yoo Memo, which incorporated the Bybee Memo nearly verbatim.

186 As discussed above, the analysis which follows applies equally to the March 14, 2003 Yoo Memo.

regimes to extract intelligence or false confessions from captured United States airmen. OLC's approval was sought as a final step before implementing the EITs.

We also found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result, at the expense of their duty of thoroughness, objectivity, and candor. The specific techniques the agency proposed were described to the OLC attorneys in detail, and were presented as essential to the success of the interrogation program. The waterboard, in particular, was initially portrayed as essential to the success of the program.[187] As [redacted] told us, "[M]y personal perspective was there could be thousands of American lives lost" if the techniques were not approved.

Yoo provided the CIA with an unqualified, permissive statement regarding specific intent in his July 13, 2002 letter, and approved an equally permissive statement in the June 2003 Bullet Points that were drafted in part and reviewed in their entirety by Yoo and [redacted] for use by the CIA. Goldsmith viewed the Bybee Memo itself as a "blank check" that could be used to justify additional EITs without further DOJ review. Although Yoo told us that he had concluded that the [redacted] technique would violate the torture statute, he nevertheless told the client, according to [redacted] Rizzo, that he would "need more time" if the client wanted it approved.

According to Rizzo, there was never any doubt that waterboarding would be approved by Yoo, and the client clearly regarded OLC as willing to find a way to achieve the desired result, [redacted]

[redacted]

After dropping the waterboard from the program, the CIA told OLC, as stated in the 2007 Bradbury Memo, that sleep deprivation was "crucial" and that the remaining EITs were "the minimum necessary to maintain an effective program . . . ."

[redacted] Finally, immediately after the Criminal Division stated that the Department would not provide an advance declination of prosecution for violations of the torture statute, Yoo added the Commander-in-Chief and defenses sections to the Bybee Memo.

Several of the memoranda's arguments were supported by authority whose significance was exaggerated or misrepresented. Neither of the two law review articles cited in the Yoo Memo to support the position that torture could be justified under U.S. law by the common law doctrine of self-defense in fact supported that argument. Nor did the 1890 Supreme Court case, *In re Neagle,* provide adequate support for the statement that "the right to defend the national government can be raised as a defense in an individual prosecution" for torture. In addition, Yoo's conclusions about the broad scope of the Commander-in-Chief power did not reflect widely-held views of the Constitution.

The memoranda relied upon the phrase "severe pain" in medical benefits statutes to suggest that the torture statute applied only to physical pain that results in organ failure, death, or permanent injury. Another case describing the statutory meaning of "willful" was used to suggest a heightened standard of specific intent. A case from the Supreme Court of Israel was, according to the memorandum, "best read" as saying that the use of certain EITs did not constitute torture, despite the fact that the question was not addressed in the court's opinion. That case and one other foreign case was relied on for the conclusion that international law permits "an aggressive interpretation as to what amounts to torture."

We found instances in which adverse authority was not discussed and its effect on OLC's position was not assessed accurately and objectively. For example, the Bybee Memo cited *United States v. Bailey* for the proposition that the U.S. Supreme Court "has recognized the [necessity] defense," but did not cite a later case, *United States v. Oakland Cannabis Buyers' Cooperative,* which stated it was "incorrect to suggest that *Bailey* has settled the question whether federal courts have authority to recognize a necessity defense not provided by statute."

In discussing the Torture Victim Protection Act, the Bybee Memo focused almost exclusively on *Mehinovic v. Vuckovic,* which involved extremely brutal conduct, to support the argument that TVPA cases were all "well over the line of

what constitutes torture."[188] However, two other cases, in which far less serious conduct was found to constitute torture, were relegated to the appendix and their significance was not fully discussed.

In taking the extreme position that acts of torture could not be punished under certain circumstances or could be justified by common law defenses, the memoranda did not refer to or discuss the relevance of article 2(2) of the Convention Against Torture, which explicitly states that no exceptional circumstances can be invoked to justify torture. The drafters were, however, aware of article 2(2) and invoked it to the extent it supported a permissive view of the torture statute.[189] Similarly, the memos failed to acknowledge the statement, in the United States' 1999 report to the United Nations Committee Against Torture, that no exceptional circumstances could ever justify torture, and ignored statements from the first Bush administration that undercut the authors' theory that Congress intended to permit common law defenses to torture, or that "severe pain" under the torture statute must be "excruciating and agonizing."

We also noted that the Bybee and Yoo Memos adopted inconsistent positions to advance a permissive view of the torture statute. The torture statute's ban on "threat[s] of imminent death" resulting in severe mental pain or suffering was minimized by the assertion that "[c]ommon law cases and legislation generally define imminence as requiring that the threat be almost immediately forthcoming." Bybee Memo at 12; Yoo Memo at 44 (citing LaFave & Scott at 655). According to the memoranda, only threats of immediate, certain death would be covered by the statute. Bybee Memo at 12; Yoo Memo at 44.

However, in the discussion of self-defense that appeared later in the memoranda, the authors interpreted that authority differently to minimize

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188 Where the court in *Mehinovic v. Vuckovic* found one example of less extreme treatment – hitting and kicking a detainee and forcing him into a kneeling position – to constitute torture, the Bybee Memo simply observed that "we would disagree with such a view based on our interpretation of the criminal statute." Bybee Memo at 27.

189 As discussed above, the Bybee and Yoo Memos argued, without acknowledging adverse authority, that because Congress did not explicitly adopt article 2(2) in the torture statute, it must have intended the common law defense of necessity to remain available to persons accused of torture. CAT article 2(2) was also cited as support for the memoranda's contention that the Supreme Court of Israel did not consider harsh interrogation techniques to constitute torture.

possible problems with the defense. The same section of LaFave & Scott, along with the Model Penal Code's discussion of self-defense, were cited to support the conclusion that "[i]t would be a mistake . . . to equate imminence necessarily with timing – that an attack is immediately about to occur." Bybee Memo at 43; Yoo Memo at 78. The memoranda cited LaFave & Scott's example of a kidnapper telling a victim he would be killed in a week; in such a situation, the victim could use force to defend himself before the week passed. Based on that logic, a threat that would be sufficiently imminent to justify killing a person in self-defense could nevertheless be insufficiently immediate or certain to qualify as a "threat of imminent death" under the torture statute. Put differently, an interrogator could threaten a prisoner in such a way that would justify the prisoner killing the interrogator in self-defense, but would not constitute a "threat of imminent death" under the torture statute, even if it caused severe mental pain or suffering.

Some of the arguments in the memoranda were illogical or convoluted, but were nevertheless advanced to support an aggressive interpretation of the torture statute. For example, the use of medical benefits statutes to define "severe pain" as the pain associated with "death, organ failure, or permanent damage" was of no practical value in interpreting the statute. The memoranda also presented a particularly convoluted argument about the necessity defense, suggesting that subtle differences between the CAT and the torture statute meant that "Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense."

In his response, Bybee claimed that the Bybee Memo made it clear that the assertion of the necessity defense or self-defense by an interrogator accused of torture would be an extension of the law. Bybee argued that the purpose of the defenses sections "was to call attention to the fact that such defenses *might* be available to an official prosecuted under the statute" and "was not meant to be an exhaustive study of the common law defenses." Bybee Response at 74 (emphasis in original). Bybee also asserted that "[i]t is certainly not an ethical violation or incompetent lawyering to advance a position that extends the current case law to novel factual scenarios." *Id.* at 73.

First, we agree that it can be appropriate to advance a position that extends the case law to new factual situations. However, it is a violation of professional standards and Department standards to advance such a position as legal advice,

without making clear to the client that the advice is an extension of existing law and that there are countervailing arguments against such a position.

The Bybee Memo did not make clear that extension of these defenses to prosecutions for torture would be novel. For example, in the section on self-defense, the memorandum presented only one qualification, consisting of a brief acknowledgment that "this situation is different from the usual self-defense justification." The memorandum went on to assert that "leading scholarly commentators believe that interrogation of such individuals using methods that might violate [the torture statute] would be justified under the doctrine of self-defense . . . ." Bybee Memo at 44. Thus, the Bybee Memo concluded, terrorists who help create a deadly threat "may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion . . . ." *Id.*

The language of the section on self-defense gave the impression that the defense would be readily available. For example, the section began with the sentence: "Even if a court were to find that a violation of Section 2340A was not justified by necessity, a defendant could still appropriately raise a claim of self-defense." *Id.* at 42. The Memo added: "Under the circumstances, we believe that a defendant accused of violating Section 2340A could have, in certain circumstances, grounds to properly claim the defense of another." *Id.* at 43.

Similarly, the language in the Commander-in-Chief section created the impression that the memorandum was presenting a definitive view of the law. The Memo stated that "it could be argued" that Congress enacted the torture statute with the intention of restricting the president's discretion in the interrogation of enemy combatants, but went on to conclude as follows:

> Even were we to accept this argument, however, we conclude that the Department of Justice could not enforce Section 2340A against federal officials acting pursuant to the President's constitutional authority to wage a military campaign. . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.

Bybee Memo at 36, 39.

Bybee conceded in his response that "[s]ome language in the [Bybee Memo], viewed in isolation, could be read to suggest that Congress has no power to criminalize *any* interrogations." Bybee Response at 58 (emphasis in original). He went on to assert that the Commander-in-Chief section, "properly viewed as a whole," was narrowly confined to a power that the President must invoke personally. *Id.* However, the Bybee Memo failed to state anywhere in the Commander-in-Chief section that its analysis was conditioned upon issuance of an order by the President.[190] In addition, Bybee told OPR in his interview: "we haven't explored that [issue] in this memorandum."

Similarly, on the issue of specific intent, Bybee asserted that the Bybee Memo "includes numerous qualifications that would be counterproductive if the objective was to obtain the most robust defense for interrogators possible." Bybee Response at 46-47. In fact, as discussed above, the Bullet Points[191] said about specific intent:

> The interrogation of al-Qa'ida detainees does not constitute torture within the meaning of section 2340 where the interrogators do not have the specific intent to cause the detainee to experience severe physical or mental pain or suffering. The absence of specific intent is demonstrated by a good faith belief that severe physical or mental pain or suffering will not be inflicted upon the detainee. A good faith belief need not be a reasonable belief. The presence of good faith can be established through evidence of efforts to review relevant professional literature, consulting with experts, or reviewing evidence gained from past experience.

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190 As noted, the sole reference to the requirement is made indirectly in the introduction to the Defenses section, which follows the Commander-in-Chief section. Bybee Memo at 39 ("We have also demonstrated that Section 2340A, as applied to interrogations of enemy combatants *ordered by the President* pursuant to his Commander-in-Chief power would be unconstitutional." (emphasis added)). We found this single reference was inadequate to make it clear to the reader that such an order was required.

191 Yoo denied to Goldsmith that he authored or approved the Bullet Points. We found, however, that the Bullet Points were drafted in part and reviewed in their entirety by Yoo and [redacted] and that neither of them expressed any disagreement with their contents.

[redacted]

Third, the argument that the Classified Bybee Memo narrowed the scope of the Bybee Memo does not apply in the case of the March 2003 Yoo Memo to the DOD. As recognized by Philbin and Goldsmith, the Yoo Memo was not limited to specific techniques or the interrogation of a specific individual. Both Philbin and Goldsmith told OPR that they were concerned that the Defense Department might improperly rely on the opinion in determining the legality of new interrogation techniques. Goldsmith later explained, in an email to other OLC attorneys, that he saw the Yoo Memo as a "blank check" to create new interrogation procedures without further DOJ review or approval.

These and other examples discussed above led us to conclude that the Bybee Memo and the Yoo Memo did not present a thorough, objective, and candid assessment of the law.

C. Analysis of the Classified Bybee Memo (August 1, 2002)

Based on the results of our investigation, we concluded that the Classified Bybee Memo did not constitute thorough, objective, and candid legal advice.

First, the Classified Bybee Memo did not consider the United States legal history surrounding the use of water to induce the sensation of drowning and suffocation in a detainee. The government has historically condemned the use of various forms of water torture and has punished those who applied it. After World War II, the United States convicted several Japanese soldiers for the use of "water torture" on American and Allied prisoners of war.[192] American soldiers also have been court-martialed for administering the "water cure." One such court-martial occurred for actions taken by United States soldiers during the American occupation of the Philippines after the 1898 Spanish-American War.[193]

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192 These trials took place before United States military commissions, and in the International Military Tribunal for the Far East (IMTFE),commonly known as the Tokyo War Crimes Trial. According to records from that time period, there were two main forms of water torture, which was also referred to as water treatment, the water test, or suffocation by immersions. In the first, the subject was tied or held down on his back and cloth placed over his nose and mouth. Water was then poured on the cloth. As the interrogation continued, he would be beaten and water poured down his throat "until he could hold no more." In the second, the subject was tied lengthways on a ladder, face upwards. He was then slipped into a tub of water and held there until "almost drowned." Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468, 490-494 (2007) (citing *United States of America v. Chinsaku Yuki*, Manilla (1946)) (citation omitted); Affidavit of J.L. Wilson, The Right Reverend Lord Bishop of Singapore, admitted as Prosecution Exhibit 1519A, December 16, 1946, IMTFE Record, at 12,935; *United States of America v. Hideji Nakamura, Yukio Asano, Seitara Hata, and Takeo Kita*, United States Military Commission, Yokohama, May 1-28, 1947; *United States of America v. Yagoheiji Iwata*, Case Docket No. 135 31 March 1947 to 3 April, 1947, Yokohama (citation omitted); Judgment of the IMTFE, note 96 at 49,663 ("The practice of torturing prisoners of war and civilian internees prevailed at practically all places occupied by Japanese troops . . . . Methods of torture were employed in all areas so uniformly as to indicate policy both in training and execution. Among these tortures were the water treatment.").

193 *See* Guenael Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to National Case Law on War Crimes*, 1 Oxford Journal of International Criminal Justice 135 (2003) (Major Edwin Glenn and Lieutenant Edwin Hickman were tried for

The general view that waterboarding is torture has also been adopted in the United States judicial system. In civil litigation against the estate of the former Philippine President Ferdinand Marcos, the district court found the "water cure," in which a cloth was placed over a detainee's mouth and nose and water poured over it to produce a drowning sensation, was both "a human rights violation" and a "form[ ] of torture." *In Re Estate of Marcos, Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995). The court's description of the "water cure" closely resembles that of the CIA in its request to use enhanced interrogation techniques.

In addition, the use of "water torture" was punished when it was used by law enforcement officers as a means of questioning prisoners. In 1983, Texas Sheriff James Parker and three of his deputies were charged by the Department of Justice with civil rights violations stemming from their abuse, including the use of "water torture," of prisoners to coerce confessions.[194] *United States v. Carl Lee*, 744 F.2d 1124 (5th Cir. 1984). All four men were convicted.

None of these cases involved the interpretation of the specific elements of the torture statute. Nor are there sufficient descriptions in the opinions to determine how similar the techniques were to those proposed by the CIA. However, a thorough and balanced examination of the technique of waterboarding would have included a review of the legal history of water torture in the United States.

In addition, in concluding that the CIA's use of ten specific EITs during the interrogation of Abu Zubaydah would not violate the torture statute, the Classified Bybee Memo relied almost exclusively on the fact that the "proposed interrogation methods have been used and continue to be used in SERE training" without "any negative long-term mental health consequences." Classified Bybee Memo at 17.

[redacted]

conduct to the prejudice of good order and military discipline by courts martial in May 1902 based upon infliction of the "water cure." The "water cure" was essentially forcing a subject's mouth open and pouring water down his throat. Glenn was convicted and Hickman acquitted.).

[194] The court did not describe what consistuted the "water torture."

[redacted]

In light of the fact that the express goal of the CIA interrogation program was to induce a state of "learned helplessness," we found that the Classified Bybee Memo's conclusion that use of the ten specific EITs in the interrogation of Abu Zubaydah would not violate the torture statute was not based on a thorough, objective, and candid analysis of the issues.

We also found that the Classified Bybee Memo's conclusion that the use of sleep deprivation would not result in severe physical pain or suffering was not based on a thorough, objective, and candid analysis of the issues. As noted in the 2005 Bradbury Memo, the Classified Bybee Memo's analysis "did not consider the potential for physical pain or suffering resulting from the shackling used to keep detainees awake." 2005 Bradbury Memo at 35. Rather, the OLC attorneys limited their analysis to the physical effects of lack of sleep, without inquiring about or considering how the subject would be kept awake. In light of the fact that prisoners were typically shackled in a standing position with their arms elevated, wearing only a diaper, we concluded that the Classified Bybee Memo's analysis was incomplete.

We note that the Bybee Memo did not discuss the fact that the use of sleep deprivation as an interrogation technique was condemned as "torture" in a report cited by the U.S. Supreme Court in *Ashcraft v. Tennessee*, 322 U.S. 143, 151, n.6 (1944). In that opinion, the Court quoted the following language from a 1930 American Bar Association report: "It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired." *Id.*

Similarly, the Classified Bybee Memo failed to consider how prisoners would be forced to maintain stress positions and thus there was an insufficient basis for the memorandum's conclusion that the use of stress positions would not result in severe physical pain or suffering. The memorandum recited that subjects subjected to wall standing would be "holding a position in which all of the individual's body weight is placed on his finger tips." In other stress positions, they would sit on the floor "with legs extended straight out in front and arms

raised above the head" or would be kept "kneeling on the floor and leaning back at a 45 degree angle." Classified Bybee Memo at 10. However, the authors did not consider whether subjects would be shackled, threatened, or beaten by the interrogators, to ensure that they maintained those positions.

Bybee argued that he should not be responsible for these omissions given his role as a "reviewer" of the Classified Bybee Memo. He stated that it was reasonable for him to rely on the work of his "extremely experienced staff" – [redacted]Yoo and Philbin. Indeed, Bybee conceded in his written response that he would have included the legal history of waterboarding had he been aware of it. He wrote:

> Without pre-existing knowledge of the charging specifications in the World War II war crimes trials, or the techniques employed by U.S. soldiers in the years following the 1898 Spanish-American War, there would be no reason for Judge Bybee to suspect that such legal precedent existed. Nor did the CIA inform Judge Bybee that the U.S. military had historically condemned this interrogation technique as torture – a fact he would expect to be told if it were true. . . . Consistent with this, Judge Bybee maintains that he was unaware of any legal history at the time and would have included such history in the [Classified Bybee Memo] had he known of it.[195]

Because of the authors' failure to address the issues detailed above, we concluded that the legal advice provided was not thorough, objective, and candid legal advice.

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[195] Bybee Classified Response at 4. Bybee also notes that the Classified Bybee Memo did list one case on waterboarding in the Appendix, which Bybee asserts "demonstrates that [OLC] *did* consider reported decisions holding that practices satisfied the definition of torture, but likely found this particular case factually distinguishable." *Id.* at 4-5 (emphasis in original). We do not agree that listing a case in the Appendix without discussion satisfied the attorneys' professional obligations in this matter. Bybee also argued that the cases relating to waterboarding were "obscure" and "easily missed even by diligent researchers." *Id.* Again, we disagree.

D. The Yoo Letter[196]

On August 1, 2002, Yoo also issued a six-page letter to White House Counsel Gonzales, in response to Gonzales's question whether interrogation methods that did not violate the torture statute could nevertheless be found to (1) violate U.S. obligations under CAT, or (2) provide a basis for prosecution under the Rome Statute in the International Criminal Court.

1. Violation of CAT

Yoo advised Gonzales that "international law clearly could not hold the United States to an obligation different than that expressed in [the torture statute]." Yoo Letter at 3. Yoo explained that the U.S. instrument of ratification to the CAT included a statement of understanding that defined torture in terms identical to the language of the torture statute. Citing "core principles of international law," Yoo concluded that "so long as the interrogation methods do not violate [the torture statute], they also do not violate our international obligations under the Torture Convention." *Id.* at 3, 4.

In arriving at that conclusion, Yoo blurred some important distinctions that are recognized by international law and by the foreign relations law of the United States. Yoo noted that the United States had submitted an "understanding" with its instrument of ratification as to the meaning of torture. He then discussed, in the next four paragraphs, the legal effect of a party's "reservation" to a treaty. Finally, Yoo concluded that the "understanding" was in fact a "reservation" that limited the United States' obligations under the CAT.[197]

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196 Yoo subsequently incorporated the substance of the Yoo Letter into the Yoo Memo. Yoo Memo at 55-57.

197 Yoo explained, in a footnote, that the understanding might be a reservation, because although "the Bush administration's definition of torture was categorized as an 'understanding,' . . . we consider it to be a reservation if it indeed modifies the Torture Convention standard." Yoo Letter at 4, n.5 (citing Restatement (Third) of Foreign Relations Law of the United States at § 313 cmt g). In the very next footnote, however, Yoo stated that, "if we are correct in our suggestion that [CAT] itself creates a heightened intent standard, then the understanding attached by the Bush Administration is less a modification of the Convention's obligations and more of an explanation of how the United States would implement its somewhat ambiguous terms." Yoo Letter at 4, n.6.

Yoo did not elaborate on the well-established meanings of "reservation" and "understanding" in U.S. and international law:

- Reservations change U.S. obligations without necessarily changing the text [of a treaty]; and they require the acceptance of the other party.

- Understandings are interpretive statements that clarify or elaborate provisions but do not alter them.

Congressional Research Service, *Treaties and Other International Agreements: the Role of the United States Senate,* 106th Cong., 2d Sess. 11 (Comm. Print prepared for the Senate Comm. on Foreign Relations, 1984); *accord, e.g., Relevance of Senate Ratification History to Treaty Interpretation,* 11 Op. O.L.C. 28, 32 (April 9, 1987)).

Thus, a reservation to a duly ratified treaty "is part of the treaty and is law of the United States." Restatement (Third) of Foreign Relations Law of the United States at § 314 cmt. b. A treaty subject to an understanding "becomes effective in domestic law . . . subject to that understanding." *Id.* at cmt. d.

The difference between a reservation and an understanding could not have been lost on the first Bush administration or the Senate when the CAT was ratified, because – as Yoo subsequently observed in the Yoo Memo – the Bush administration intentionally "upgraded" one of the Reagan administration's proposed conditions to the CAT from an understanding to a reservation. Yoo Memo at 51. *See* Senate Hearing at 41 (1990) (testimony of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) ("that is why we have proposed the reservation, as a reservation, not merely an understanding . . . ."). Thus, it is likely that a court would consider the international obligations of the United States separately from the enforcement of domestic law implementing the treaty. Yoo did not acknowledge or discuss that possibility.

2. Prosecution Under the Rome Statute

In response to Gonzales's second question, the Yoo Letter stated that the U.S. is not a signatory to the ICC Treaty, and that the treaty therefore cannot bind the U.S. as a matter of international law, and that even if the treaty did apply, "the

interrogation of an al Qaeda operative could not constitute a crime under the Rome Statute." Yoo Letter at 5. According to the letter, this is because article 7 of the Rome Statute only applies to "a widespread and systematic attack directed against any civilian population," not interrogation of individual terrorists, and because article 8 is limited to acts that violate the provisions of the Geneva Conventions. *Id.*

The Yoo Letter went on to explain that article 8 would not apply because President Bush declared on February 27, 2002 that Taliban and al Qaeda fighters were not entitled to protection under the Geneva Conventions, consistent with OLC's January 22, 2002 opinion to that effect. Thus, "[i]nterrogation of al Qaeda members . . . cannot constitute a war crime because article 8 of the Rome Statute applies only to those protected by the Geneva Conventions." Yoo Letter at 6.

The Yoo Letter's analysis of article 8 was incomplete in two respects. First, the letter ignored a relevant provision of article 8. The Yoo Letter referred only to subsection 2(a), which defines war crimes as grave breaches of the Geneva Conventions. However, subsection 2(b) of article 8 also defines war crimes as "[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law." Those enumerated violations include "[c]ommitting outrages upon personal dignity, in particular humiliating and degrading treatment." Rome Statute, article 8(2)(b)(xxi). Because certain of the CIA EITs would likely be found by the international community to constitute humiliating and degrading treatment, we concluded that the Yoo Letter's assertion that "interrogation of an al Qaeda operative could not constitute a crime under the Rome Statute" was based on an incomplete analysis of the law.[198]

Second, Yoo's analysis was based on the assumption that a court in a nation that is party to the ICC treaty would accept the determination of the President of the United States – a non-party nation – that a given detainee was not protected under the Geneva Conventions. We believe that assumption was unwarranted.

[redacted]

E. Analysis of the Bradbury Memos

Our review raised questions about the objectivity and reasonableness of some of the Bradbury Memos' analyses, although we did not conclude that those failings rose to the level of professional misconduct. The Bradbury Memos relied substantially upon the legal analysis of the Levin Memo (which corrected the most obvious errors of the Bybee and Yoo Memos) and applied that analysis to the facts and information provided to the Department by the CIA.[199] The Bradbury Memos were more carefully and thoroughly written than the Bybee and Yoo Memos, and unlike those memoranda, did not advance unsupported legal arguments that suggested that acts of torture were permitted or could be justified in certain circumstances. We nevertheless had some concern about the Bradbury Memos' analyses.

Others within the government expressed similar concerns. As discussed above, DAG Comey and Philbin objected to the issuance of the Combined Techniques Memo. In addition, Bellinger, then Legal Adviser to Secretary of State Condoleezza Rice, wrote to Bradbury and stated that he was "concerned that the [2007 Bradbury] opinion's careful parsing of statutory and treaty terms" would be considered "a work of advocacy to achieve a desired outcome." February 9, 2007 Bellinger letter at 11.

We found several indicia that the Bradbury Memos were written with the goal of allowing the ongoing CIA program to continue. First, we found some evidence that there was pressure on the Department to produce legal opinions which would allow the CIA interrogation program to go forward, and that Bradbury was aware of that pressure. Although Bradbury strongly denied that he was expected to arrive at a desired outcome, in Comey's April 27, 2005 email to Rosenberg, Comey stated that "[t]he AG explained that he was under great pressure from the Vice President to complete both memos, and that the President had even raised it last week." He wrote, "Patrick [Philbin] had previously reported that Steve [Bradbury] was getting constant similar pressure from Harriet Miers

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[199] The May 2005 Bradbury Memos were in some respects replaced or updated by the 2007 Bradbury Memo, which adopted much of their analysis. Prior to President Obama's executive order of January 22, 2009, providing that no one was to rely upon any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001 and January 20, 2009, the 2005 Bradbury Memos had not been withdrawn by the Department.

and David Addington to produce the opinions." In addition, Bellinger told us that there was tremendous pressure placed on the Department to conclude that the program was legal and could be continued, even after the DTA and MCA were enacted.

The Bradbury Memos contained some of the flaws we noted in the Bybee and Yoo Memos. Although the Bradbury Memos, unlike the Classified Bybee Memo, acknowledged the substantial differences between SERE training and the use of EITs by the CIA, some sections of the Bradbury Memos nevertheless cited data obtained from the SERE program to support the conclusion that the EITs were lawful as implemented by the CIA. The SERE program was also cited as evidence that the CIA interrogation program and its use of EITs was "consistent with executive tradition and practice." In light of the significant differences, as pointed out by the CIA itself, between a training program and real world application of techniques, we found this argument to be strained.

We also noted that the Bradbury Memos frequently relied upon representations and assurances from the CIA concerning the procedures, monitoring, and safeguards that would accompany the use of EITs. For example, OLC's approval of the sleep deprivation technique was based on assurances from the CIA that medical officers would "intervene to alter or stop" the technique if they concluded in their "medical judgment that the detainee is or may be experiencing extreme physical distress." OLC's approval of waterboarding assumed "adherence to the strict limitations" and "careful medical monitoring," implicitly acknowledging that application of the techniques could constitute torture under certain circumstances.

Similar representations had accompanied the CIA's original request to use EITs in the interrogations of Abu Zubaydah, KSM and others, and as the CIA OIG Report determined, many abuses nevertheless took place. Under these circumstances, we question whether it was reasonable for Department officials to accept such representations at face value, given the CIA's previous history with EITs, the inevitable pressures faced by interrogation teams to achieve results, the CIA's demonstrated interest in shielding its interrogators from legal jeopardy, and the difficulty of detecting, through "monitoring," the largely subjective experiences of severe mental or physical pain or suffering.

The Bradbury Memos also reflect uncritical acceptance of the CIA's representations regarding the method of implementation of certain EITs. For example, in concluding that prolonged sleep deprivation, which involves shackling and diapering detainees, did not constitute cruel, inhuman, or degrading treatment, Bradbury noted that the CIA asserted that the use of diapers was necessary because releasing detainees from shackles to relieve themselves "would present a security problem and would interfere with the effectiveness of the technique" and that "diapers are used solely for sanitary and health reasons and not in order to humiliate the detainee." Article 16 Memo at 13; 2007 Bradbury Memo at 9-10. However, the CIA's 2002 list of proposed EITs described diapering as a separate EIT, in which the detainee "is forced to wear adult diapers and is denied access to toilet facilities for an extended period, in order to humiliate him."[200]

In addition, we question whether it was reasonable for OLC to rely on CIA representations as to the effectiveness of the EITs. The CIA Effectiveness Memo was essential to the conclusion, in both the Article 16 Memo, drafted in 2005, and the 2007 Bradbury Memo, that the use of EITs did not "shock the conscience" and thus did not violate the Due Process Clause because the CIA interrogations were not "arbitrary in the constitutional sense," that is, had a governmental purpose that the EITs achieved. However, as Bradbury acknowledged, he relied entirely on the CIA's representations as to the effectiveness of EITs, and did not attempt to verify or question the information he was given. As Bradbury put it, "[I]t's not my role, really, to do a factual investigation of that."[201]

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200 We had similar concerns about two documents that were not the subject of this investigation – a letter and a memorandum from Bradbury to the CIA, both dated August 31, 2006, evaluating the legality of the conditions of confinement at the CIA's secret facilities. Some of the conditions were approved because, among other reasons, they were represented as essential to the facilities' security. However, these conditions were similar or identical to conditions that were previously described by the CIA or the military, in documents we found in OLC's files, as "conditioning techniques." Those conditions of confinement included isolation, blindfolding, and subjection to constant noise and light.

201 Bellinger told OPR that he pushed for years to obtain information about whether the CIA interrogation program was effective. He said he urged AG Gonzales and White House Counsel Fred Fielding to have a new CIA team review the program, but that the effectiveness reviews consistently relied on the originators of the program. He said he was unable to get information from the CIA to show that, but for the enhanced techniques, it would have been unable to obtain the information it believed necessary to stop potential terrorist attacks.

[redacted]

We were able to obtain limited information about the interrogations of some [redacted] detainees from other sources. As discussed above, the CIA Briefing Slides and the CIA OIG Report stated that Abu Zubaydah and KSM, the two main sources cited in the CIA Effectiveness Memo, were subjected to EITs and were waterboarded extensively by CIA interrogators. [redacted]

[redacted]

[redacted]

According to CIA documents, by 2005, approximately thirty detainees had been subjected to EITs. [redacted] was Al-Nashiri, the third detainee to be waterboarded, who, according to the CIA OIG Report, continued to be subjected to EITs – despite the objections of [redacted] interrogators – because CIA headquarters officials believed he must be withholding information. [redacted] We examined CIA assertions regarding specific

[redacted]

disrupted terrorist plots.[204] The memorandum stated that Abu Zubaydah "provided significant information" about Jose Padilla and Binyam Mohammed, "who planned to build and detonate a 'dirty bomb' . . . ." CIA Effectiveness Memo at 4. FBI sources cited in the DOJ IG Report stated, however, that the information in question was obtained through the use of traditional interrogation techniques, before the CIA began using EITs.

More importantly, the CIA Effectiveness Memo provided inaccurate information about Abu Zubaydah's interrogation. It asserted that:

> Abu Zubaydah provided significant information on two operatives, Jose Padilla and Binyam Mohammed, who planned to build and detonate a "dirty bomb" in the Washington DC area. Zubaydah's reporting *led to the arrest of Padilla* on his arrival in Chicago in May 2003 [sic] [redacted]

CIA Effectiveness Memo at 4 (emphasis added).

In fact, Padilla was arrested in May 2002, not 2003. [redacted] the information "[leading] to the arrest of Padilla" could not have been obtained through the authorized use of EITs. Yet, Bradbury relied upon this plainly inaccurate information in both the Article 16 Memo and the 2007 Bradbury Memo. In the Article 16 Memo, he wrote:

> You have informed us that Zubaydah also "provided significant information on two operatives, [including] Jose Padilla[,] who planned to build and detonate a 'dirty bomb' in the Washington DC area." (quoting CIA Effectiveness Memo at 4).

Article 16 Memo at 10.

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[204] Much of the following information was made public in a September 6, 2006 speech by President Bush, and in a non-classified document issued by the Director of National Intelligence on September 6, 2006, "Summary of the High Value Terrorist Detainee Program."

The 2007 Bradbury Memo made the following assertion:

> Interrogations of Zubaydah – again, once enhanced techniques were employed – revealed two al Qaeda operatives already in the United States and planning to destroy a high rise apartment building and to detonate a radiological bomb in Washington, D.C.

2007 Bradbury Memo at 32.

[redacted]

In addition, in considering whether the use of EITs is "arbitrary in the constitutional sense," we believe the failures as well as the claimed successes of the program should have been considered by Bradbury. [redacted]

We also note that, to the extent the CIA Effectiveness Memo was relied upon by Bradbury in approving the legality of the waterboard as an EIT in 2005, most if not all of the CIA's past experience with that technique appear to have exceeded the limitations, conditions, and understandings recited in the Classified Bybee Memo and the Bradbury Memos.[205] As noted in the 2005 Bradbury Memo, the CIA OIG Report concluded that the CIA's past use of the waterboard "was different from the technique described in the [Classified Bybee] opinion and used in the

[205] Because CIA video tapes of its actual use of the waterboard were destroyed by the CIA, a definitive assessment of how that technique was applied may be impossible.

SERE training." 2005 Bradbury Memo at 41, n.51 (quoting CIA OIG Report at 37). In addition, the report found that "the expertise of the [redacted] SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant" and that there was no "reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe." *Id.* (citing CIA OIG Report at 21, n.26).

The 2005 Bradbury Memo stated that the CIA's proposed use of EITs in 2005 reflected "a number of changes in the application of the waterboard, including limits on the frequency and cumulative use of the technique." *Id.* [redacted] Moreover, the program approved by Bradbury in 2007, which did not include the use of the waterboard, was based upon the "effectiveness" of interrogation sessions that made extensive use of the waterboard. Thus, the programs approved by Bradbury in 2005 and 2007, largely on the basis of intelligence data cited in the CIA Effectiveness Memo, were significantly different from the program that produced the intelligence in question.

We also note that the Bradbury Memos' analysis rested in part on assurances provided by the CIA that EITs would be administered only to high-value detainees with knowledge of imminent al Qaeda threats, or, in the case of the waterboard, where there were "substantial and credible indicators" that the subjects had actionable information that could disrupt or delay an imminent terrorist attack. [redacted]

We question whether it was reasonable for Bradbury not to have demanded more specific information before concluding that the use of EITs was both essential and effective in disrupting terrorist attacks. Given the importance of the CIA Effectiveness Memo's conclusions to Bradbury's constitutional analysis, and in light of the CIA OIG report, he should have insisted that it set forth: the CIA's

basis for believing the subjects possessed information about imminent attacks; the type and sequence of EITs that were applied; the information obtained after EITs were used; and any verification or follow up use of that information. The CIA also should have described any instances where the use of EITs produced no useful information, or false information.[206] Absent this type of information and analysis, we question Bradbury' reliance on the CIA Effectiveness Memo to approve the use of EITs going forward.

Accordingly, based on our review of the CIA Effectiveness Memo, and in light of the questions that have been publicly raised about the effectiveness and usefulness of EITs, we question whether OLC's conclusion that the use of EITs does not violate substantive due process standards was adequately supported.

Our review of the Bradbury Memos raised additional concerns about OLC's legal analysis. Some of the memoranda's reasoning was counterintuitive. For example, the Article 16 Memo concluded that the use of thirteen EITs, including stress positions, forced nudity, cramped confinement, sleep deprivation, and the waterboard, did not violate the United States obligation under CAT to prevent "acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." The 2007 Bradbury Memo concluded that Common Article 3 of the Geneva Conventions, which requires the United States to ensure that detainees "shall in all circumstances be treated humanely," and which bars, among other things, "cruel treatment" and "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," did not bar the use of six EITs, including extended sleep deprivation that involves dietary manipulation, shackling and diapering. Those conclusions, although the product of complex legal analysis,

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206 According to the September 8, 2006 report of the Senate Select Committee on Intelligence on "Postwar Findings About Iraq's WMD Programs and Links to Terrorism and How They Compare with Prewar Assessments" (the SSCI Report), the CIA "relied heavily on the information obtained [in 2002] from the debriefing of detainee Ibn al-Shaykh al-Libi, a senior al-Qa'ida operational planner, to assess Iraq's potential [chemical and biological weapons] training of al-Qa'ida." SSCI Report at 76. Al-Libi recanted that information in 2004, and claimed that, after he was subjected to harsh treatment by CIA debriefers, he "decided he would fabricate any information the interrogators wanted in order to gain better treatment and avoid being handed over to [a foreign government.]" *Id.* at 79-80. Al-Libi was in fact transferred to the custody of a foreign government and was allegedly subjected to threats and harsh physical treatment. *Id.* at 80-81. He later stated that he continued to fabricate information in order to avoid harsh treatment. *Id.* at 81.

appear to be inconsistent with the plain meaning and commonly-held understandings of the language of Common Article 3.

Moreover, the Article 16 Memo's and the 2007 Bradbury Memo's analysis of substantive due process appears incomplete. On the question of what would "shock the contemporary conscience" in light of executive tradition and contemporary practice, OLC looked to United States case law on coercive treatment, discussed the military's tradition of not using abusive techniques, noted the State Department's regular practice of condemning "conduct undertaken by other countries that bears at least some resemblance to the techniques at issue," and discussed the rulings of foreign tribunals. In each instance, the memoranda attempted to distinguish the CIA interrogation program from those accepted standards of conduct.

For example, criminal law prohibitions on coercive interrogation were distinguished because OLC found the governmental interest in preventing terrorism to be more important than conducting "ordinary law enforcement." Article 16 Memo at 33. Military doctrine was distinguished because al Qaeda terrorists are "unlawful combatants" and not prisoners of war. *Id.* at 35. Official United States condemnations of harsh interrogation in other countries "are not meant to be legal conclusions" and are merely "public diplomatic statements designed to encourage foreign governments to alter their policies in a manner that would serve United States interests." 2007 Bradbury Memo at 38. The judgments of foreign tribunals were distinguished because courts did not make any findings "as to any safeguards that accompanied the . . . interrogation techniques," because the foreign courts did not make inquiries into "whether any governmental interest might have reasonably justified the conduct," or because the cases involved legal systems where intelligence officials are "subject to the same rules as 'regular police interrogation[s].'" *Id.* at 40, 42.

Thus, OLC found that the condemnation of coercive or abusive interrogation in those contexts did not apply to the CIA interrogation program, and that executive tradition therefore did not prohibit the use of EITs by the CIA. However, the absence of an exact precedent is not evidence that conduct is traditional. Even though the OLC opinions found no "evidence of traditional executive behavior or contemporary practice . . . condoning an interrogation program" using coercive techniques, it concluded, based on the absence of any previous, explicit condemnation of a program that was virtually identical to the CIA interrogation

program, that "in light of 'an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them,' the use of [EITs by the CIA] as we understand it, does not constitute government behavior" that shocks the contemporary conscience. Article 16 Memo at 38.

Although we had serious concerns about the objectivity of the advice in the Bradbury Memos, as discussed above, we did not find that the shortcomings we identified rose to the level of professional misconduct.

F. Individual Responsibility

Having concluded that much of the legal analysis of the Bybee Memo, the Classified Bybee Memo, the Yoo Memo, Yoo's July 13, 2002 Letter, and the Yoo Letter fell short of the standards of thoroughness, objectivity, and candor that apply to Department of Justice lawyers, we now consider the levels of responsibility that apply to each of the subjects. As Yoo was the primary author of those documents, we first consider those questions with respect to him.

1. John Yoo

John Yoo accepted the initial assignment from the NSC and the CIA on behalf of the Department. He was directly responsible for the contents of the Bybee Memo, the Classified Bybee Memo, the Yoo Memo, the July 13 Letter, and the Yoo Letter. In addition, he signed the Yoo Memo, the July 13 Letter, and the Yoo Letter. He also directed and reviewed [redacted] research and drafting. We therefore concluded that he was primarily responsible for ensuring that the legal analysis in those documents was thorough, objective, and candid.

Under OPR's analytical framework, an attorney commits intentional professional misconduct when he violates a clear and unambiguous obligation purposefully or knowingly. We found, based on a preponderance of the evidence, that Yoo knowingly failed to provide a thorough, objective, and candid interpretation of the law.[207] The Bybee Memo had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute,

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[207] Because subjects rarely acknowledge or announce their intent to disregard a professional obligation, our findings here, as in most cases, are largely based on circumstantial evidence.

the War Crimes Act, the Geneva Convention, and the Convention Against Torture, and Yoo's legal analyses justified acts of outright torture under certain circumstances, and characterized possible prosecutions under the torture statute as unconstitutional infringements on the President's war powers. We based our conclusion that Yoo committed intentional professional misconduct on the following:

First, we found that Yoo knowingly provided incomplete and one-sided advice in his analysis of the Constitution's Commander-in-Chief clause, which he asserted could bar enforcement of the torture statute in the context of the CIA interrogation program. Philbin told us that he thought the Commander-in-Chief section was aggressive and went beyond what OLC had previously said about executive power, and that he told Yoo to take it out of the Bybee Memo. In addition, given Yoo's academic and teaching background, we found that Yoo knew his view of the Commander-in-Chief power was a minority view and would be disputed by many scholars. As such, Yoo had an obligation to inform his client that his analysis was a novel and untested one.

We also found that Yoo knew that the Commander-in-Chief section might be used in an effort to provide immunity to CIA officers engaged in acts that might be construed as torture. We found significant the timing of the addition to the Bybee Memo of the Commander-in-Chief section directly after Criminal Division AAG Chertoff refused to provide an advance criminal declination in CIA interrogation cases. In addition, we found that Yoo was aware that, absent the requirement of a direct presidential order, the Commander-in-Chief section could become "this kind of general immunity from everything anybody ever did." Despite this knowledge, he failed to include in the memoranda that a direct presidential order was required to trigger the Commander-in Chief clause.

In addition, we found that Yoo was aware that the Bybee Memo's discussion of specific intent was insufficient. As discussed in detail above, that section suggested that an interrogator who inflicted severe pain and suffering during an interrogation would not violate the torture statute if his objective was to obtain information. Yoo told us that he had not dealt with the question of specific intent prior to the Bybee Memo, and that he "was very surprised to see that the Supreme Court cases were so confused about it." Yet, he only "looked at the cases quickly" and relied upon a relatively inexperienced attorney "to figure out . . . what the law really is." Yoo acknowledged that Chertoff and others told

him that the law of specific intent was "awfully confused." Philbin stated that he told Yoo his reasoning was incorrect. Yoo also remembered reading a law review article or treatise, possibly La Fave & Scott, that discussed "how they're not sure what the exact definition of specific intent is."

Despite Yoo's knowledge, the Bybee and Yoo Memos' advice on the issue of specific intent did not convey any of the uncertainty or ambiguity of this area of the law. This was even more apparent in Yoo's July 13, 2002 letter to Rizzo and in the Classified Bybee Memo, where Yoo provided a less complete explanation of the torture statute's specific intent element, and in the 2003 CIA Bullet Points, which Yoo tacitly approved. Given Yoo's background as a former Supreme Court law clerk and tenured professor of law, we concluded that his awareness of the complex and confusing nature of the law, his failure to carefully read the cases, and his exclusive reliance on the work of a junior attorney, established by a preponderance of the evidence that he knowingly failed to present a sufficiently thorough, objective, and candid analysis of the specific intent element of the torture statute.

We found additional evidence that Yoo knowingly provided incomplete advice to the client. Shortly before the Bybee Memo was signed, [redacted] told Yoo that the memorandum's discussion of common law defenses did not mention that one of the Reagan administration's proposed understandings to the CAT (the understanding that common law defenses would remain available to persons accused of torture under United States law), had been withdrawn prior to the treaty's ratification. [redacted] told Yoo that the understanding had been withdrawn "[t]o make clear that torture cannot be justified." Despite receiving this information contradicting the memorandum's assertion that self-defense could be invoked by CIA interrogators charged with torturing detainees, Yoo did not alter the memorandum. The Bybee Memo continued to rely on other aspects of the CAT ratification history to support its aggressive interpretation of the torture statute, while ignoring this important aspect of its history.

We also found that Yoo knowingly misstated the strength of the Bybee Memo's argument "that interrogation of [prisoners] using methods that might violate [the torture statute] would be justified under the doctrine of self-defense . . . ." The Bybee Memo asserted that "leading scholarly commentators" supported that proposition, even though a single law review article was the only support.

During the drafting of the Yoo Memo, Bybee questioned Yoo about the reference to "commentators," to determine whether there was more than one such commentator. Rather than change the memorandum to assert that there was one "commentator," Yoo added a citation to an article by Professor Dershowitz that did not support the proposition in question.[208] Accordingly, we concluded that Yoo knowingly misrepresented the authority that supported his statement that "some leading scholarly commentators believe that interrogation of such individuals using methods that might violate [the torture statute] would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot 'has culpably caused the situation where someone might get hurt.'"

Some of the other flaws discussed in the Analysis section of this report, considered in isolation, could be seen as the result of reckless action or mistake. However, the evidence of the knowing violations discussed above led us to conclude that Yoo put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice, and that he therefore committed intentional professional misconduct.

We recognize that the Bybee Memo was written at a difficult time in our nation's history, and that the fear and uncertainty that followed the September 11, 2001 attacks might explain why some Department of Justice lawyers were willing to conclude, contrary to core principles of American and international law, that the torture statute could not be enforced against CIA interrogators under certain circumstances, or that acts of outright torture could be justified by common law defenses. However, situations of great stress, danger, and fear do not relieve Department attorneys of their duty to provide thorough, objective, and candid legal advice, even if that advice is not what the client wants to hear. Accordingly, we concluded that the extraordinary circumstances that surrounded the drafting of the Bybee and Yoo Memos did not excuse or justify the lack of thoroughness, objectivity, and candor reflected in those documents.

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208 We found by a preponderance of the evidence that Yoo added the Dershowitz citation. Both Yoo and [redacted] acknowledged that Yoo was responsible for the sections of the memorandum on common law defenses. In addition, Yoo told us that he recalled reading the symposium issue of the law review that contained the Moore and Dershowitz articles. We considered the possibility that Yoo may have misrecollected the substance of the Dershowitz article and simply added the citation without looking at the article. However, because the citation included a reference to specific page numbers, we discounted that possibility.

2. Judge Jay Bybee

We concluded that Bybee, as the head of OLC and signator of the Bybee Memo and the Classified Bybee Memo, was responsible for ensuring that the advice provided to the clients presented a thorough, objective, and candid view of the law. Although Bybee did not conduct the basic research that went into the memoranda and did not draft any sections, he reviewed many drafts, provided comments, and signed both memoranda. Philbin told us that Bybee "was so personally involved, he was kind of taking over" and, ultimately "churn[ed] through three drafts with comments on them per day."

We acknowledge that an Assistant Attorney General should not be held responsible for checking the accuracy and completeness of every citation, case summary, or argument in every legal memorandum submitted for his signature by a Deputy AAG. However, this was not a routine project that simply required Bybee to sign off as an administrative matter. Bybee's signature had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture, and he endorsed legal analyses that justified acts of outright torture under certain circumstances, and that characterized possible prosecutions under the torture statute as unconstitutional infringements on the President's war powers.

When Bybee reviewed and signed the Bybee Memo and the Classified Bybee Memo, he assumed responsibility for verifying that the documents provided thorough, objective, and candid legal analysis. He also assumed the responsibility for investigating problems that were apparent in the analysis or that were brought to his attention by others. Bybee's signature, which added greater authority to the memoranda, carried with it a significant degree of personal responsibility.[209]

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[209] Bybee did not have to sign the opinions. Yoo had the authority to sign OLC memoranda and did so on many other occasions.

Unlike Yoo, we found insufficient evidence to conclude that Bybee knew at the time that the advice in question was incomplete or one-sided.[210] Accordingly, we concluded that Bybee did not commit intentional professional misconduct.

However, we concluded, based on a preponderance of the evidence, that Bybee, at a minimum, should have known that the memoranda were not thorough, objective, or candid in terms of the legal advice they were providing to the clients and that thus he acted in reckless disregard of his professional obligations. As noted above, an attorney commits professional misconduct through reckless disregard of an obligation when he when (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard, (2) knows, or should know based on his experience and the unambiguous applicability of the obligation or standard, that his conduct involves a substantial likelihood that he will violate or cause a violation of the obligation or standard, and (3) engages in the conduct, which is objectively unreasonable under all the circumstances.

The memoranda were densely written in a confident and authoritative tone, and included citations to many historical sources and legal authorities. Moreover, Yoo had a reputation as an expert in presidential war powers, adding an additional air of authority to the drafts he submitted to Bybee. However, we believe an attorney of Bybee's background and experience, who had the opportunity to review and comment on numerous drafts over an approximately two-week period, should have recognized and questioned the unprecedented nature of the Bybee Memo's conclusion that acts of outright torture could not be

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210 To date, Bybee has not acknowledged that the Bybee and Yoo Memos were incomplete or otherwise deficient in any respect, but has conceded that certain sections could have been more thorough. In his response to a draft of this report, he commented that: (1) in discussing the ratification history of the CAT, "OLC may have unwittingly overstated the degree of unity between [the Bush and Reagan] Administrations' views"; (2) "certain portions of the [Commander-in-Chief and common law defenses] analysis would benefit from additional clarification"; (3) "in retrospect, this particular section [concluding that Congress had no power to regulate interrogation] could have been more fulsome"; (4) "even if it would have been better to cite *Oakland*, this is not evidence of an ethics violation"; and (5) "in retrospect, it would have been useful to cite either the Bush Administration's understanding of the availability of the necessity defense or both the Reagan Administration's and the Bush Administration's understanding . . . ." Bybee Response at 48, 54-55, 68, 72, 75.

prosecuted under certain circumstances, or that common law defenses could be successfully invoked by a defendant in a prosecution for torture.

We also found that Bybee should have questioned the logic and utility of applying language from the medical benefits statutes to the torture statute, and should have recognized the potentially misleading nature of statements such as, "even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith."

Our conclusion that Bybee should have known about the serious flaws in the memoranda is reinforced by Philbin's statement that he voiced his doubts to Bybee about the accuracy of the Bybee Memo's specific intent discussion, and advised against discussing possible defenses or including the section on the Commander-in-Chief power. Although Philbin stated that he ultimately advised Bybee that he could sign the Bybee Memo because he thought the questionable sections were *dicta*, we would expect a reasonable attorney in Bybee's position to react to these significant concerns raised by one of his Deputy AAGs by verifying that the opinion was thorough, objective, and candid before signing it, even if that meant conducting independent research, reading the authorities that supported the questionable arguments, or obtaining comments from other Department attorneys or government national security experts. As such, we concluded that Bybee knew or should have known that there was a substantial likelihood the Bybee Memo did not present a thorough, objective, and candid view of the law, and, given the importance of the matter, his actions were objectively unreasonable under the circumstances. Consequently, we concluded that he acted in reckless disregard of his obligation to provide thorough, objective and candid legal advice.

3. Patrick Philbin

Philbin conducted the second Deputy reviews for the Bybee Memo, the Classified Bybee Memo, and the Yoo Memo. As with Bybee, we concluded that he was not responsible for checking the accuracy and completeness of every citation, case summary, or argument, and that he was responsible for verifying that the memoranda provided thorough, objective, and candid legal analysis. He also had the duty to bring any apparent problems to the attention of the OLC official who signed the document in question.

We concluded that Philbin did not commit professional misconduct in this matter. Philbin raised his concerns about the memoranda with both Yoo and Bybee, he did not have ultimate control over the content of the memoranda, and he did not sign them. After Yoo and Bybee resigned from the Department, Philbin directed [redacted] to notify the Department of Defense that it could not rely on the Yoo Memo to approve any additional enhanced interrogation techniques. He later alerted Goldsmith to the flawed reasoning in the memoranda, and participated in the decision to formally withdraw the Bybee and Yoo Memos. Accordingly, we concluded that Philbin did not commit professional misconduct in this matter.

[redacted]

[redacted] was a relatively inexperienced attorney when the Bybee and Yoo Memos were being drafted, and [redacted] worked under the direction and supervision of Yoo. Although [redacted] appears to have made errors of research and analysis in drafting portions of the Bybee and Yoo Memos, [redacted] work was subject to Yoo's and Bybee's review and approval. We therefore concluded that [redacted] should not be held professionally responsible for the incomplete and one-sided legal advice that was provided in the memoranda.

5. Steven Bradbury

Bradbury signed four OLC memoranda related to the CIA interrogation program: the 2005 Bradbury Memo, the Combined Techniques Memo, the Article 16 Memo, and the 2007 Bradbury Memo. As discussed above, we had serious concerns about some of his analysis, but we did not conclude that those problems rose to the level of professional misconduct. The Bradbury Memos incorporated the legal analysis of the Levin Memo, which Bradbury helped draft, and which substantially corrected the defects in the Bybee and Yoo Memos – specifically eschewing reliance on the Commander-in-Chief, necessity, and self-defense sections, correcting the inaccurate specific intent section, and removing the earlier memoranda's reliance on the health benefits statute. None of the analysis in the Bradbury Memos is comparable to the inadequately supported, unprecedented theories advanced in the Bybee and Yoo Memos to support the proposition that torture can be permitted or justified under certain circumstances.

In applying the facts to the law, Bradbury explicitly qualified his conclusions and explained the assumptions and limitations that underlay his analysis. Moreover, Bradbury distributed drafts of the memoranda widely, within and without the Department, for comments. The memoranda were written in a careful, thorough, lawyerly manner, which we concluded fell within the professional standards that apply to Department attorneys.

As previously discussed, in light of the interrogation abuses described in the CIA OIG Report and the ICRC report, as well as the fact that the SERE program was fundamentally different from the CIA interrogation program, however, we believe Bradbury should have cast a more critical eye on the conclusory findings of the Effectiveness Memo, which were essential to his analysis, in both the Article 16 Memo and the 2007 Bradbury Memo, that the use of EITs was consistent with constitutional standards and international norms. However, we found that these issues did not rise to the level of professional misconduct.

6. Other Department Officials

We did not find that the other Department officials who reviewed the Bybee Memo committed professional misconduct. We found Michael Chertoff, as AAG of the Criminal Division, and Adam Ciongoli, as Counselor to the AG, should have recognized many of the Bybee Memo's shortcomings and should have taken a more active role in evaluating the CIA program. John Ashcroft, as Attorney General, was ultimately responsible for the Bybee and Yoo Memos and for the Department's approval of the CIA program. Ashcroft, Chertoff, Ciongoli, and others should have looked beyond the surface complexity of the OLC memoranda and attempted to verify that the analysis, assumptions, and conclusions of those documents were sound. However, we cannot conclude that, as a matter of professional responsibility, it was unreasonable for senior Department officials to rely on advice from OLC.

G. Institutional Concerns

In addition to assessing individual responsibility in this matter, we noted, in the course of our investigation, several managerial concerns. First, we found that the review of the OLC memoranda within the Department and the national security arena was deficient. The memoranda were not circulated to experts on

national security law in the Criminal Division, or to the State Department, which had an interest in the interpretation of treaties. Given the significance of the issue – opining on the CIA's use of EITs to gain intelligence in the absence of clear precedent on the issue – and the pressure of knowing that missed intelligence might result in another terrorist attack, the memoranda should have been circulated to all attorneys and policy makers with expertise and a stake in the issues involved.

We found that the limitations imposed on the circulation of the draft were, in part, based on the limited number of security clearances granted to review the materials. This denial of clearances to individuals who routinely handle highly classified materials has never been explained satisfactorily and represented a departure from OLC's traditional practices of widely circulating drafts of important opinions for comment. In the end, the restrictions added to the failure to identify the major flaws in the OLC's legal advice.

We commend the Best Practices as laid out by Bradbury and urge the OLC to adhere to them. In order to effect its mission of providing authoritative legal advice to the Executive Branch, the OLC must remain independent and produce thorough, objective, and candid legal opinions. The Department, and in particular the Attorney General and Deputy Attorney General, must encourage and support the OLC in its independence, even when OLC advice prevents its clients, including the White House, from taking the actions it desired.

CONCLUSION

Based on the results of our investigation, we concluded that former Deputy AAG John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.

We found that former AAG Jay Bybee committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.[211]

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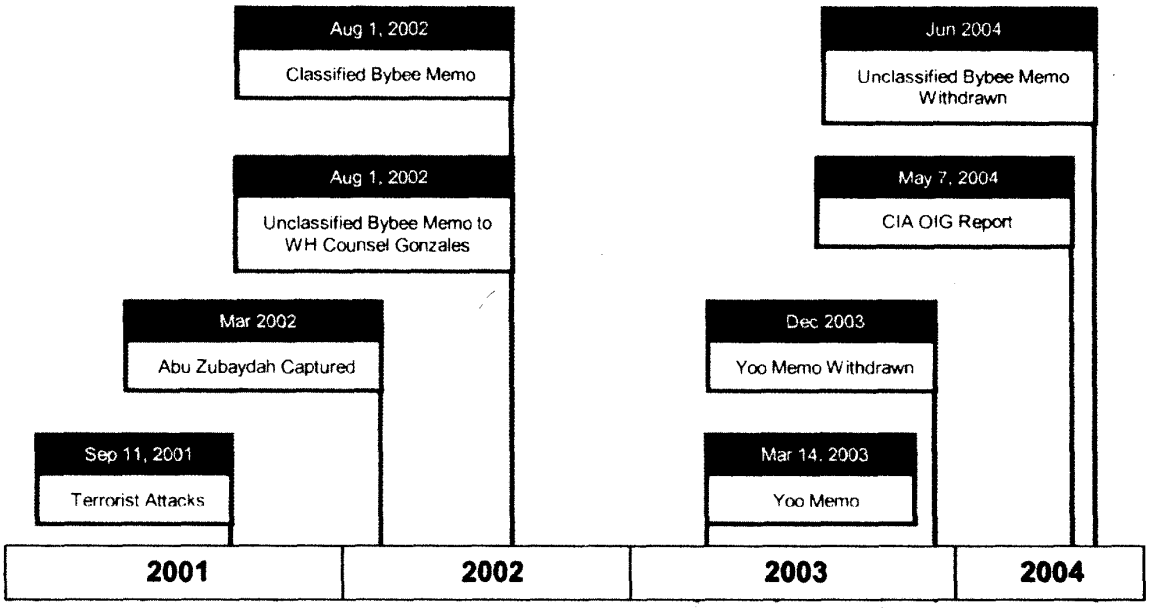
[211] Pursuant to Department policy, we will notify bar counsel in the states where Yoo and Bybee are licensed.

We did not find that the other Department officials involved in this matter committed professional misconduct in this matter.

In addition to these findings, we recommend that, for the reasons discussed in this report, the Department review certain declinations of prosecution regarding incidents of detainee abuse referred to the Department by the CIA OIG.

Office of Legal Counsel's Memoranda Timeline



Bybee Leaves OLC;
Whelan Becomes Acting AAG

Bybee Confirmed as AAG

Yoo Leaves OLC

Yoo Joins OLC as DAAG

Goldsmith Becomes AAG

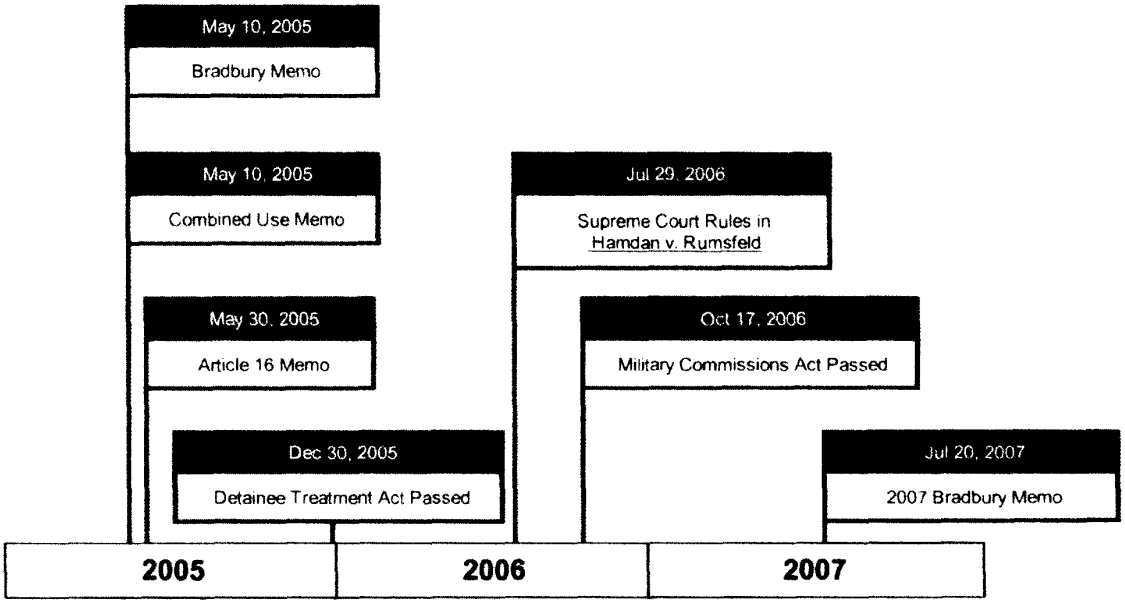
Koffsky Becomes Acting AAG

Comey Becomes DAG

Whelan becomes Acting AAG

Goldsmith Leaves OLC;
Levin Becomes Acting AAG

ATTACHMENT A



Bradbury Renominated

Comey Leaves DOJ

Bradbury Resumes Principal Deputy Position

Bradbury Nominated for AAG, OLC and Becomes Acting AAG

Bradbury Renominated

Bradbury Becomes Principal Deputy

Levin Leaves OLC

Attachment B

Glossary of Acronyms

AAG	Assistant Attorney General
ABA	American Bar Association
ACLU	American Civil Liberties Union
AG	Attorney General
CAT	United Nations Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment
CIA	Central Intelligence Agency
CITA	Department of Defense's Criminal Investigative Task Force
CTC	CIA Counter Terrorism Center
DAG	Deputy Attorney General
DHS	Department of Defense's Defense Humint Services
DOD	Department of Defense
DOJ	Department of Justice
ECHR	European Court of Human Rights
EDVA	United States Attorney's Office for the Eastern District of Virginia
EIT	Enhanced Interrogation Technique
FBI	Federal Bureau of Investigation
ICC	International Criminal Court
JPRA	Department of Defense Joint Personnel Recovery Agency
JTF	Army Intelligence Joint Task Force
NCIS	Naval Criminal Investigative Service
NSA	National Security Agency
NSC	National Security Council
OGC	Office of General Counsel
OIG	Office of the Inspector General
OLC	Office of Legal Counsel
OPR	Office of Professional Responsibility
PREAL	Pre-Academic Laboratory
SERE Program	Survival, Evasion, Resistance, Escape Program
TVPA	Torture Victim Protection Act
USSG	United States Sentencing Guidelines

Attachment C

Glossary of Names

Addington, David	Counsel to Vice President 2001-2005; Chief of Staff to the Vice President 2005-2009
Ashcroft, John	Attorney General 2001-2005
[redacted]	Counsel, Office of Intelligence and Policy Review
[redacted]	Legal Adviser to the JTF
Bellinger, John, III	Legal Adviser to the NSC 2001-2005; Legal Adviser to the Secretary of State 2005-2009
Bradbury, Steven G.	Principal Deputy AAG OLC May 2005-June 2005, April 2007 - January 2009; Acting AAG OLC June 2005- April 2007
Brant, David	Director Naval Criminal Investigative Services
Bybee, Jay S.	OLC AAG 2001-2003
Chertoff, Michael	AAG, Criminal Division 2001-2003
Ciongoli, Adam	Counselor to the Attorney General 2001-2003
Clement, Paul	Solicitor General 2005-2008
[redacted]	FBI Supervisory Special Agent
[redacted]	Attorney in DOD OGC
Comey, James	Deputy Attorney General 2003-2005
[redacted]	NSC Attorney
[redacted]	DOD Associate General Counsel
[redacted]	CIA attorney
[redacted]	CIA Associate General Counsel
[redacted]	Assistant U.S. Attorney, EDVA
[redacted]	OLC paralegal
Fisher, Alice	Deputy AAG, Criminal Division 2001-2003; AAG 2005-2008
Flanigan, Timothy	Deputy White House Counsel 2001-2002
Fleisher, Ari	White House spokesperson
[redacted]	CIA Counter Terrorism Center attorney
[redacted]	NCIS psychologist based in Guantanamo
[redacted]	Assistant U.S. Attorney, EDVA
Goldsmith, Jack, III	OLC AAG October 2003 - June 2004
Gonzales, Alberto	White House Counsel 2001-2005; Attorney General 2005-2007
Hadley, Stephen	Deputy National Security Advisor 2001-2005; National Security Advisor 2005-2009
[redacted]	[redacted]
Haynes, William J., II	DOD General Counsel 2001-2008
Helgerson, John	CIA Inspector General

[redacted]	CIA attorney
Jarrett, H. Marshall	Counsel, OPR 1998 - 2009
[redacted]	[redacted]
	OLC Attorney Advisor 2002-2003; Special Assistant General Counsel DOD 2003-2004; Assistant General Counsel, Department of Homeland Security 2005-2006
Leahy, Patrick	United States Senator from Vermont
[redacted]	Deputy White House Counsel 2002-2005
Levin, Daniel	OLC Acting AAG July 2004-February 2005
McCain, John	United States Senator from Arizona
McLaughlin, John	Acting Director of Central Intelligence
McNulty, Paul	U.S. Attorney, EDVA
[redacted]	[redacted] Assistant U.S. Attorney, EDVA
Miers, Harriet	White House Counsel 2005-2007
Mora, Alberto	Navy General Counsel 2001-2006
Morello, Steven	Army General Counsel 2001-2004
[redacted]	Chief of Staff to the Director of Central Intelligence
Muller, Scott	CIA General Counsel 2002-2004
Mueller, Robert S., III	FBI Director 2001-present
Philbin, Patrick	OLC Deputy AAG 2001-2003; Associate Deputy Attorney General 2003-2005
Powell, Colin	Secretary of State 2001-2005
Rice, Condoleeza	National Security Adviser 2001-2005; Secretary of State 2005-2009
Rizzo, John A.	Acting General Counsel CIA 2001-2002; 2004-present
[redacted]	Army JAG Major General
Rosenberg, Chuck	Office of the Deputy Attorney General, Chief of Staff
Rotunda, Ronald	Professor, Chapman University School of Law
Rumsfeld, Donald	Secretary of Defense 2001-2006
[redacted]	DOJ CounterTerrorism Section Chief
[redacted]	Assistant U.S. Attorney, EDVA
[redacted]	DOJ CounterTerrorism Section attorney
[redacted]	Legal Adviser, Department of State 2001-2005
Tenet, George	Director of Central Intelligence 1997-2004
Thompson, Larry	Deputy Attorney General 2001-2003
[redacted]	CIA attorney
Ullyot, Ted	Chief of Staff for Attorney General Gonzales
[redacted]	CIA atttorney
[redacted]	NSC attorney
Wolf, Frank	U.S. Congressman from Virginia
Yoo, John	Deputy AAG OLC 2001-2003
[redacted]	[redacted]

Attachment D

Chronological List of Office of Legal Counsel Memoranda
on the Issue of Enhanced Interrogation

August 1, 2002: Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (August 1, 2002) (An **unclassified** overview of the Anti-Torture Statute and Convention Against Torture which concluded that "acts must be of an extreme nature to rise to the level of torture within the meaning" of both; an analysis of whether the Anti-Torture Statute may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers; and an analysis of possible defenses to an allegation that an interrogation method violated the statute, concluding that necessity or self-defense "may justify interrogation methods that might violation Section 2340A").

August 1, 2002: Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Interrogation of al Qaeda Operative* (August 1, 2002) (A classified analysis of specific interrogation techniques proposed for use in the interrogation of Abu Zubaydah; **declassified 2009**).

March 14, 2003: Memorandum for William J. Haynes, II, from John C. Yoo, Deputy Assistant General, Office of Legal Counsel, *Re: Military Interrogation of Unlawful Combatants Held Outside the United States* (March 14, 2003) (An examination of the legal standards governing military interrogations of alien unlawful combatants held outside the United States, including an analysis of: the application of the Fifth and Eighth Amendments; federal criminal law; international law; and defenses to possible criminal prosecutions; **declassified 2008**).

December 30, 2004: Memorandum for the Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, (December 30, 2004) (**Unclassified** memo replacing the withdrawn Bybee Memo).

May 10, 2005: Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005) (Memo replacing the Classifed Bybee Memo; **declassified 2009**).

May 10, 2005: Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Combined Use of Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005) (Memo addressing question of whether the combined or cumulative effects of certain techniques could render a prisoner unusually susceptible to physical or mental pain or suffering; **declassified 2009**).

May 30, 2005: Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005) (Memo asserting that Article 16 did nto apply to conduct outside the United States, but addressing whether the EITs would violate Article 16 if geographic limits did not apply; **declassified 2009**).

July 20, 2007: Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Convention to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* (July 20, 2007) (Memo updating earlier memoranda in light of the Detainee Treatment Act and Military Commissions Act; **classified**).

Attachment E

U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General — *Washington, D.C. 20530*

May 16, 2005

MEMORANDUM FOR ATTORNEYS OF THE OFFICE

Re: Best Practices for OLC Opinions

By delegation, the Office of Legal Counsel exercises the Attorney General's authority under the Judiciary Act of 1789 to advise the President and executive agencies on questions of law. OLC is authorized to provide legal advice only to the Executive Branch; we do not advise Congress, the Judiciary, foreign governments, private parties, or any other person or entity outside the Executive Branch. OLC's primary function is to provide formal advice through written opinions signed by the Assistant Attorney General or (with the approval of the AAG) a Deputy Assistant Attorney General. Our Office is frequently called upon to address issues of central importance to the functioning of the federal Government, and, subject to the President's authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch. Accordingly, it is imperative that our opinions be clear, accurate, thoroughly researched, and soundly reasoned. The value of an OLC opinion depends on the strength of its analysis. Over the years, OLC has earned a reputation for giving candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers. This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in preparing the formal opinions of the Office.

Evaluating opinion requests. Each opinion request is assigned to a Deputy and an Attorney-Adviser, who will review the question presented and any relevant statutory materials, prior OLC opinions, and leading cases to determine preliminarily whether the question is appropriate for OLC advice and whether it appears to merit a written opinion, as distinct from informal advice. The legal question presented should be focused and concrete; OLC generally avoids undertaking a general survey of an area of law or a broad, abstract legal opinion. There also should be a practical need for the opinion; OLC particularly should avoid giving unnecessary advice where it appears that policymakers are likely to move in a different direction. A formal opinion is more likely to be necessary when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies. If we are asked to provide an opinion to an executive agency whose head does not serve at the pleasure of the President (i.e., an agency whose head is subject to a "for cause" removal restriction), our practice is to receive in writing from that agency an agreement to be bound by our opinion. As a prudential matter, OLC should avoid opining on questions likely to be at issue in pending or imminent litigation involving the United States as a party (except where there is a need to resolve a dispute within the Executive Branch over a position to be taken in litigation). Finally, the opinions of the Office should address legal questions prospectively; OLC avoids opining on the

legality of past conduct (though from time to time we may issue prospective opinions that confirm or memorialize past advice or that necessarily bear on past conduct).

Soliciting the views of interested agencies. Before we proceed with an opinion, our general practice is to ask the requesting agency for a detailed memorandum setting forth the agency's own analysis of the question—in many cases, there will be preliminary discussions with the requesting agency before the formal opinion request is submitted to OLC, and the agency will be able to provide its analysis along with the opinion request. (A detailed analysis is not required when the request comes from the Counsel to the President, the Attorney General, or one of the three other Senior Management Offices of the Department of Justice.) In the case of an interagency dispute, we will ask each side to submit such a memorandum. Ordinarily, we expect the agencies on each side of a dispute to share their memoranda with the other side, or permit us to share them, so that we may have the benefit of reply comments, when necessary. When appropriate and helpful, and consistent with the confidentiality interests of the requesting agency, we will also solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented. For example, when the question involves the interpretation of a treaty or a matter of foreign relations, our practice is to seek the views of the State Department; when it involves the interpretation of a criminal statute, we will usually seek the views of the Justice Department's Criminal Division. We will not, however, circulate a copy of an opinion request to third-party agencies without the prior consent of the requesting agency.

Researching, outlining, and drafting. An OLC opinion is the product of a careful and deliberate process. After reviewing agency submissions and relevant statutes, OLC opinions and leading cases, the Deputy and Attorney-Adviser should meet to map out a plan for researching the issues and preparing an outline and first draft of the opinion. The Deputy and Attorney-Adviser should set target deadlines for each step in the process and should meet regularly to review progress on the opinion. A thorough working outline of the opinion will help to focus the necessary research and the direction of the analysis. An early first draft often will help identify weaknesses or holes in the analysis requiring greater attention than initially anticipated. As work on the opinion progresses, it will generally be useful for the Deputy and the Attorney-Adviser to meet from time to time with the AAG to discuss the status and direction of the opinion project.

An OLC opinion should focus intensively on the central issues raised by a question of law and should, where possible, avoid addressing issues not squarely presented. On any issue involving a constitutional question, OLC's analysis should focus principally on the text of the Constitution and the historical record illuminating the original meaning of the text and should be faithful to that historical understanding. Where the question relates to the authorities of the President or other executive officers or the separation of powers between the Branches of the Government, past precedents and historical practice are often highly relevant. On questions of statutory and treaty interpretation, OLC's analysis will be guided by the text and will rely on traditional tools of construction in interpreting the text. OLC opinions should also consider and apply the past opinions of Attorneys General and this Office, which are ordinarily given great weight. The Office will not lightly depart from such past decisions, particularly where they directly address and decide a point in question. Decisions of the Supreme Court and courts of appeals directly on point often provide guiding authority and should be thoroughly addressed,

particularly where the issue is one that is likely to become the subject of litigation. Many times, however, our Office will be asked to opine on an issue of first impression or one that is unlikely to be resolved by the courts; in such instances, court decisions in relevant or analogous areas may serve as persuasive authority, depending on the strength of their analysis.

In general, we strive in our opinions for clarity and conciseness in the analysis and a balanced presentation of arguments on each side of an issue. If the opinion resolves an issue in dispute between executive agencies, we should take care to consider fully and address impartially the points raised on both sides; in doing so, it is best, to the extent practicable, to avoid ascribing particular points of view to the agencies in a way that might suggest that one side is the "winner" and one the "loser." OLC's interest is simply to provide the correct answer on the law, taking into account all reasonable counterarguments, whether provided by an agency or not. It is therefore often not necessary or desirable to cite or quote agencies' views letters.

Secondary review of draft opinions. Before an OLC opinion is finalized it undergoes rigorous review by the Front Office within OLC and often by others outside the Office. When the primary Deputy and the Attorney-Adviser responsible for the opinion are satisfied that the draft opinion is ready for secondary review, the opinion is generally assigned to a second Deputy for a "second Deputy read." Along with the draft opinion, the Attorney-Adviser should provide to the second Deputy copies of any key materials, including statutes, regulations, key cases, relevant prior OLC opinions, and the views memoranda received from interested agencies. Once the second Deputy read is complete and the second Deputy's comments have been addressed, the primary Deputy should circulate the draft opinion for final review by the AAG, the remaining Deputies, and any particular attorneys within the Office with relevant expertise.

Once OLC's internal review is complete, a draft of the opinion may be shared outside the Office. In some cases, because of time constraints, OLC may circulate a draft opinion before the internal review is complete. Our general practice is to circulate draft opinions to the Office of the Attorney General and the Office of the Deputy Attorney General for review and comment. When and as warranted, we also circulate an informational copy of the draft opinion to the Office of the Counsel to the President. In addition, in most cases, we will circulate a draft to the requesting agency (or, in cases where we are resolving a dispute between agencies, to those agencies that are parties to the dispute) for review, primarily to ensure that the opinion does not misstate the facts or the legal points of interest to the agencies. On certain occasions, where we determine it appropriate, we may circulate a draft opinion to one or more other agencies that have special expertise or interest in the subject matter of the opinion, particularly if they have offered views on the question.

Finalizing opinions. Once all substantive work on the opinion is complete, it must undergo a thorough cite check by our paralegal staff to ensure the accuracy of all citations and consistency with the Office's rules of style. After all cite-checking changes have been approved and made, the final opinion should be printed on bond paper for signature. Each opinion ready for signature should include a completed opinion control sheet signed by the primary Deputy, the Attorney-Adviser, and the Deputy who did the second Deputy read. After it is signed and issued, if the opinion is unclassified, it will be loaded into our ISYS database and included in the Office's unclassified Day Books. A separate file containing a copy of the signed opinion, the

opinion control sheet, and copies of key materials not readily available, such as the original opinion request, the views memoranda of interested agencies, and obscure sources cited in the opinion, will also be retained in our files for future reference.

Opinion publication. Most OLC opinions consist of confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of OLC opinions is often necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between OLC and other executive offices; in some cases, the disclosure of OLC advice also may interfere with federal law enforcement efforts. These confidentiality interests are especially great for OLC opinions relating to the President's exercise of his constitutional authorities, including his authority as Commander in Chief. It is critical to the discharge of the President's constitutional responsibilities that he and the officials under his supervision are able to receive confidential legal advice from OLC.

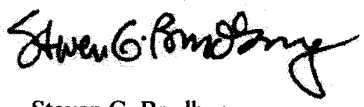
At the same time, many OLC opinions address issues of relevance to a broader circle of Executive Branch lawyers or agencies than just those officials directly involved in the opinion request. In some cases, the President or an affected agency may have a programmatic interest in putting other agencies, Congress, or the public on notice of the legal conclusion reached by OLC and the supporting reasoning. In addition, some OLC opinions will be of significant practical interest and benefit to lawyers outside the Executive Branch, or of broader interest to the general public, including historians. In such cases, and when consistent with the legitimate confidentiality interests of the President and the Executive Branch, it is the policy of our Office to publish OLC opinions. This publication program is in accordance with a directive from the Attorney General to OLC to publish selected opinions on an annual basis for the convenience of the Executive, Legislative, and Judicial Branches of the Government, and of the professional bar and the general public.

At the time an opinion is signed, the attorneys responsible for the opinion will make a preliminary recommendation as to whether it may be appropriate for eventual publication. Thereafter, on a rolling or periodic basis, each opinion issued by the Office is reviewed for possible publication by the OLC Publication Review Committee. If the Publication Review Committee decides that the opinion meets the Office's basic criteria for publication, the Committee will solicit the views of the agency or Justice Department component that requested the opinion, and any agency or component likely to be affected by its publication, as to whether the opinion is appropriate for current publication, whether its publication should be deferred, or whether it should not be published. OLC gives due weight to the publication recommendations of interested agencies and components, particularly where they raise specific concerns about programmatic or litigation interests that might be advanced or compromised by publication of the opinion. OLC also generally solicits the views of the Office of the Attorney General and the Office of the Counsel to the President on publication questions, particularly with respect to significant opinions of the Office.

After the final decision is made to publish an opinion, the opinion is rechecked and reformatted for online publication; a headnote is prepared and added to the opinion; and the opinion is posted to the Department of Justice Web site at www.usdoj.gov/olc/opinions.htm. All opinions posted on the Web site are eventually published in OLC's hardcover bound volumes.

* * *

Please let me know if you have any questions about the principles set forth above or any suggestions for revising or adding to the guidance provided in this memorandum.



Steven G. Bradbury
Principal Deputy Assistant Attorney General

Attachment F

Principles to Guide the Office of Legal Counsel
December 21, 2004

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government ... being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in* 4 The Founders' Constitution 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled Opinions of the Attorney General and Opinions of the Office of Legal Counsel, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

1. When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the

executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

2. *OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government–the courts and Congress–and constitutional limits on the exercise of governmental power.*

The President is constitutionally obligated to "preserve, protect and defend" the Constitution in its entirety–not only executive power, but also judicial and congressional power and constitutional limits on governmental power–and to enforce federal statutes enacted in accordance with the Constitution. OLC's advice should reflect all relevant legal constraints. In addition, regardless of OLC's ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

3. OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President–and by extension OLC–has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

4. OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

5. OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC, appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address

applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

6. OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning–in the courts as well as among academics, other commentators, and the public more generally–and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

7. OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and

appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal "advice" after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties; although OLC's current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a "two deputy rule" that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

8. *Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.*

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

9. *OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality.*

Although OLC's legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration's goals and assist their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality. Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

10. OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

The following former Office of Legal Counsel attorneys prepared and endorse this document:

Walter E. Dellinger, Assistant Attorney General 1993-96
Dawn Johnsen, Acting Assistant Attorney General 1997-98; Deputy AAG 1993-97
Randolph Moss, Assistant Attorney General 2000-01, Acting 1998-2000; Deputy AAG 1996-98
Christopher Schroeder, Acting Assistant Attorney General 1997; Deputy AAG 1994-96
Joseph R. Guerra, Deputy Assistant Attorney General 1999-2001
Beth Nolan, Deputy Assistant Attorney General 1996-99; Attorney Advisor 1981-85
Todd Peterson, Deputy Assistant Attorney General 1997-99; Attorney Advisor 1982-85
Cornelia T.L. Pillard, Deputy Assistant Attorney General 1998-2000
H. Jefferson Powell, Deputy Assistant Attorney General and Consultant 1993-2000
Teresa Wynn Roseborough, Deputy Assistant Attorney General 1994-1996
Richard Shiffrin, Deputy Assistant Attorney General, 1993-97
William Michael Treanor, Deputy Assistant Attorney General 1998-2001
David Barron, Attorney Advisor 1996-99
Stuart Benjamin, Attorney Advisor 1992-1995
Lisa Brown, Attorney Advisor 1996-97
Pamela Harris, Attorney Advisor 1993-96
Neil Kinkopf, Attorney Advisor 1993-97
Martin Lederman, Attorney Advisor 1994-2002
Michael Small, Attorney Advisor 1993-96

Attachment G

District of Columbia Rules of Professional Conduct

Rule 2.1 - Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment - Rule 2.1

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Attachment H

District of Columbia Rules of Professional Conduct

Rule 1.1 - Competence

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

Comment - Rule 1.1

Legal Knowledge and Skill

1. [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation, and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence.