

# DEPARTMENT OF JUSTICE



## OFFICE OF PROFESSIONAL RESPONSIBILITY REPORT

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

December 22, 2008

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(U) INTRODUCTION AND SUMMARY

(U) On June 7, 2004, in the wake of media reports of detainee abuse by United States soldiers at the Abu Ghraib prison in Iraq, the Wall Street Journal reported that the Department of Justice had advised the Department of Defense (DOD) that the President's Commander-in-Chief power allowed him to authorize interrogations amounting to torture, notwithstanding the prohibitions of 18 U.S.C. §§ 2340-2340A (the torture statute) and the United Nations Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Apr. 18, 1988, 1465 U.N.T.S. 113 (the CAT). Jess Bravin, *Pentagon Report Set Framework For Use of Torture*, Wall Street Journal, June 7, 2004. The day the article appeared, the paper posted on its web site a copy of a March 6, 2003 draft of a classified report on military interrogation methods (the draft Working Group Report), and alleged that the document reflected the advice of Department of Justice lawyers.

(U) On June 8, 2004, the Washington Post reported:

In 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.

Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post, June 8, 2004 at A1.

(U) The article quoted extensively from "a newly obtained" Department of Justice memorandum. *Id.* On June 13, 2004, the Washington Post posted a copy of that memorandum on its web site, identifying it as an August 1, 2002 memorandum from then Assistant Attorney General (AAG) Jay S. Bybee of the Office of Legal Counsel (OLC) to Alberto R. Gonzales, then Counsel to the President, captioned "Standards of Conduct for Interrogation under 18 U.S.C. §§

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2340-2340A" (the Bybee Memo).<sup>1</sup>

(U) Commentators, law professors and other members of the legal community were highly critical of the Bybee Memo. The Dean of Yale Law School characterized its authors as "blatantly wrong" and added that "[i]t's just erroneous legal analysis." Edward Alden, *US Interrogation Debate*, Financial Times, June 10, 2004 (2004 WLNR 9744181). A past chairman of the international human rights committee of the New York Bar Association stated that "the government lawyers involved in preparing the documents could and should face professional sanctions." *Id.* 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, 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.*

(U) Other commentators observed that the Bybee Memo did not address important Supreme Court precedent and that it ignored portions of the CAT that contradicted its thesis. *Id.* One article suggested that the author of 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 also, 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 were prepared. Fran Davies, *Probe Urged Over Torture Memos*, Miami Herald, August 5, 2004 at 6A; Scott Higham, *Law Experts Condemn U.S. Memos*

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<sup>1</sup> (U) As discussed more fully below, substantial portions of the Bybee Memo appeared verbatim in the draft Working Group Report.

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on *Torture*, Washington Post, August 5, 2004 at A4.<sup>2</sup>

(U) On June 22, 2004, Executive Branch officials responded to public criticism of the Bybee Memo. Then White House Counsel 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. . . .

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).

(U) 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 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

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<sup>2</sup> (U) 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.

(U) In addition, former OLC Deputy Assistant Attorney General John Yoo, the principal author of the Bybee Memo, has vigorously defended his work since leaving the Department. See e.g., John 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](http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml)).

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at 2A. Comey reportedly added, "We're scrubbing the whole thing." *Id.*

(U) 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.

(U) On July 15, 2004, OPR asked then OLC AAG Jack Goldsmith, III, to provide certain information and documents relevant to the Bybee Memo. Principal Deputy Assistant Attorney General Steven G. Bradbury met with OPR Counsel H. Marshall Jarrett on July 23, 2004, to discuss that request. Mr. 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]

(U) We reviewed the Bybee Memo and the draft Working Group Report, along with email, correspondence, file material, drafts, and other unclassified documents provided by OLC. On October 25, 2004, OPR formally initiated an investigation.<sup>3</sup>

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

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<sup>3</sup> (U) 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 John Yoo's email records had been deleted and were not recoverable. Philbin's email records from July 2002 through August 5, 2002, 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.

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

(U) 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).

(U) 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 Secure Compartmented Information (SCI). We obtained the necessary clearances and requested and reviewed additional documents from OLC and from the CIA.<sup>4</sup> We then re-interviewed [REDACTED] Philbin and Goldsmith, and interviewed Yoo and Bybee.

(U) In addition, we interviewed former DAG James Comey, former OLC Acting AAG Dan 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,<sup>5</sup> former White House Counsel Alberto Gonzales, and former Counselor to then Attorney General (AG) John Ashcroft, Adam Ciongoli. We are currently attempting to schedule an interview with John Bellinger, III, former National Security Council (NSC) Legal Adviser.

(U) A number of witnesses declined to be interviewed. CIA Counter Terrorism Center (CTC) attorneys [REDACTED] both refused

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<sup>4</sup> (U) For background purposes, we also reviewed newspaper articles, law review commentaries and historical accounts.

<sup>5</sup> (U) Mr. 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 Mr. Rizzo on July 7, 2007.

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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 titled "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. Former Attorney General Ashcroft did not respond to several interview requests but ultimately informed us, through his attorney, that he had declined our request. 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.

(U) Sometime in May 2005, then Acting AAG Bradbury informed us that he had signed a classified memorandum that replaced the Classified Bybee Memo. We reviewed that document, 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 Bradbury Memo). The Bradbury Memo discussed a number of individual interrogation techniques and concluded that their use by CIA interrogators would not violate the torture statute.

(U) 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 military, and that the Department 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.

(U) In late August 2007, we asked OLC to provide copies of the executive order, the "classified addendum," and the Bradbury Memo. Bradbury informed us that there was no "classified addendum," but that he had drafted an accompanying 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*

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*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). We also learned that there was another classified OLC memo dated May 10, 2005, in addition to the Bradbury Memo, a document 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 the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005)" (the Combined Techniques Memo). When we obtained copies of those documents on August 29, 2007, we learned that there was a third classified OLC memo – "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).<sup>6</sup> We reviewed those documents and conducted additional interviews.

(U) On October 4, 2007, the New York Times reported the existence of the Bradbury Memo and the Combined Techniques Memo, and stated that they set forth "an expansive endorsement of the harshest interrogation techniques ever used by the Central Intelligence Agency." On November 6, 2007, the American Civil Liberties Union (ACLU) announced that the Department had confirmed, in papers filed in response to the ACLU's pending Freedom of Information Act lawsuit, that three interrogation memoranda – two dated May 10, 2005 and one dated May 30, 2005 – had been issued by the Department.

(U) 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. Moreover, we cannot say with certainty that the documents provided to us by the CIA included all relevant material.

(U) During the course of our investigation significant pieces of information

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<sup>6</sup> (U) The Bradbury Memo, the Combined Techniques Memo, the Article 16 Memo, and the 2007 Bradbury Memo are hereinafter referred to collectively as the Bradbury Memos.

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were brought to light by the news media and more recently, by congressional investigations. While we believe our findings regarding the legal advice contained in the Bybee Memo and related, subsequent memoranda are complete, we are certain that additional information will eventually surface regarding the CIA program and the military's interrogation programs in Guantanamo, Afghanistan and Iraq.

(U) Based on the results of our investigation, we concluded that former AAG Jay S. Bybee and former Deputy AAG John Yoo failed to meet their responsibilities under D.C. Rule of Professional Conduct 1.1 to provide competent representation to their client, the United States, and failed to fulfill their duty to exercise independent legal judgment and to render candid legal advice, pursuant to D.C. Rule of Professional Conduct 2.1. In violating D.C. Rules 1.1 and 2.1, Bybee and Yoo committed professional misconduct. Pursuant to Department policy, we will notify their respective state bars of our findings.

(U) We concluded that Patrick Philbin did not commit professional misconduct [REDACTED]

[REDACTED] Finally, we concluded that [REDACTED] because of her relative inexperience and subordinate position, did not commit misconduct.

(U) We did not find that the other Department officials involved 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. We note that Ashcroft was at least consistent in his deference to OLC. When Goldsmith and Comey recommended that the Yoo Memo be withdrawn, Ashcroft did not hesitate to support them.

(U) In addition to these findings, we recommend that, for the reasons



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discussed in this report, the Department reexamine certain declinations of prosecution regarding incidents of detainee abuse referred to the Department by the CIA OIG.

(U) Finally, we recommend that the Department review the Bradbury Memos carefully to determine whether they appropriately relied upon CIA representations, whether they provided reasonable and objective legal advice, and whether the Department has identified and evaluated all relevant moral and policy considerations associated with the CIA interrogation program. Any such review should, we believe, consider the views of the Criminal Division, the National Security Division, the Department of State, and the intelligence community, including the FBI and the United States military.

(U) **I. BACKGROUND**

(U) **A. The Office of Legal Counsel<sup>7</sup>**

(U) The Assistant Attorney General in charge of the Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and all the executive branch agencies. The office is responsible for providing legal advice to the executive branch on all constitutional questions. The first AAG for OLC under the Bush administration was Jay Bybee, who was not sworn in until November 2001. Prior to that time, M. Edward Whelan, III, was the Acting AAG.

(U) John Yoo joined the office as a Deputy AAG in the summer of 2001. He had graduated from Yale Law School in 1992 and 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 United States Supreme Court Justice Clarence Thomas. At the time of the September 11, 2001 terrorist attacks, John Yoo was the resident expert in the OLC on foreign policy 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 Commander's war powers, and I had written a number of articles on the

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<sup>7</sup> (U) Chart 1 is a timeline of OLC leadership and significant events relevant to this report.

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relationship between presidential and legislative powers over foreign affairs. I was one of the few appointed Justice Department officials whose business was national security and foreign affairs.<sup>8</sup>

(U) After September 11, John 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<sup>9</sup> and a memorandum on the applicability of the Geneva Convention to al Qaeda and Taliban detainees.<sup>10</sup>

(U) 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, but was not confirmed until March 13, 2003, when he left the Department. Shortly thereafter, in late May 2003, John Yoo left the Department. Bybee was replaced by Jack Goldsmith, III, who became AAG in October 2003. Goldsmith resigned in June 2004 and left the Department in July. Daniel Levin served as the Acting AAG until he left the Department in February 2005. Steven Bradbury, the Principal Deputy AAG under Goldsmith, then became the Acting AAG and was nominated by the White House for the position of AAG on June 23, 2005. After his nomination 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

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<sup>8</sup> (U) *War By Other Means*, at 20.

<sup>9</sup> (U) That memorandum was later withdrawn by the Department.

<sup>10</sup> (U) That memorandum was signed by OLC AAG Jay Bybee. The memorandum's position that Common Article Three of the Geneva Convention did not apply to al Qaeda or Taliban detainees was subsequently rejected by the United States Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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President Bush in January 2007 and January 2008, but he has never been confirmed.

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

(U) 1. The CIA Interrogation Program

(TS) [REDACTED]

(TS) [REDACTED]

(U) CIA Acting General Counsel 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]

[REDACTED] but the agency was not authorized to detain or interrogate individuals and therefore had no institutional experience or expertise in that area.<sup>11</sup>

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<sup>11</sup> (U) Cf. Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (2006). McCoy described the CIA's role in sponsoring and conducting research into

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~~(TS)~~ [REDACTED]

(U) The CIA also gave us a copy of an undated, unsigned, ten-page memorandum titled "United Nations Convention Against Torture and Other Cruel, 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.<sup>12</sup>

coercive interrogation techniques in the decades following World War II, and its propagation of such techniques overseas during the Cold War era.

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~~(S)~~ [REDACTED]

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(U) 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.

(U) 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. 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.

(U) 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 the CIA was in charge of the interrogation and that they were there to provide assistance.<sup>13</sup> Because the CIA interrogators were not yet at the site when the FBI agents arrived, however, 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 attacks.

(U) When the CIA personnel arrived, they took control of the interrogation.

[REDACTED]

<sup>13</sup> (U) The DOJ Inspector General's report, titled *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.

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The CIA interrogators were reportedly unhappy with the quality of information being provided, and told the FBI 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 Zubaydah was withholding information and that harsh techniques were the only way to elicit further information. According to 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."

(U) According to the DOJ OIG Report, the FBI interrogators reported these developments to 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 shortly thereafter, in early June 2002.<sup>14</sup>

(U) 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 Air Force, Navy and Marine personnel.

(U) SERE training was developed after the Korean War in order 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

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<sup>14</sup> (U) 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 were in fact used on Abu Zubaydah prior to the August 1, 2002 OLC memoranda.

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manipulation and waterboarding.

(U) 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.<sup>15</sup>

~~(TS)~~ [REDACTED] 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;

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<sup>15</sup> (U) OLC's files included a copy of the PREAL Manual, but no indication of how or when it was obtained.

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- (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 it can last up to 18 hours;
- (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;<sup>16</sup>
- (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;

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<sup>16</sup> (TS) [REDACTED] 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.



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- (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 in a controlled manner. Airflow is restricted for 20 to 40 seconds; the technique produces the sensation of drowning and suffocation;
- [REDACTED]
- [REDACTED]

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<sup>17</sup> (U) 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." At the time, he therefore considered the legality of EITs an open question.

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~~(TS)~~ [REDACTED] According to John Yoo, Bellinger told him during their initial conversation that access to information about the program was extremely restricted and that the State Department should not be informed.<sup>18</sup> 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.

(U) Shortly thereafter, Yoo contacted Ciongoli and arranged to brief him and AG 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, it was decided that access would be limited to Ashcroft, Ciongoli, DAG Larry Thompson, AAG Bybee, Yoo, and OLC Deputy AAG Patrick Philbin.<sup>19</sup>

(U) 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.<sup>20</sup> 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.<sup>21</sup>

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<sup>18</sup> (U) Yoo told OPR that he did not know why the NSC excluded the State Department from the drafting process, but speculated that it may have been because of concerns about operational security. Bybee stated that he had no recollection of being told that the draft was not to be distributed to the State Department. [REDACTED]

<sup>19</sup> (U) Ciongoli's recollection of this meeting 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.

<sup>20</sup> (U) 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.

<sup>21</sup> (U) 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."

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(U) 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. 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)<sup>22</sup> and the Alien Tort Claims Act (ACTA). He also asked her to look at two foreign cases that discussed interrogation techniques and torture.<sup>23</sup> [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]

(S) At the meeting, the CIA attorneys explained that the plan developed by CIA psychologists relied on the theory of "learned helplessness," a passive and depressed condition that leads a subject to believe that his actions are ineffective. The condition reportedly creates a psychological dependance and instills a sense

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<sup>22</sup> (U) As discussed more fully below, the TVPA's definition of torture is similar to that of the torture statute.

<sup>23</sup> (U) Those cases were *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (sec. A) (1978) 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*).

<sup>24</sup> (U) 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 agency's view of the proceedings and are not necessarily accurate accounts.

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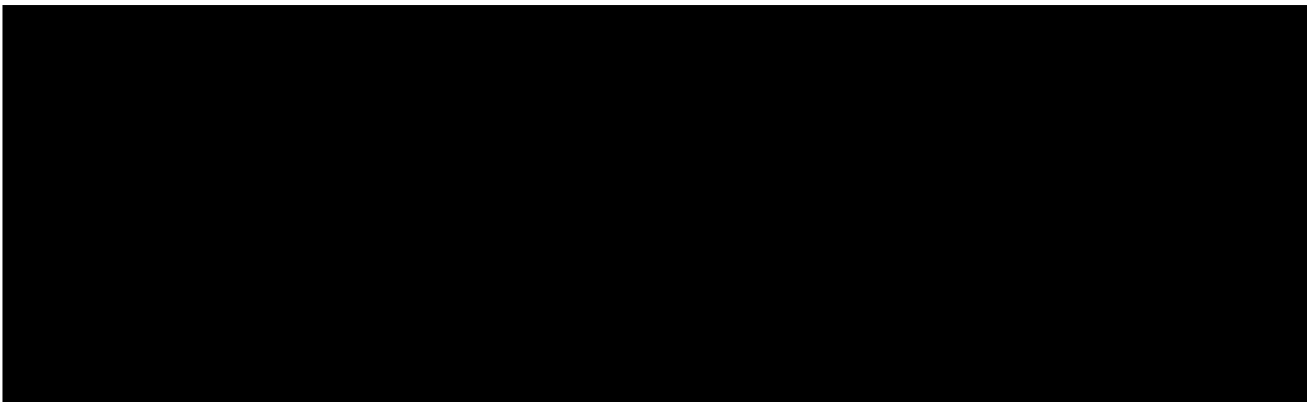
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that because resistance is futile, cooperation is inevitable.

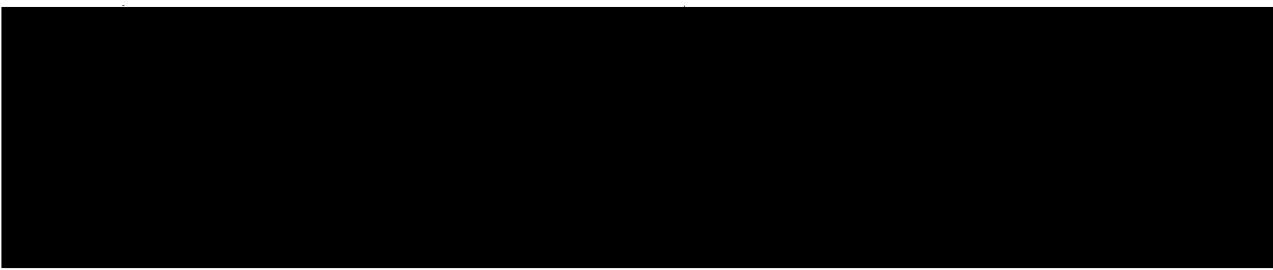


According to the MFR, Yoo stated that his research into the torture statute had revealed that there were no reported decisions interpreting the law, and that findings of torture under the TVPA involved extremely shocking mistreatment that went far beyond what was contemplated under the CIA's interrogation plan. He stated that the closest applicable authority was Common Article Three of the Geneva Conventions, but that OLC had already determined that members of al Qaeda were not entitled to the protection of Common Article Three.<sup>25</sup>



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<sup>25</sup> (U) The MFR did not name or cite those cases, but the reference was clearly to the two cases discussed 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.

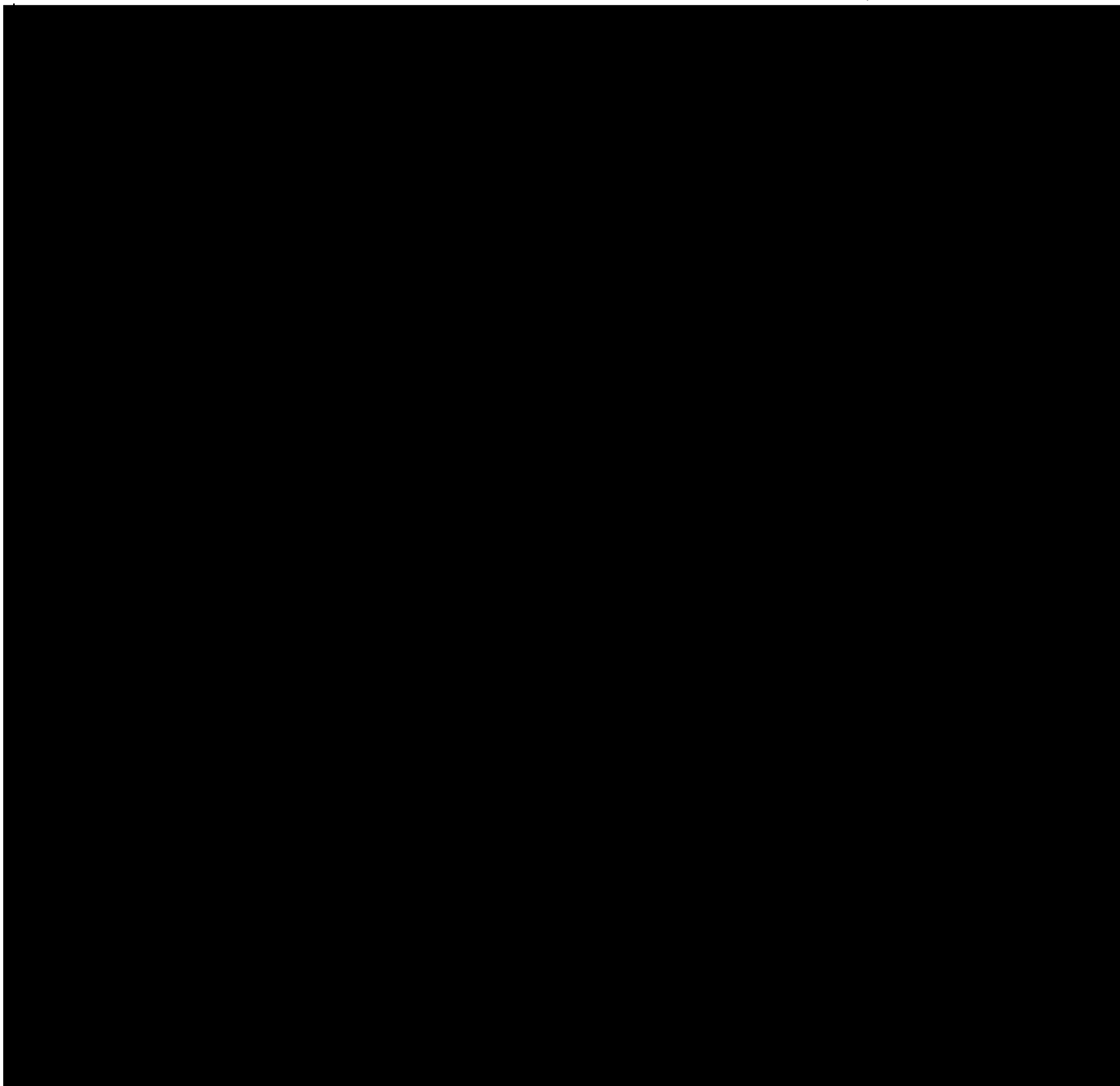


<sup>26</sup> (U) OLC reported its conclusion regarding Common Article Three in a Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes, II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (January 22, 2002). As noted earlier, that view of the law was subsequently rejected by the United States Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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(U) 2. Drafting the Bybee Memo

(U) After the meeting [REDACTED] and Yoo began drafting what would eventually become the Bybee Memo.<sup>27</sup> 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.<sup>28</sup>

(U) From the outset, the drafts argued the position that the 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 statute, the text and ratification history of the CAT, case law relating to the TVPA, and the Israeli and European Court of Human Rights cases mentioned above. As the drafts progressed, they emphasized this point more strongly.

(U) 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.

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<sup>27</sup> (U) 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. In her OPR interview, [REDACTED] denied that she was overworked or that she had insufficient time to devote to her projects.

<sup>28</sup> (U) 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 comments.

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(U) In his comments of May 23, 2002, Yoo asked [REDACTED] to see if "severe" appeared elsewhere in the United States Code, and suggested other changes "to demonstrate how high the bar is to meet the definition of torture." 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.

(U) 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 [REDACTED] on this draft, Yoo told her to "cite and quote S.Ct. case for this proposition." Id. at 2.

(U) On July 8, 2002, Yoo and [REDACTED] had produced a draft that they were ready to give to the White House Counsel, the CIA and NSC for review. On July 11, 2002, Koester provided a copy to OLC paralegal [REDACTED] for cite checking, and two meetings were scheduled - with White House Counsel on Friday, July 12, 2002, and with AAG Chertoff, the FBI, CIA and NSC on Saturday, July 13, 2002. [REDACTED] and Yoo appear to have had a briefing session with 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]

(U) 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

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significant duration, e.g., lasting for months or even years”;

(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”;

(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”; and

(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. ”

(U) On Friday afternoon, July 12, 2002, Yoo and [REDACTED] met Gonzales at the White House Counsel’s Office. It is likely that Deputy White House Counsel Tim Flanigan and/or Counsel to the Vice President David Addington were also present, but [REDACTED] and Yoo were not certain if either attended this meeting. [REDACTED] orally summarized the memorandum’s conclusions for the group and they gave Gonzales two copies of the memorandum for review. According to Yoo, none of the attendees provided any feedback or comments at this meeting.

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~~(TS)~~ [REDACTED] 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]

~~(S)~~ After the meeting, 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

<sup>29</sup> (U) The CIA allowed us to read this document and take notes, but we were not permitted to retain a copy.

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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.

(U) Shortly thereafter, 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, 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, 2002, but does not appear to have ever been sent to the CIA. The witnesses could not recall why the letter was never sent.

(U) Yoo told us that he provided regular briefings about the memorandum to John Ashcroft and Adam Ciongoli, and remembered mentioning to Ashcroft that the CIA had requested some sort of advance assurance that they would not be prosecuted for using EITs.<sup>30</sup> According to Yoo, Ashcroft was sympathetic to the

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<sup>30</sup> (U) 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

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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.

(U) On July 15, 2002, Yoo sent the following email message to [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.

(U) 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.

(U) 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 justification defenses to violations of the torture statute.

(U) [REDACTED] told us that Yoo had asked her to begin working on a section on

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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 and acknowledging that it was necessary to do so.

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possible defenses, and that the notes reflect her preliminary research.<sup>31</sup> 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.

(U) 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 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 the case where an interrogator went "over the line" and inadvertently violated the statute. Although [REDACTED] may have done a draft of the sections, Yoo told us that he remembers writing a lot of them himself.

(U) 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.

(U) 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.

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<sup>31</sup> (U) [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 [REDACTED] told us that she ultimately resolved all of her problems with the defenses and concluded that the defenses were applicable to the torture statute.

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(U) 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.

(U) 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.

(U) 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' 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."

(U) 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. In view of this sequence of events, we believe it is likely that the sections were added because some number of attendees at that meeting requested the additions, perhaps because the Criminal Division had refused to issue any advance declinations.

(TS) [REDACTED]

(U) On July 22, 2002, Yoo sent an email to [REDACTED] asking him to explain how common law defenses were

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incorporated into federal criminal law.<sup>32</sup> [REDACTED] responded that he was "just 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.

(U) 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.<sup>33</sup> The memorandum was no longer addressed to John Rizzo. 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.

~~(TS)~~ [REDACTED] 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]

<sup>32</sup> (U) 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 mentions them?

<sup>33</sup> ~~(S)~~ 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.

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(TS) [REDACTED] At some point thereafter, according to Rizzo and [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 them, because it would take longer to complete the memorandum if it were included. [REDACTED]



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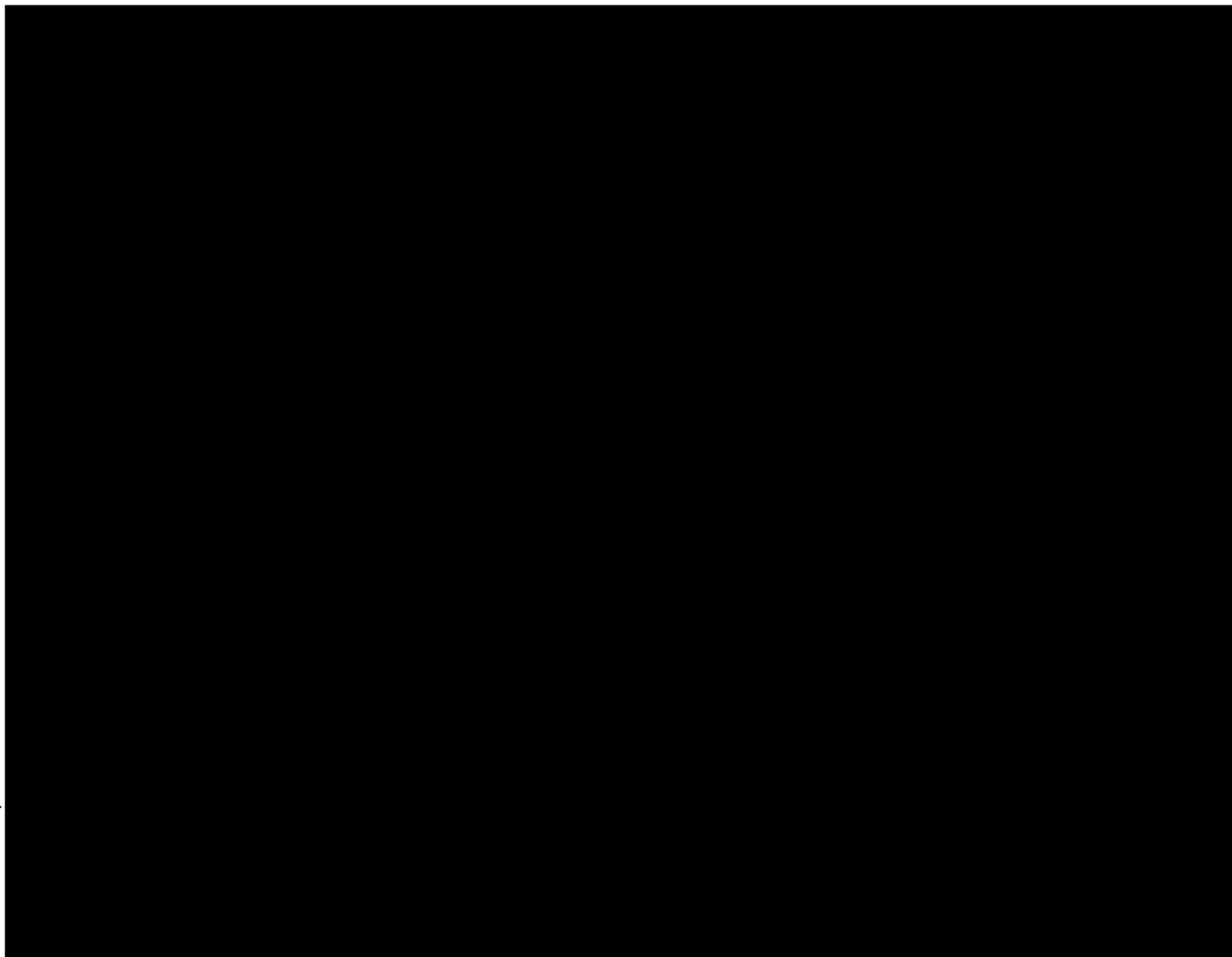
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~~(TS)~~ [REDACTED] Over the next few days, [REDACTED] sent [REDACTED] additional information relating to the proposed interrogation, including a psychological assessment of Abu Zubaydah and a report from CIA psychologists asserting that the use of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

(U) 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

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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]

(U) Later that afternoon, [REDACTED] sent Yoo the following email message:

I got a message from [REDACTED]. She 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.

(U) Yoo and [REDACTED] then began working on a 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 memorandum no 2 [the classified memorandum on specific techniques], because memorandum 1 is pretty close and I could finish 1 on Monday.

(U) 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."

(U) We did not find a record of Philbin's, Gonzales' or Chertoff's comments in OLC's files. Philbin told us that he generally noted his comments in writing on

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the draft and then discussed them either with Yoo or [REDACTED]. He did not remember any of his specific comments, but 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 us he had concerns about the section because the argument was aggressive and went beyond what OLC had previously said about executive power, but he told us that it was not "plainly wrong" or indefensible. He also said that he told Yoo the memorandum's discussion of possible defenses to the statute was unnecessary. 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.

(U) Gonzales told us that when he reviewed drafts from John 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.

(U) 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 a "blanket immunity."

(U) 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.

(U) 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 while 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 into 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

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successfully assert that he acted in good faith and did not intend to inflict severe physical or mental pain or suffering.<sup>34</sup>

(U) 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)."<sup>35</sup> 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. Bybee had a very poor memory of the drafting process and provided little information about his role. According to Rizzo, he never met Bybee or discussed the Bybee Memo with him, and "couldn't pick him out in a lineup."

(U) Yoo told us that sometime around the end of July, he briefed Ashcroft and Ciongoli on the Bybee Memo.<sup>36</sup> 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 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.

(U) We found two drafts of the Classified Bybee Memo in OLC's files that

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<sup>34</sup> (U) 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.

<sup>35</sup> (U) Based on the revisions indicated by the document's "track changes" feature, we concluded that Bybee's changes were not extensive.

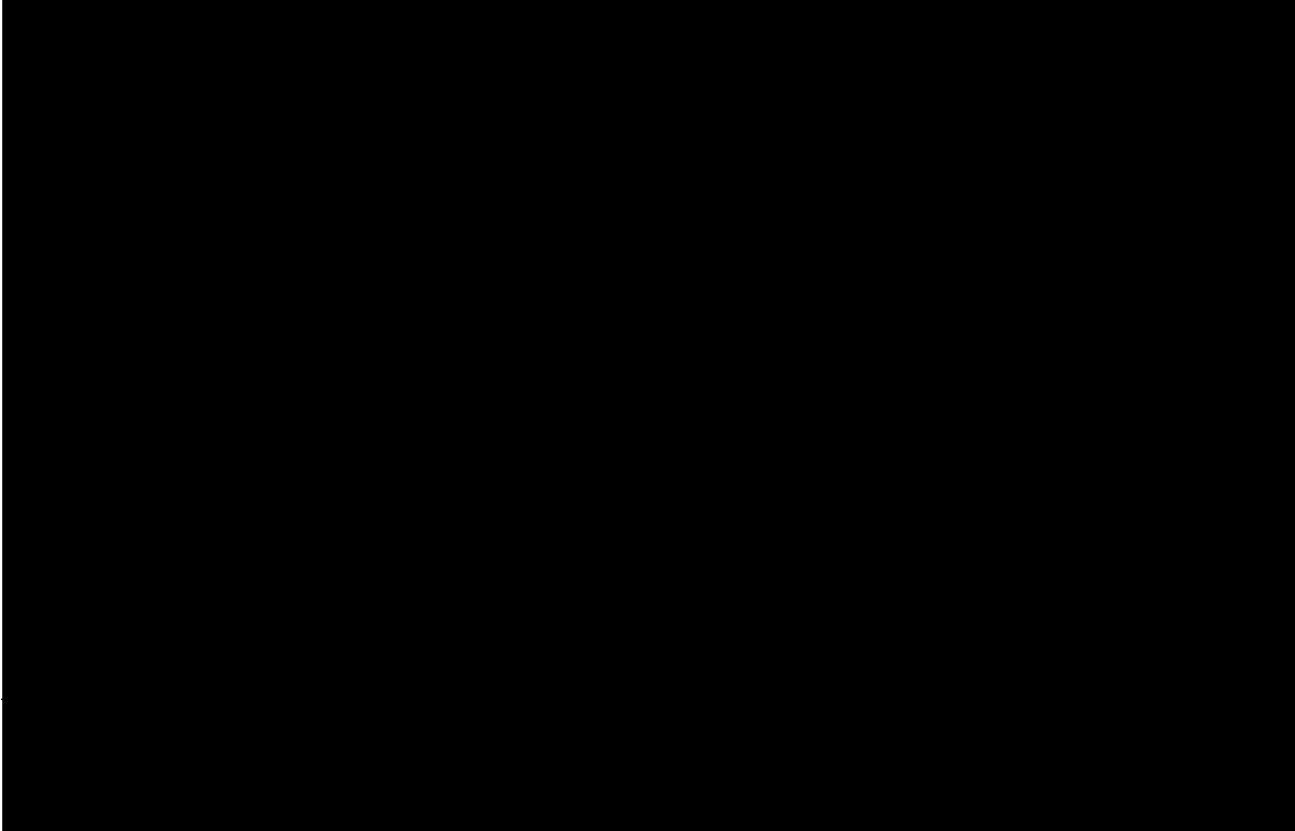
<sup>36</sup> (U) According to Yoo, he also briefed then DAG Larry Thompson about the memorandum at some point.

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appeared to include Bybee's handwritten comments in red ink.<sup>37</sup> 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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<sup>37</sup> - (U) 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.



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(U) The Bybee Memo and the Classified Bybee Memo were finalized and signed on August 1, 2002.<sup>40</sup> 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.<sup>41</sup> 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 they 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 them at 10:30 p.m. on August 1, 2002.

(U) 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 that he nevertheless told 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

<sup>40</sup> (U) In a July 31, 2002 email to Philbin, [REDACTED] wrote: "John wanted me to let you know that the White House wants both memos signed and out by COB tomorrow."

<sup>41</sup> (U) This was the first time Ciongoli had ever spoken to Bybee about the interrogation issue.

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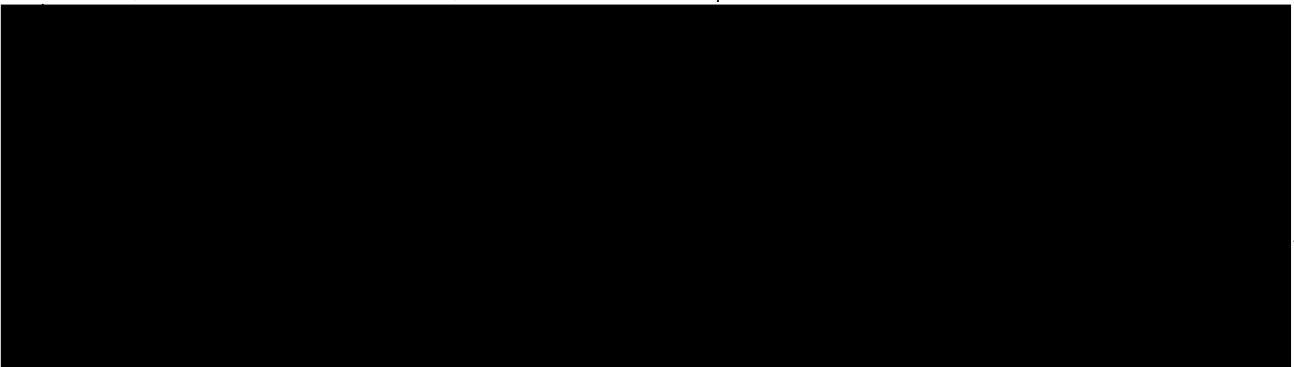
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time pressures, and they are telling us this has to be signed tonight – this was like at 9 o'clock, 10 o'clock at night on the day it was signed – my conclusion is that's dicta. That's not what's supporting this conclusion. I wouldn't put it in there. But I think it is permissible, it's okay for you to sign it.

(U) Philbin said he did not believe that defenses should have been included in the memorandum, but rather 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.” He added: “I don’t think it is good lawyering to present that to your client.”

(U) 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.

(U) 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, AG’s office and the DAG’s office.<sup>42</sup> According to CIA records, the agency received a copy of the Bybee Memo by fax at approximately 4 p.m. that day.



<sup>42</sup> (U) 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.

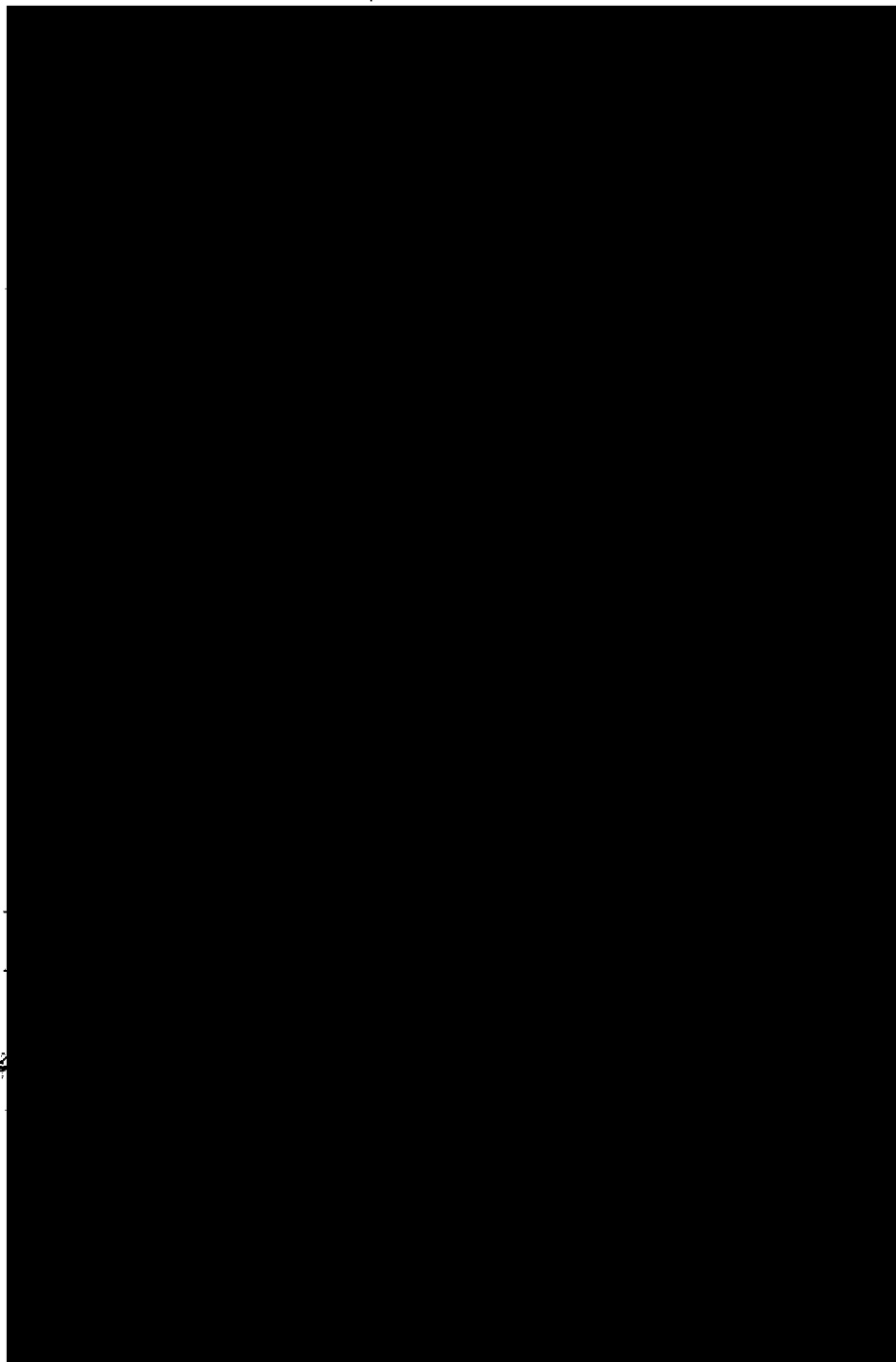
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<sup>43</sup> (U) Four days later [REDACTED] told Yoo in an email that she had spoken to [REDACTED] and that "a cable was sent out last week, following the issuance of the opinions."

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**(U) 3. Key Conclusions of the Bybee Memo**

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

(U) 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.

(U) 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.

(U) 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.

(U) 4. Almost all of the United States court decisions applying the TVPA have



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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."

(U) 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."

(U) 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."

(U) 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.

**(U) 4. Key Conclusions of the Classified Bybee Memo**

~~(TS)~~ [REDACTED] 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.

~~(TS)~~ [REDACTED] 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.

~~(TS)~~ [REDACTED] 3. None of the EITs involve 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.'"

~~(TS)~~ [REDACTED] 4. None of the EITs involve 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

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interrogation," the CIA does "not anticipate that any prolonged mental harm would result from the use of the waterboard."

(TS) [REDACTED] 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.

(TS) [REDACTED] 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.<sup>44</sup> 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."<sup>45</sup>

**(U) 5. The Yoo Letter (August 1, 2002)**

(U) In addition to the Bybee Memo and the Classified Bybee Memo, on August 1, 2002, Yoo signed a six-page unclassified letter, addressed to 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, accordingly, conduct that did not violate the torture statute could not be prosecuted in the ICC.

<sup>44</sup> (TS) [REDACTED] The Classified Bybee Memo briefly restated the Bybee Memo's discussion of the specific intent requirement, but like the July 13, 2002 letter from Yoo to Rizzo, it did not include any of the caveats and qualifications briefly mentioned in the Bybee Memo.

<sup>45</sup> (TS) [REDACTED] Yoo told OPR that most of the techniques "did not even come close to the standard," but that "waterboarding did." He told us during his interview: "I had actually thought that we prohibited waterboarding. I didn't recollect that we had actually said that you could do it."

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## (U) a. Violation of the Convention Against Torture

(U) 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 United States' 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 4.

(U) In arriving at that conclusion, 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 five 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.<sup>46</sup>

(U) Yoo did not elaborate on the well-established meanings of "reservation" and "understanding" in United States 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*, 106<sup>th</sup> 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)).

<sup>46</sup> (U) Yoo explained, in a footnote, that the understanding might in fact 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." 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 "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.

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(U) 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.

**(U) b. Prosecution Under the Rome Statute**

(U) In response to Gonzales's second question, the Yoo Letter stated that the United States is not a signatory to the ICC Treaty, and that the treaty therefore cannot bind the United States 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.

(U) 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.

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

**(U) 1. Guantanamo and the Military's Interrogation of Detainees**

(U) In January 2002, Taliban and al Qaeda prisoners captured in the war in Afghanistan began arriving at the United States Naval Base at Guantanamo 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

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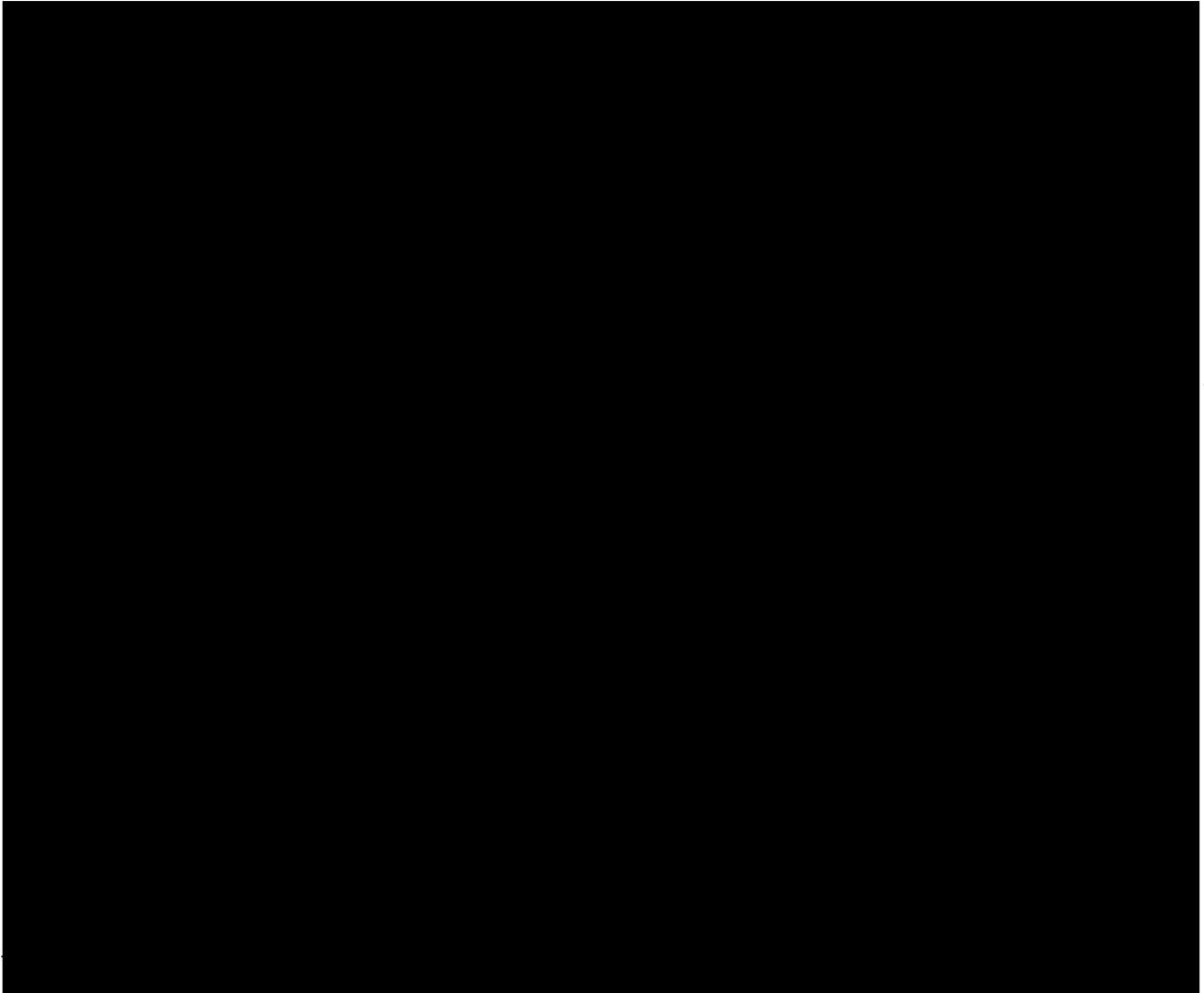
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detailed to the base.

(U) 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. According to FBI observers, the JTF interrogators were inexperienced and poorly trained, and as a result were able to obtain little useful intelligence.



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(U) 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:

(U) Category I:

1. Yelling at the detainee;
2. Deceiving the detainee by:
  - (a) Using multiple interrogators; or
  - (b) Posing as interrogators from a country that tortures detainees;

(U) Category II:

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

(U) 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,

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or poking with a finger.<sup>47</sup>

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

(U) 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 EITs were used.<sup>48</sup>

(U) 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 EITs, 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

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<sup>47</sup> (U) 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.

<sup>48</sup> (U) One of the military detainees who was reportedly subjected to EITs 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 Khafani'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 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.

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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.

(U) Mora asked the General Counsel of the Army, Steven Morello, if he were 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 adviser to JTF, which concluded that the techniques were lawful (the Beaver Memo). Morella reportedly added that he had argued against approval, without success.

(U) 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.

(U) 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.

(U) 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.

(U) In withdrawing the December 2, 2002 memorandum, 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

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directive, Haynes assembled a working group consisting of military and civilian Defense Department personnel. Working Group members included Mora, the general counsels of the other military branches, representatives of the Pentagon's policy and intelligence components, and representatives of the Joint Chiefs of Staff.

(U) 2. Drafting the Yoo Memo

(U) Shortly after the Working Group was formed, Haynes asked John Yoo to provide legal advice about interrogation to the Working Group. Yoo notified Bybee of the request and consulted with the White House. In drafting the memorandum, 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.<sup>49</sup>

(U) 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 advice they provided was identical to what was set forth in the Bybee Memo. At about this time [REDACTED] started working on a draft of what would become the

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<sup>49</sup> (U) 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. [REDACTED]

(U) In a June 10, 2004 memorandum to the files, 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.

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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 they formulated Defense Department policy.

(U) 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.

(U) 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.

(U) 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.

(U) In Part III, the Yoo Memo discussed international law. The Bybee Memo's analyses of the CAT and two foreign court decisions – *Ireland v. U.K.* 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. Yoo Memo at 62.

(U) 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 justification for any criminal liability." *Id.* at 81.

(U) In the discussion in Part III of the United States' obligations under the

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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.

(U) 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.

(U) 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 66 (citations omitted). After reviewing some of the case law, the memorandum summarized four principles that it believed determined 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.

(U) 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

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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) 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.

(U) [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.

(U) 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.

(U) On March 3, 2003, Yoo instructed [REDACTED] to send a draft of the Yoo Memo to 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.

~~(TS)~~ Muller reviewed the draft and wrote to [REDACTED] on March 7, 2003:

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(U) Bybee apparently began reviewing drafts of the Yoo Memo sometime around March 4, 2003, when he asked [REDACTED] and Yoo by email for a draft.<sup>50</sup> Email traffic indicates that he [REDACTED] and Yoo exchanged several drafts of the Yoo Memo over the next few days.

~~(S)~~ 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 OLC opinion, 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 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.

(U) 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 any of the substance of Yoo's legal analysis.

(U) Bybee was confirmed for the 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.

### (U) 3. Key Conclusions of the Yoo Memo

(U) The Yoo Memo incorporated virtually all of the Bybee Memo more or less verbatim, and advanced the following additional conclusions of law.

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<sup>50</sup> (U) 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.

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(U) 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.

(U) 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.

(U) 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.

(U) 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.

(U) 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.

(U) 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.

(U) 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 60-61, 65.

(U) 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

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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.

**(U) 4. The Working Group Report**

(U) 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.<sup>51</sup> 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,<sup>52</sup> 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.

**(U) D. Implementation of the CIA Interrogation Program**

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

<sup>51</sup> (U) 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.

<sup>52</sup> (U) 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."

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investigation into CIA detention and interrogation practices, and on May 7, 2004, it issued a report titled "Counterterrorism Detention and Interrogation Activities" (the CIA OIG Report). The facts in the following discussion are based primarily upon that document.

~~(TS)~~ 1. Abu Zubaydah

~~(TS)~~ a CIA detention facility began using EITs in the interrogation of Abu Zubaydah.<sup>53</sup> According to the CIA OIG Report, independent contractor psychologists were assigned to lead the interrogation team, consisting of CIA security, medical personnel

~~(TS)~~ The two psychologist/interrogators administered all of the interrogation sessions involving EITs, which were closely followed by headquarters personnel.

~~(TS)~~ 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.

<sup>53</sup> ~~(TS)~~ The CIA to identify specific clandestine facilities, which the agency also refers to as "black sites."

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(TS) [REDACTED] On one of the interrogation videotapes, CIA OIG investigators noted that a psychologist/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 report, that the threat was permissible because of its conditional nature.

(TS) [REDACTED] 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.

(TS) [REDACTED] 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]

[REDACTED] Senior CIA officials reportedly made the decision to resume the use of the waterboard [REDACTED]

[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]

(TS) [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."

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## 2. Abd Al-Rahim Al-Nashiri

~~(TS)~~ [REDACTED] 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]

[REDACTED]

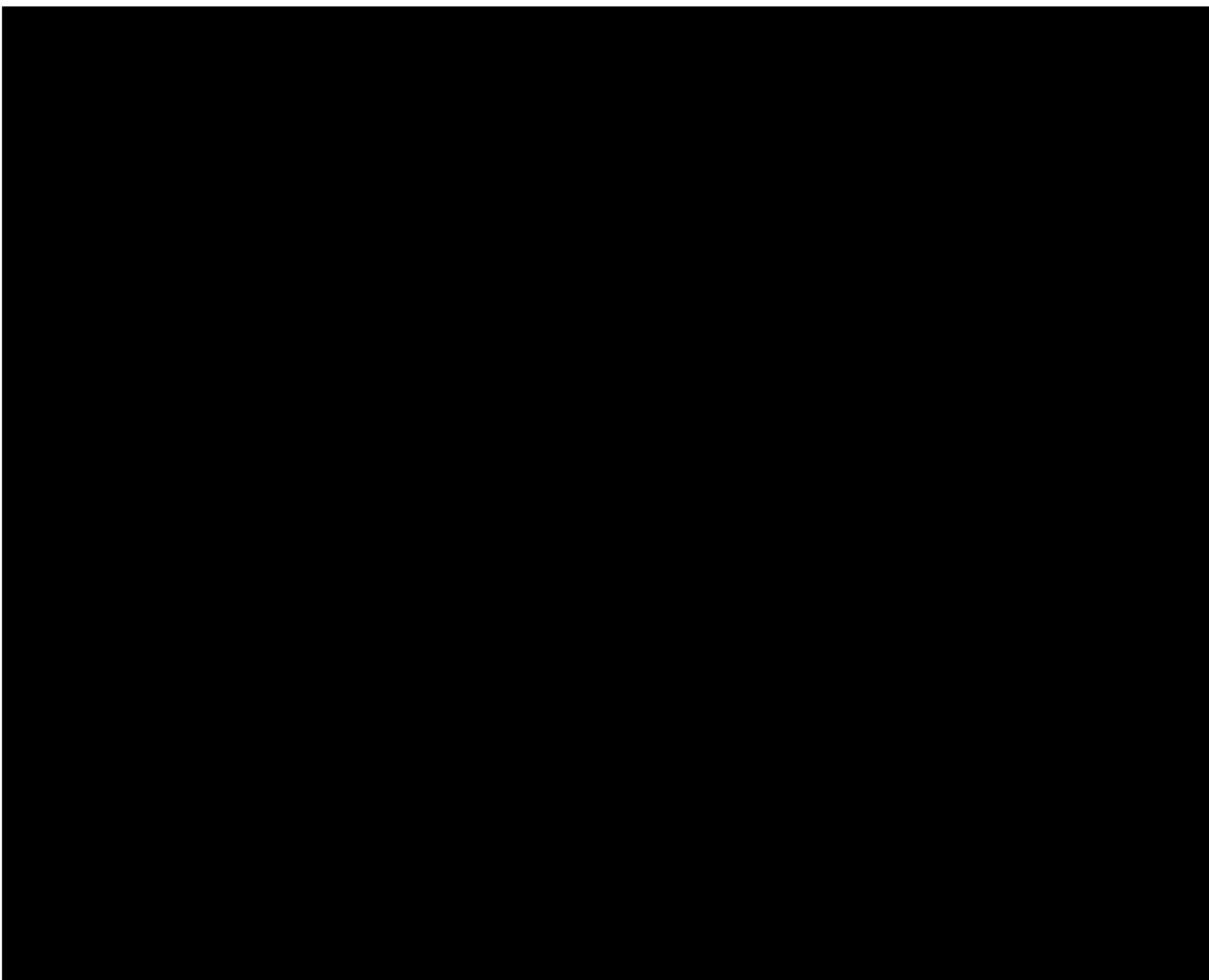
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~~(TS)~~ [REDACTED] While EITs were being administered, several unauthorized techniques were also used on Al-Nashiri. Sometime around the end of December,

[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.

~~(TS)~~ [REDACTED] On another occasion in December 2002, [REDACTED] debriefer [REDACTED] told Al-

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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.

(TS) [REDACTED] 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]

(TS) [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.

(TS) [REDACTED] 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.

(TS) [REDACTED] **3. Khalid Sheik Muhammed**

(U) EITs were also used on Khalid Sheik Muhammed (KSM), a high-ranking al Qaeda official who, according to media reports, was captured in Islamabad, 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.

(TS) [REDACTED] The CIA OIG report stated that KSM was taken to [REDACTED] facility for interrogation and that he was accomplished at resisting EITs. He reportedly underwent [REDACTED] waterboard sessions [REDACTED] involving approximately 183 applications. [REDACTED]

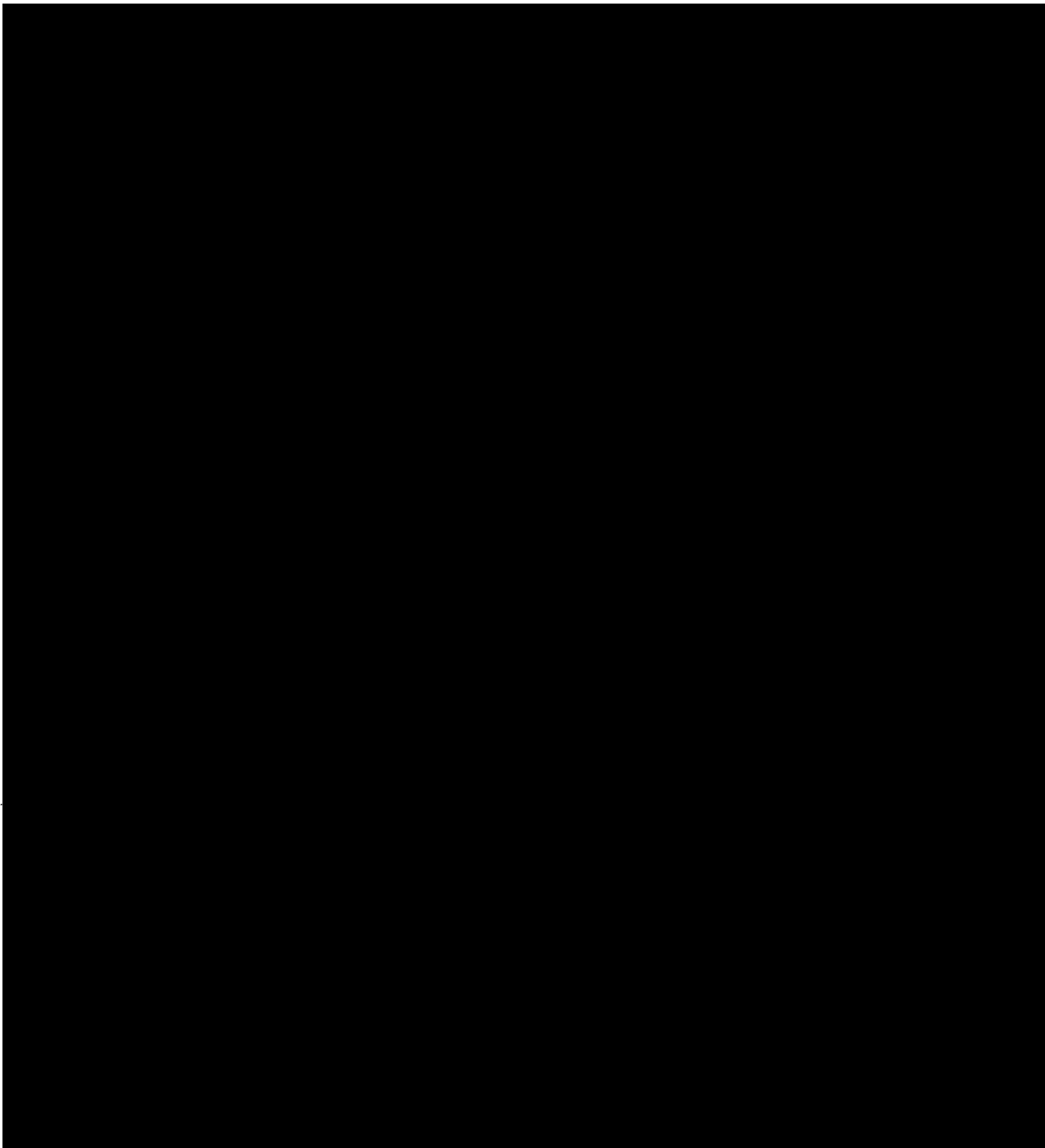
(TS) [REDACTED] The CIA OIG also reported that on one occasion, one of the

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CIA psychologist/interrogators threatened KSM by saying that "if anything else happens in the United States, 'We're going to kill your children.'"



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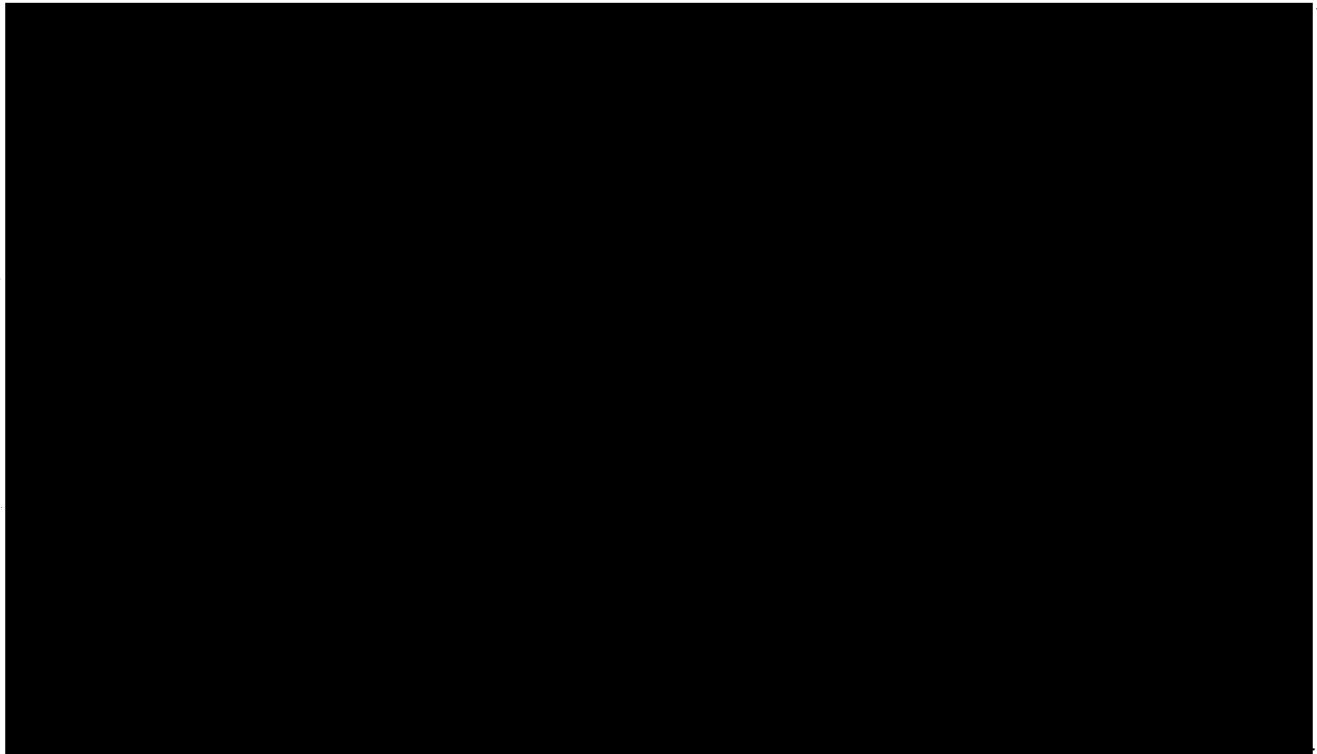
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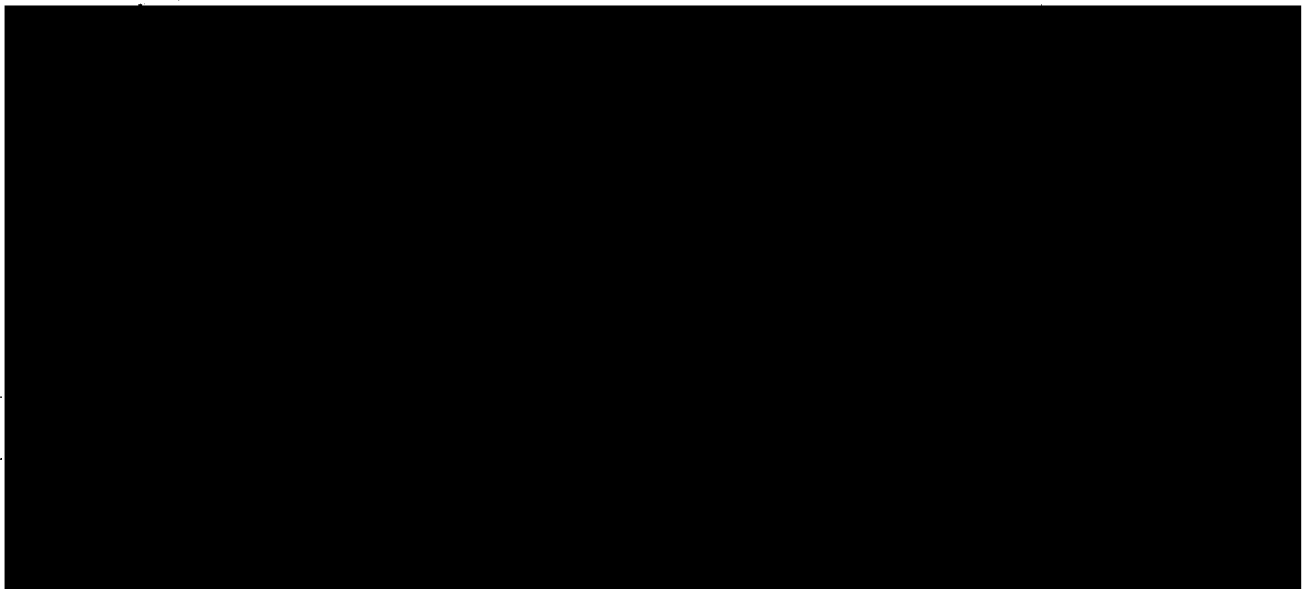
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(U) 5. CIA Referrals to the Department

~~(S)~~ 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



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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."

(S) Muller had [REDACTED] describe the unauthorized EITs that had been used [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]

(S) 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]"

(S) On January 28, 2003, CIA Inspector General John Helgerson called John 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: "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]

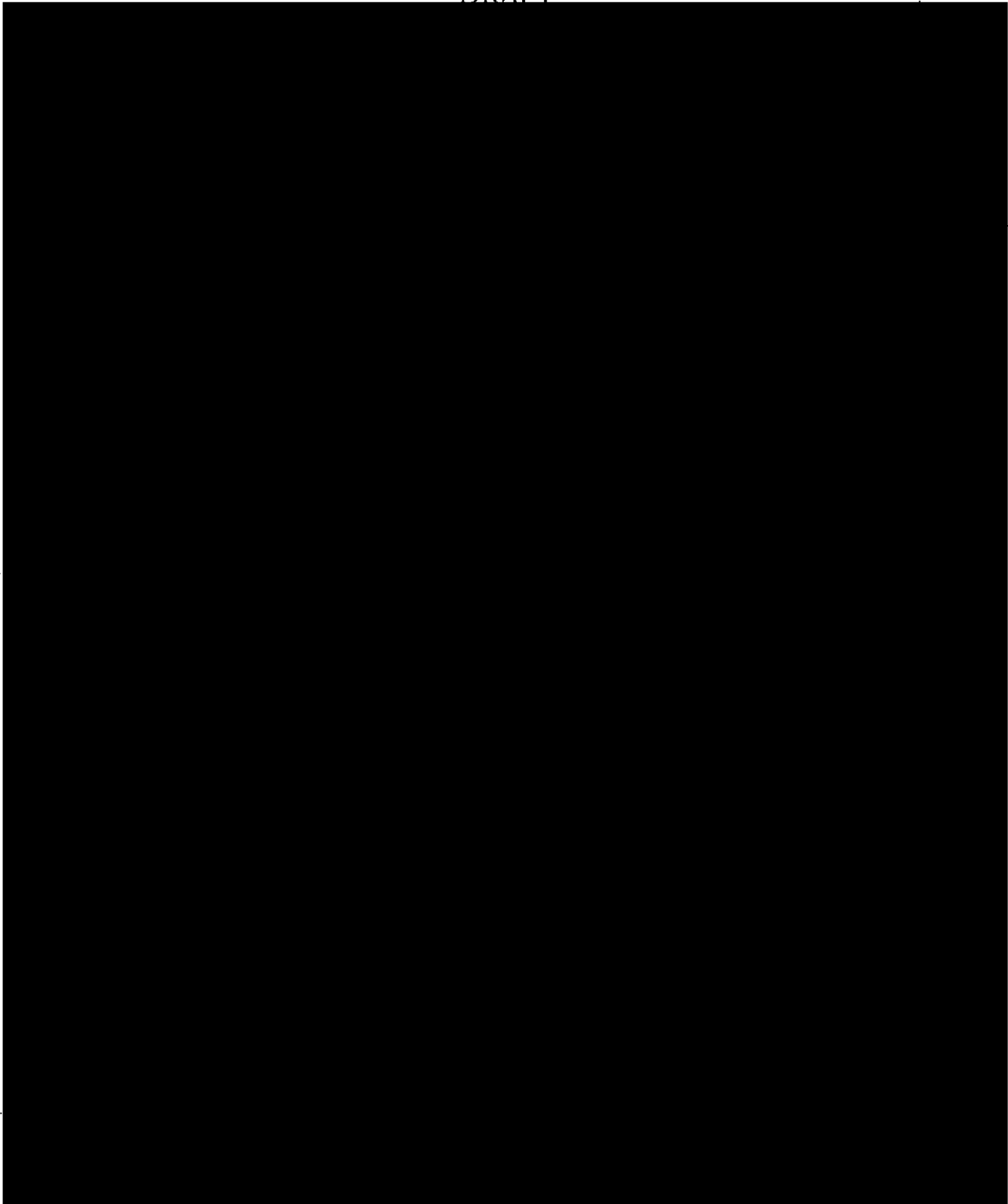
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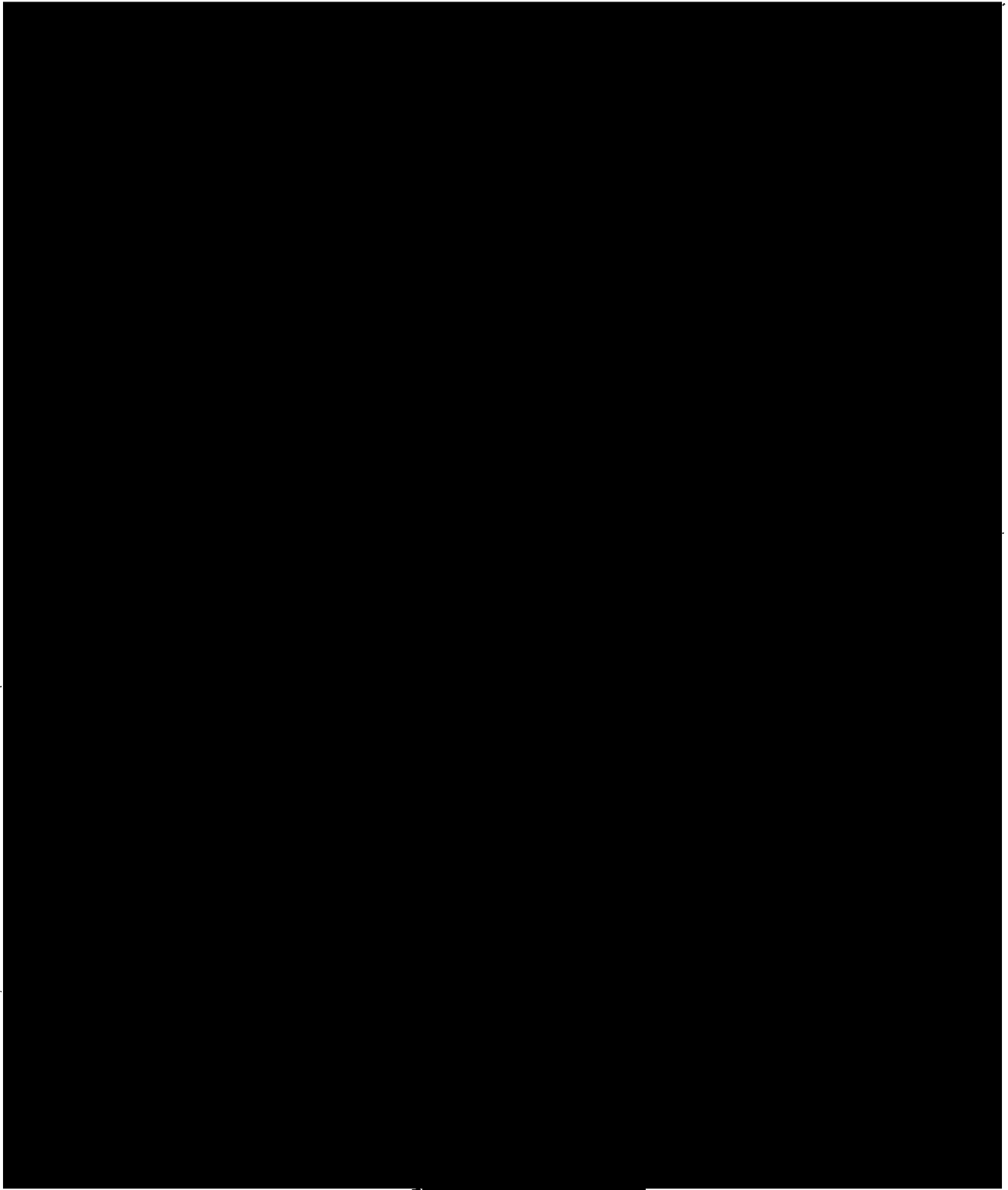
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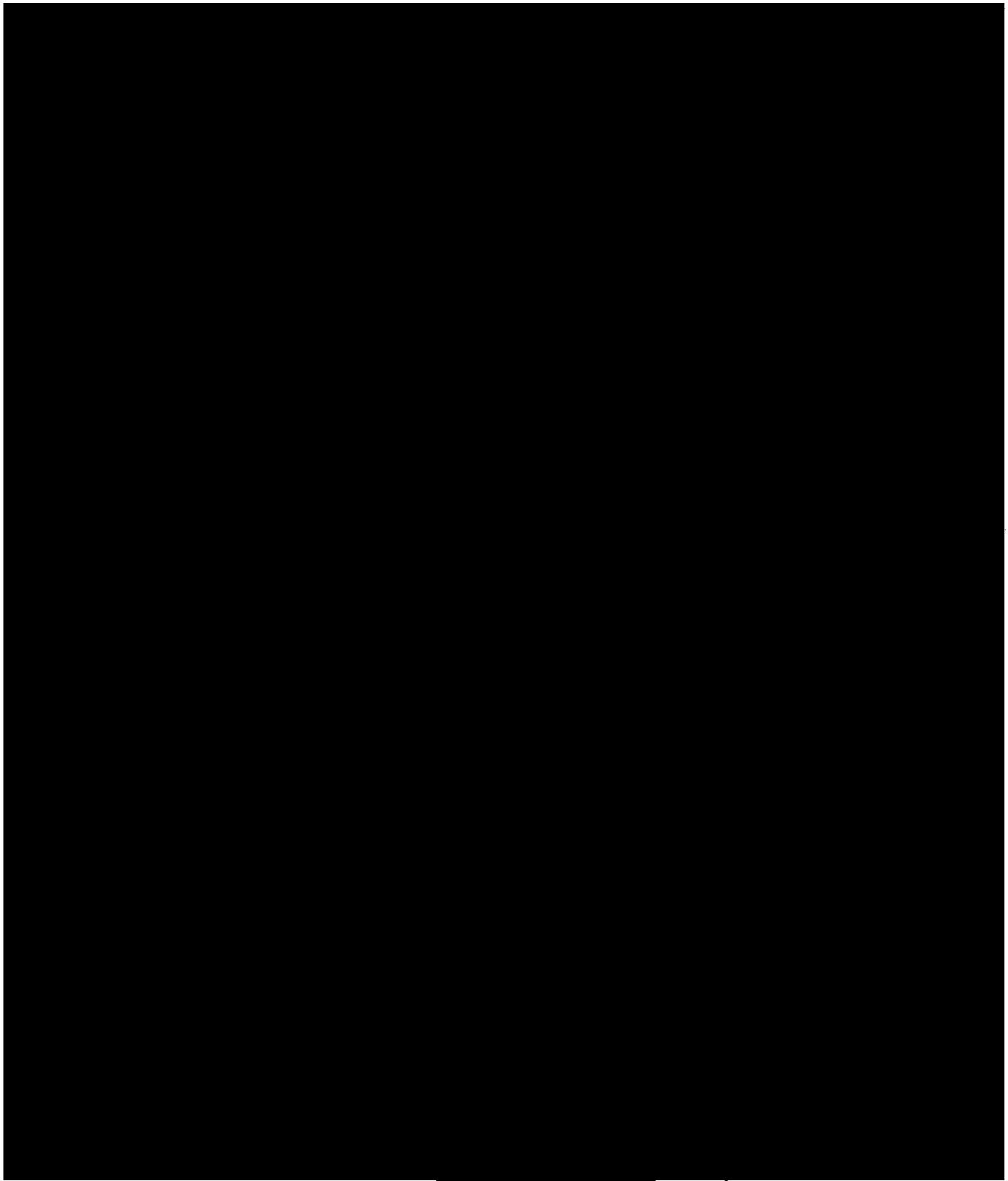
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[REDACTED]

(TS) [REDACTED] Accordingly, we recommend that the declination decision with respect to the death of [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.

**(U) 6. Other Findings of the CIA OIG Report**

(TS) [REDACTED] In addition to reporting on specific incidents, the CIA OIG Report made the following general observations:

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

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<sup>61</sup> (U) The EDVA Memorandum was issued after the Bybee Memo had been publicly withdrawn, but before the Supreme Court's decision in *Hamdan*.

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may have different results; and

CIA OIG Report at ¶ 221.

*Id.* at ¶¶ 233-235.

(U) E. Reaffirmation of the CIA Program

(U) 1. The Question of "Humane Treatment"

~~(TS)~~ In a February 7, 2002 order, the President determined that armed forces were required to treat detainees humanely.

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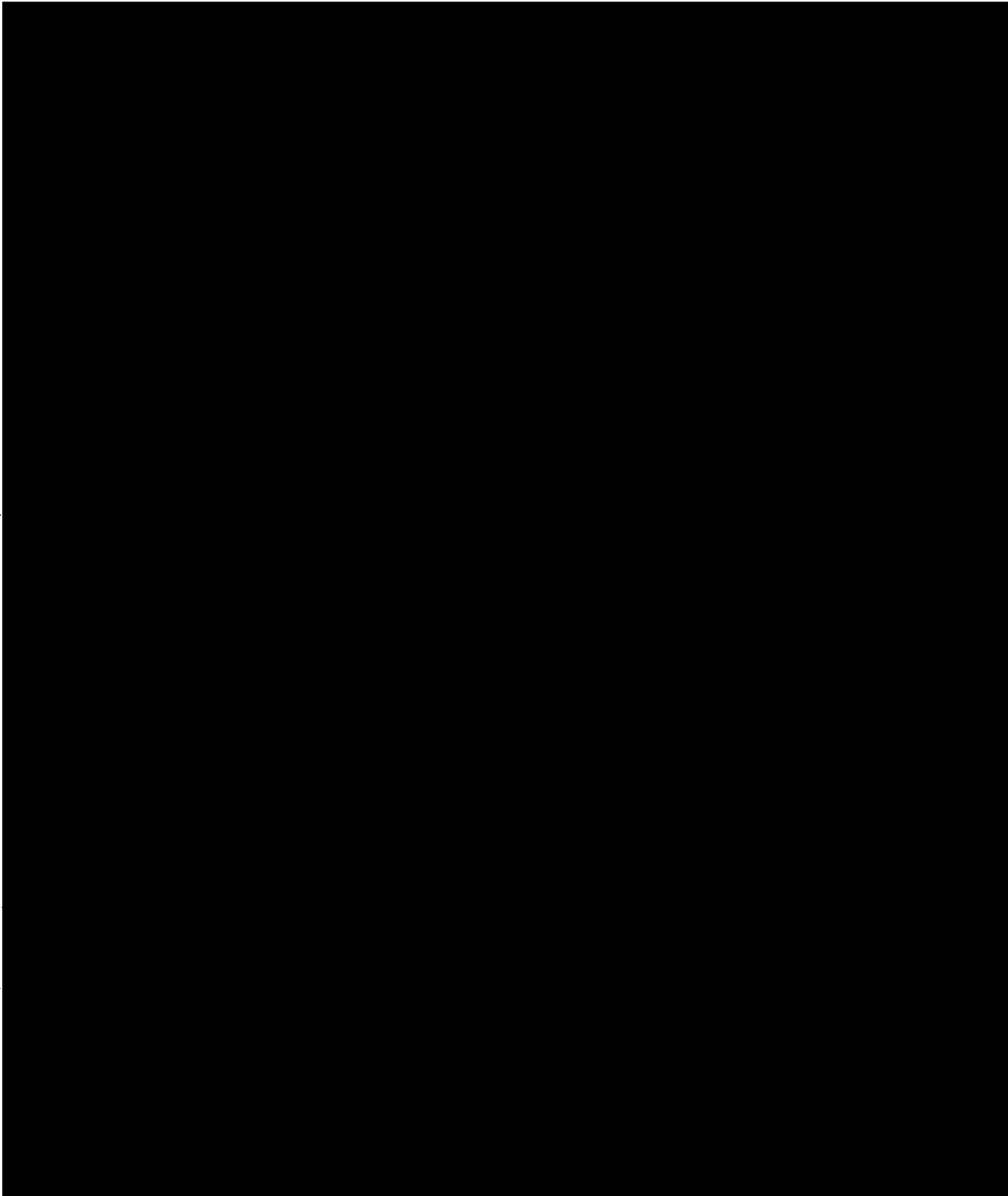
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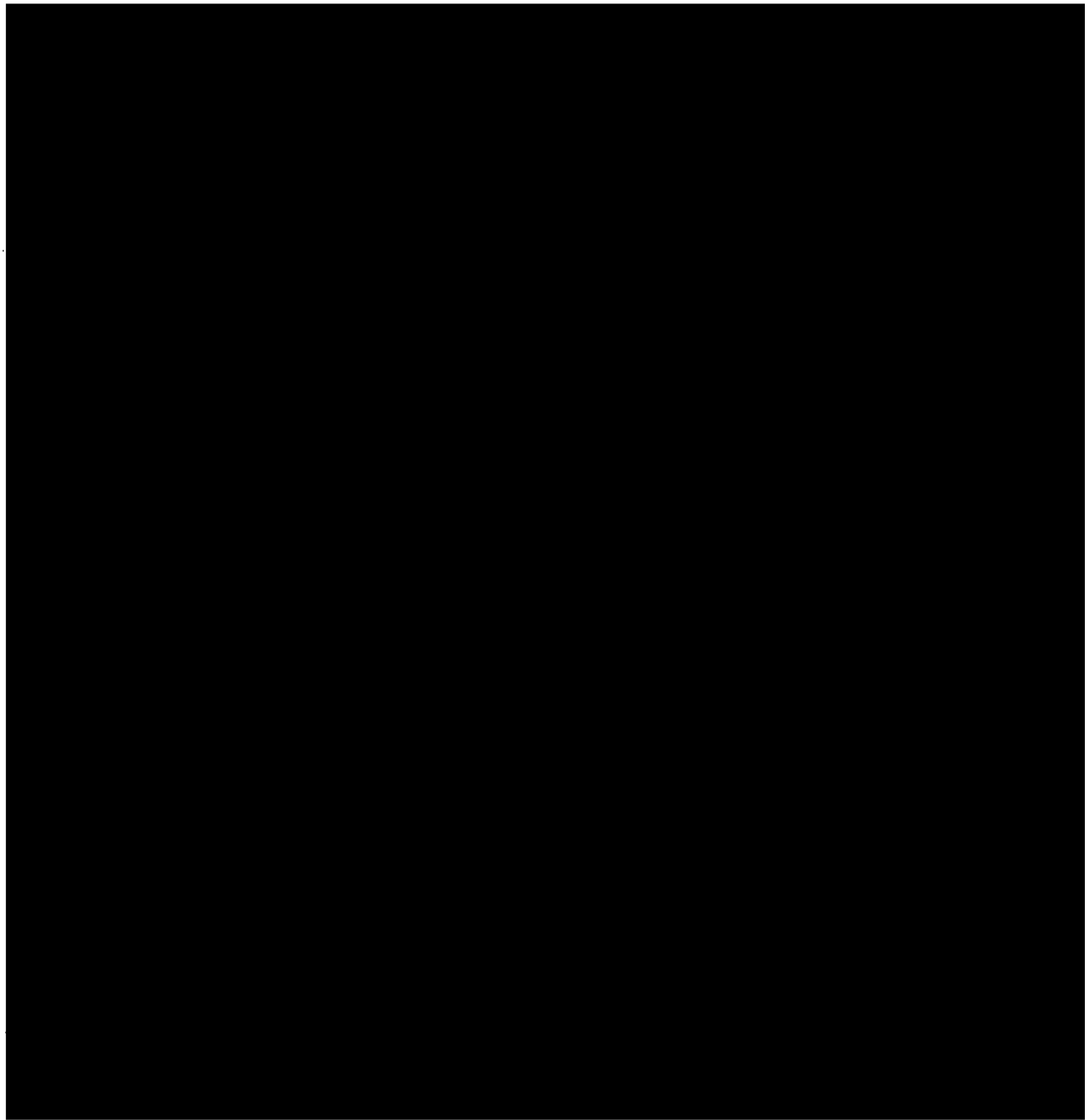
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(U) 2. The "Bullet Points"

~~(TS)~~ [REDACTED] On April 28, 2003, Muller faxed John Yoo a draft document, in bullet point form, captioned "Legal Principles Applicable to CIA Detention and

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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. 6/14/04 Muller letter to Goldsmith.

(TS) [REDACTED] 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]

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(U) John Yoo left the Department on May 30, 2003.

[REDACTED]

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(TS) [REDACTED] The Bullet Points stated that the CAT definition of torture "is identical in all material respects 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 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.

(TS) [REDACTED] 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 water board.

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(TS) [REDACTED] On June 16, 2003, [REDACTED] prepared a MFR referencing the Bullet Points, stating that the document "was fully coordinated with John Yoo . . . as well as with [REDACTED] who reported to Mr. Yoo at OLC. It was drafted in substantial part by Mr. Yoo and [REDACTED] and was approved verbatim. It reflects the joint conclusion of the CIA Office of General Counsel and the DoJ Office of Legal Counsel."

(TS) [REDACTED] provided a copy of the Bullet Points to the CIA OIG, which discussed them and incorporated them into their draft report. As discussed below, OLC subsequently disavowed the Bullet Points.

(U) 3. The Leahy Letter

(U) On June 20, 2003, Muller and [REDACTED] met with Gonzales at his office to discuss how the administration should respond to a June 2, 2003 letter from Senator Patrick Leahy to Condoleezza Rice, requesting confirmation that the United States was treating detainees humanely. Also attending the meeting were Deputy White House Counsel David Leitch, John Bellinger, Whit Cobb (from DOD OGC), Patrick Philbin and [REDACTED]. Prior to the meeting, Muller prepared a draft response to Leahy's letter, which was redrafted by Philbin and circulated at the meeting for comments.

(TS) [REDACTED]  
[REDACTED]  
[REDACTED] 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."

(U) The response was subsequently redrafted by Bellinger and went out under Haynes' signature.

(TS) [REDACTED] The letter advised Senator Leahy that the United States Government complies with its domestic and international legal obligations not to

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engage in torture and does not subject detainees to cruel, inhuman or degrading treatment or punishment. An internal CIA summary noted that:

The 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.

(TS) [REDACTED] After the meeting, Muller, [REDACTED] and Bellinger reportedly remained behind to discuss questions raised about the implementation of the CIA 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 substantially 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 with which to assess the lawfulness of any future activities that did not fall squarely within the specific facts reflected in the memorandum." [REDACTED] All of them also reportedly agreed that simply because conduct went beyond the 'safe harbor' did not necessarily mean that the conduct violated the statute or convention.

(TS) [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. We 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.'"

[REDACTED]

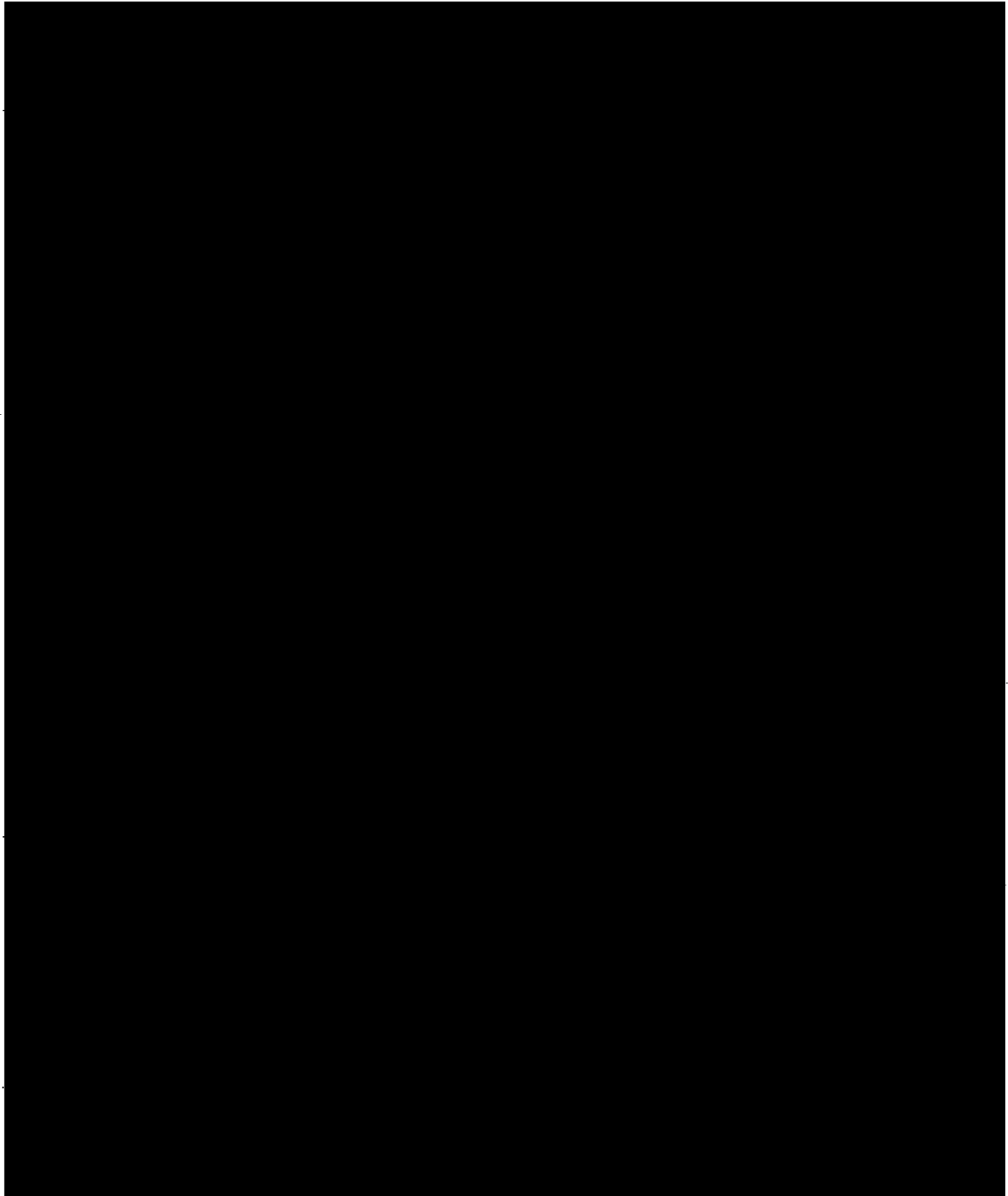
(U) 4. The CIA Request for Reaffirmation

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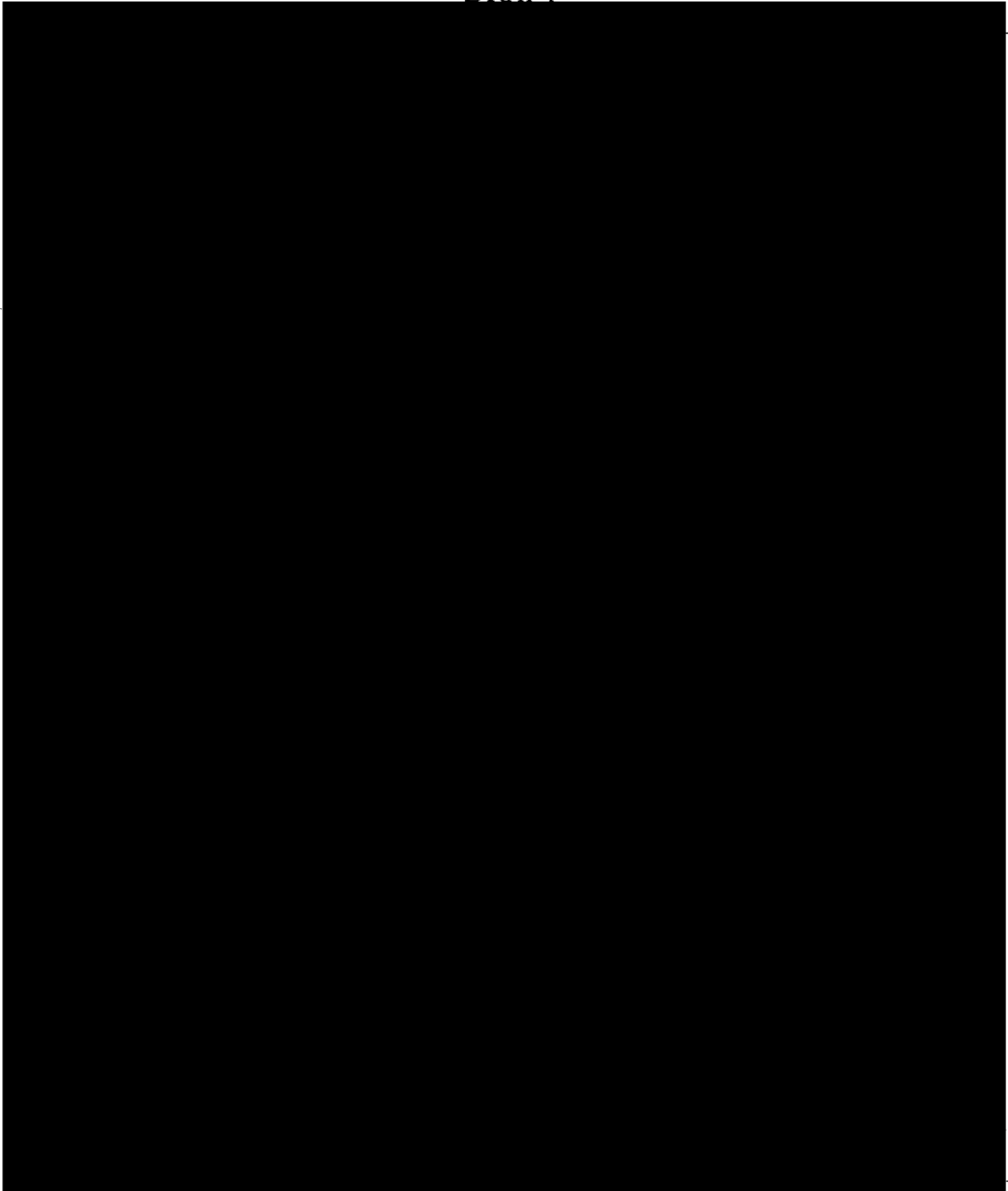
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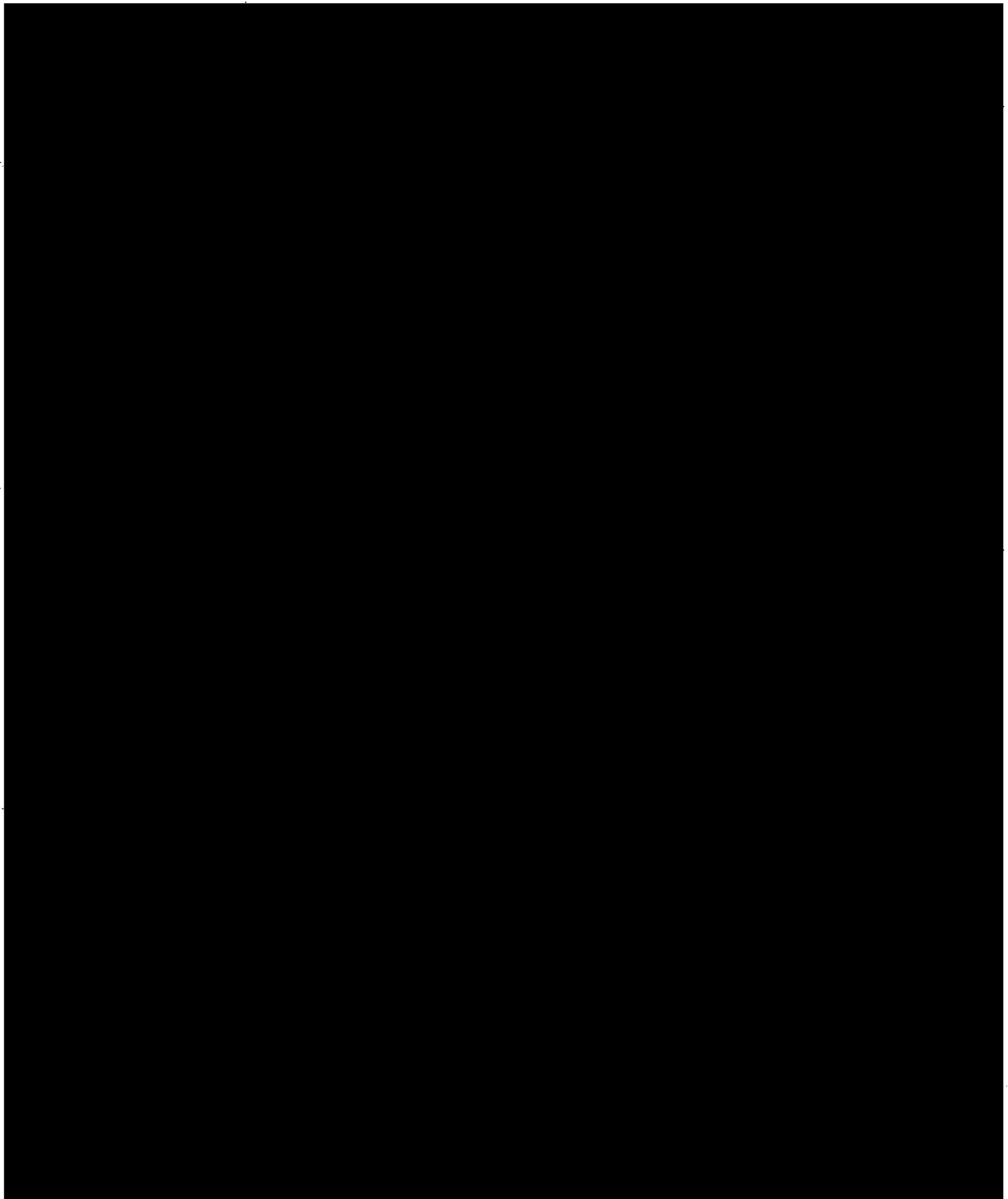
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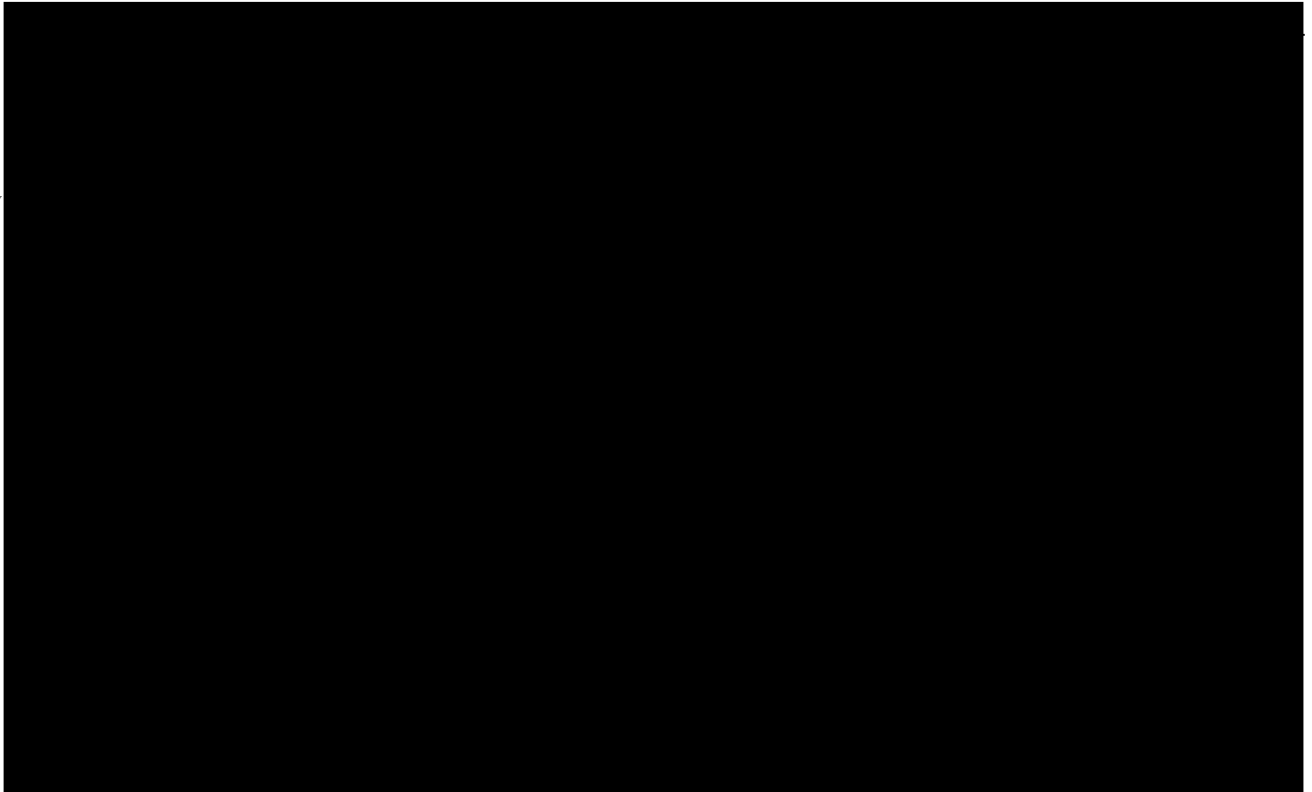


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**(U) E. AAG Goldsmith - Withdrawal of OLC's Advice on Interrogation**

(U) 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.<sup>65</sup> 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.

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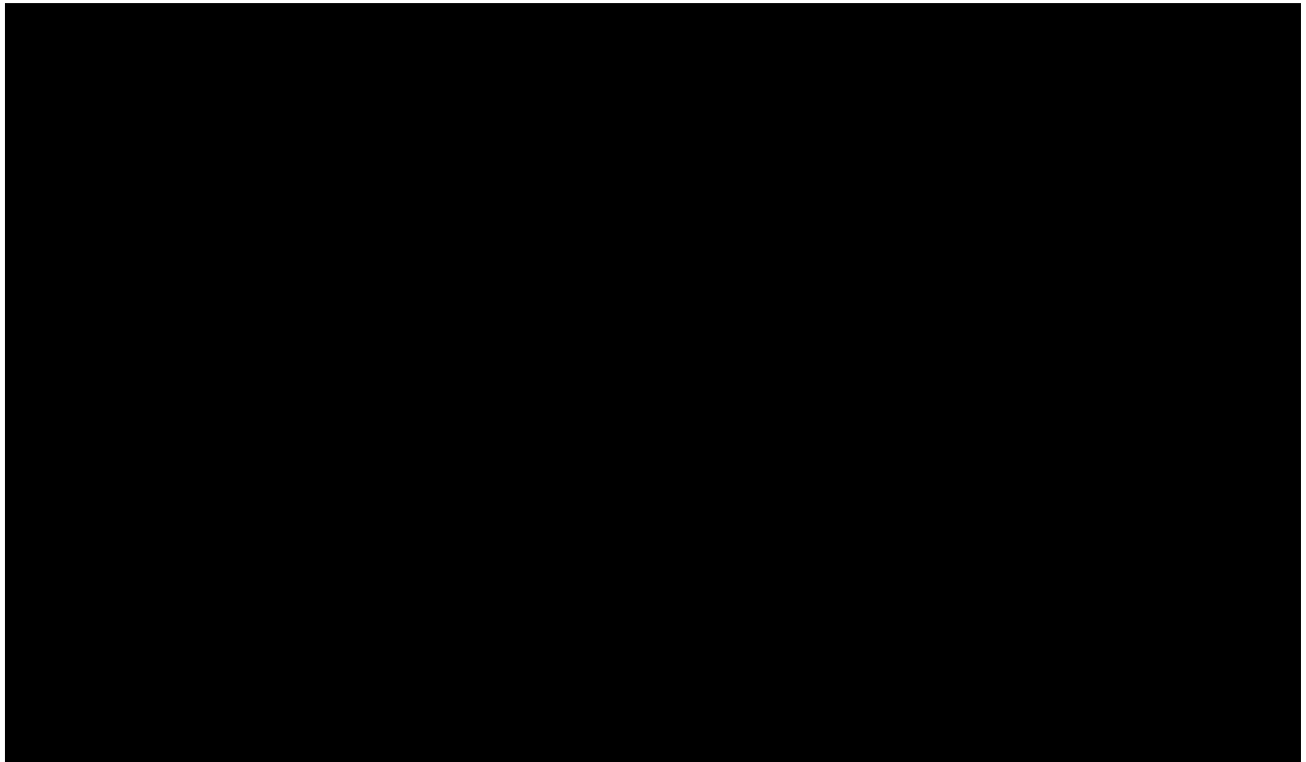
<sup>65</sup> (U) Goldsmith confirmed that when Bybee left OLC, then White House Counsel Gonzales wanted Yoo to take over as AAG. Ashcroft reportedly objected because he thought Yoo was too close to the White House, and recommended his Counselor, Adam Ciongoli, for the job. Ciongoli was reportedly not 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.

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(U) 1. The NSA Matter



(U) 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 he read sometime in December 2003.

(U) 2. The Withdrawal of the Yoo Memo

(U) Goldsmith's reaction to the Yoo Memo was that it was "deeply flawed,"<sup>67</sup> and his immediate concern was that the Defense Department might improperly rely



<sup>67</sup> (U) [REDACTED] told us that after Goldsmith read the Yoo Memo, he told her it was "riddled with error."

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on the opinion in determining the legality of new interrogation techniques.<sup>68</sup> 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.<sup>69</sup>

(U) 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 more extreme techniques requiring Secretary of Defense approval without first consulting OLC. Having allayed his immediate concerns, Goldsmith temporarily set the Yoo Memo aside and continued to deal with the more urgent matter of the NSA program.

(U) In early March 2004, the Defense Department told Goldsmith that they wanted to use one of the four EITs 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.

(U) On Saturday, March 13, 2004, Goldsmith telephoned DAG Comey at home and asked to meet with him that day. Philbin and Goldsmith went to

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<sup>68</sup> (U) 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 . . . ."

<sup>69</sup> (U) 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.

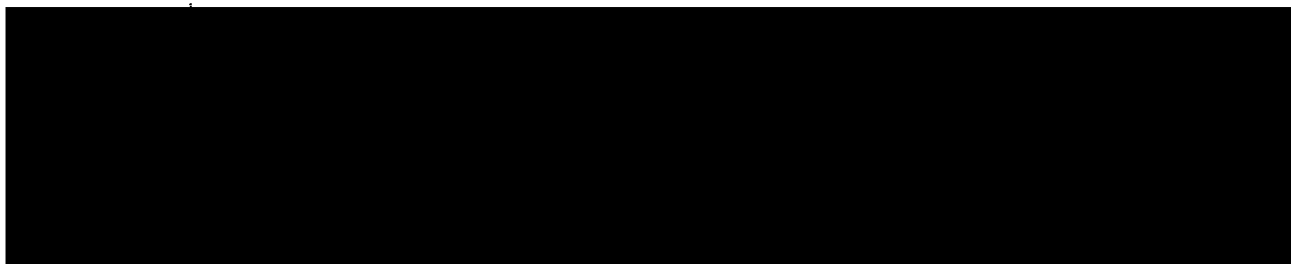
(U) Goldsmith answered as follows: "I'm not selling anyone short – It's just that Haynes said he heard nothing about that advice."

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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 overly broad definition of the term "severe pain." Goldsmith added that generally speaking, the memorandum's legal analysis was loosely done and was subject to misinterpretation.

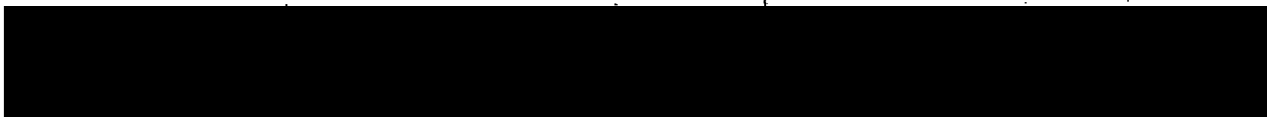
(U) Comey remembered that Philbin seemed in accord with Goldsmith's comments, and that Philbin claimed that he had advised Yoo to remove the questionable sections from the memorandum. Both Goldsmith and Philbin were friendly with Yoo at the time, and Comey got the impression that they were both embarrassed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

(U) 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 without hesitation 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 Principal Deputy AAG Steve Bradbury and several OLC line attorneys.



(U) 3. The CIA OIG Report and the Bullet Points Controversy

~~(TS)~~ [REDACTED] On March 2, 2004, Goldsmith received a letter from Muller, asking OLC to reaffirm the legal advice they 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.<sup>70</sup>



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(U) 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."<sup>71</sup> 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.

(TS) [REDACTED] Sometime 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 Bullet Points as appendices.<sup>72</sup> 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.

(TS) [REDACTED] 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 a number of 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."

(TS) [REDACTED] 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

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<sup>71</sup> (TS) [REDACTED] 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.

(U) 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.

<sup>72</sup> (U) 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.

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assumptions and limitations set forth in the Classified Bybee Memo.



(TS) [REDACTED] During this period, OLC began preparing comments on the CIA OIG Report. OLC and CIA OGC initially contemplated submitting a joint letter to Helgeson, and early drafts of the letter included signature blocks for both Muller and Goldsmith.

(TS) [REDACTED] On June 9, 2004, Goldsmith talked to Yoo by telephone about the Bullet Points.<sup>73</sup> 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."

(TS) [REDACTED] 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 their 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

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<sup>73</sup> (U) 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 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.

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Advisor, the Attorney General, who was accompanied by Patrick Philbin, the Director of Central Intelligence, and others.”

(TS) [REDACTED] 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 Helgerson.

(TS) [REDACTED] 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 of approved techniques on other detainees in addition to Abu Zubaydah, not the use of new techniques. 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.”

(TS) [REDACTED] 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.

(U) **4. Goldsmith’s Draft Revisions to the Yoo Memo**

(U) 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, Goldsmith noted specific criticisms of the Yoo Memo in footnotes. Although he decided to remove that criticism from later drafts, Goldsmith told OPR that he did not do so out of any doubts about his criticism. Rather, he concluded that it was unnecessary to specifically address the errors in the replacement memorandum. Goldsmith criticized the Yoo Memo as follows:

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

(U) 2. The Yoo Memo “contains numerous overbroad and unnecessary

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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.* at 1, n. 1.<sup>74</sup>

- (U) 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.

- (U) 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, 2004draft

<sup>74</sup> (U) 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

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at 29-30 n. 28.

- (U) 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.

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.

- (U) 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.

- (U) 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 . . . , are plainly 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

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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), 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.

- (U) 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.
- (U) 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,



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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.

(U) Goldsmith left the Justice Department on July 17, 2004, before he was able to finalize a replacement for the Yoo Memo. As discussed below, his successor, Dan Levin, continued to work on the project.

**(U) 5. The Withdrawal of the Bybee Memo**

(U) 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 *Post* made a copy of the Bybee Memo available on its web site.

(U) 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. Since 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 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.

(U) 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.

(U) Goldsmith said he found it “deeply strange” that both the Classified

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Bybee Memo and the unclassified memoranda were issued on the same day. He commented:

One is hyper narrow and cautious and splitting hairs and not going one millimeter more than you needed to to answer the question. And the other 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.

(U) 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."

(U) 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.

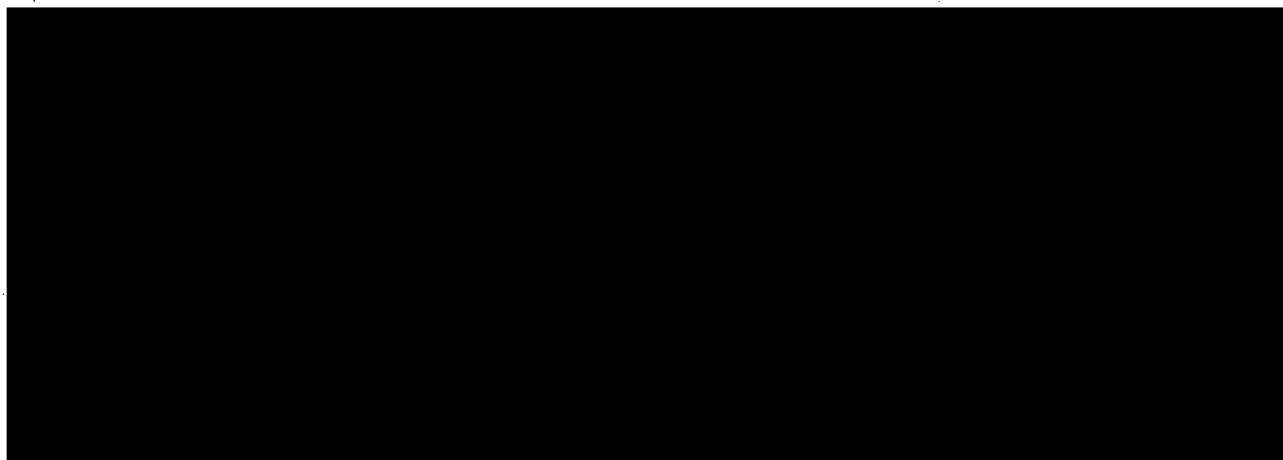
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In my view, there's something to be said for not being a scholar or professor in this job [in the OLC]. . . . And taking a more practical approach, and one where you don't think you know the answers already, because you haven't got a body of scholarly work, you know, you've already developed on these questions. And I just think that for practical reasons that's healthy.

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(U) 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, 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 interpretation."

(U) 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.<sup>75</sup> 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.



(U) **F. Case by Case Approvals and The Levin Memo**

(U) When Goldsmith left the Department, Dan Levin, who was Counselor to the Attorney General 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,

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<sup>75</sup> (U) Several replacement drafts for the Bybee Memo were prepared under Goldsmith's direction, the last of which was dated July 16, 2004.



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the Yoo 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.<sup>77</sup>

(U) 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, in his view.

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<sup>77</sup> (U) Prior to the Bullet Points controversy, the CIA did not seek OLC approval to use EITs on new prisoners brought into the interrogation program, but simply relied on the analysis provided in the Classified Bybee Memo. After Goldsmith disavowed the Bullet Points, however, the agency sought written approval every time it intended to use EITs.

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(U) 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

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than [what it would mean if applied] to a United States citizen in New York."<sup>78</sup>

~~(TS)~~ [REDACTED] 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]

~~(TS)~~ [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.<sup>79</sup> 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. 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.

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<sup>78</sup> ~~(TS)~~ [REDACTED] That question was eventually addressed by Bradbury in the Article 16 Memo, which concluded that thirteen CIA EITs, then 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.

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~~(TS)~~ [REDACTED] 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."<sup>80</sup> 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.<sup>81</sup>

(U) 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.<sup>82</sup>

[REDACTED]

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Although Levin authorized its use, [REDACTED]

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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 twenty minutes each day.

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[REDACTED]

(TS) [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.

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

(TS) [REDACTED]

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(U) 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. Levin used the last draft created under Goldsmith's supervision as a starting point, but changed it significantly as the drafting progressed. 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.

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

(U) He 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."

(U) 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

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<sup>84</sup> (U) Levin told us that he got "two rounds of very detailed excellent comments" from the State Department on his classified draft.

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the final draft.<sup>85</sup>

(U) 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.

(TS) [REDACTED] On December 30, 2004 [REDACTED] provided Levin a copy of a twenty-page document titled "Background Paper on CIA's Combined Use of Interrogation Techniques." [REDACTED]

[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.<sup>86</sup>

(U) Levin told us that when Gonzales was named as Ashcroft's replacement, he knew he would not be nominated for the permanent AAG position. According to Levin, he and Gonzales never got along very well, and although he would have loved to stay on as AAG, he knew it was not a realistic possibility.<sup>87</sup> At that point, Bellinger and Rice had moved to the State Department, and Gonzales asked him to take over Bellinger's position as legal adviser to the NSC. Levin was not interested in the job, but Gonzales, the new National Security Adviser Stephen Hadley, and Harriet Miers all urged him to take the position. As a further incentive, Gonzales knew that Levin was interested in serving as United States Attorney in the Central District of California, and he told Levin that if the position

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<sup>85</sup> (U) 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.

<sup>86</sup> (TS) [REDACTED] All of Levin's drafts that we saw in OLC's files authorized the CIA to use the EIT's under consideration.

<sup>87</sup> (U) Levin told us that Gonzales' opinion of him may have been shaped by an incident that occurred when Levin was at the FBI. Levin recalled being summoned to the White House, where Gonzales told him that the President was very upset because Levin was allowing too many people at the FBI to be read into the NSA surveillance program. According to Levin, because access to the NSA program was so restricted, people at the FBI had become suspicious that the NSA was doing something illegal. Levin got permission to show Yoo's OLC opinions to a few senior FBI officials, who were then able to "calm down" the other FBI personnel.

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became vacant, he would be nominated.

(U) Levin did not take Gonzales' promise seriously; he told us that he cynically suspected that the White House was worried that if he left government right after completing the Levin Memo, it would look like he had been forced to resign because of the memorandum. He accepted the position at NSC, 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.

(U) 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."

(U) H. The Bradbury Memos

(U) When Levin left the Department in early February 2005, Bradbury was named OLC's Acting AAG. He 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.<sup>88</sup>

(TS) [REDACTED] 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]

<sup>88</sup> (TS) [REDACTED] Bradbury told us that Levin had started working on the combined techniques memorandum before he left the Department, but we found no reference to that document in OLC's files prior to late February 2005. We noted, however, that on December 30, 2004, the CIA sent Levin a twenty-page "Background Paper on CIA's Combined Use of Interrogation Techniques."

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[REDACTED]

(U) 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 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 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 never saw a final draft of the document.

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

(TS) [REDACTED] The Bradbury Memo was one of two May 10, 2005 memoranda written to replace the Classified Bybee Memo.<sup>89</sup> The 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

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<sup>89</sup> (TS) [REDACTED] The 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]." Bradbury Memo at 6, n.9.

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violate" the torture statute.

(TS) [REDACTED] The Bradbury Memo authorized the CIA to use the following EITs: (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 waterboard. Each technique was described in the memorandum, along with the restrictions and safeguards CIA OMS had represented would be implemented with their use.

(TS) [REDACTED] 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 who (3) would constitute a clear and continuing threat to the United States or its allies if released.

(TS) [REDACTED] Following a general discussion of the torture statute, the 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. Bradbury Memo at 29, n. 33; Classified Bybee Memo at 5. Although the Bradbury Memo prefaced its discussion with the qualifying statement, "fully recognizing the limitations of reliance on this experience," [REDACTED]

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(TS) [REDACTED] In evaluating the legality of the first eleven techniques, the memorandum concluded without extensive discussion 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.

(TS) [REDACTED] 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 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." 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.

(TS) [REDACTED] On the question of whether sleep deprivation caused severe physical suffering, the 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 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. Relying on similar assurances from CIA OMS, and on one medical text, the 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.

(TS) [REDACTED] With respect to the waterboard, the 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,

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according to OMS, the technique was not physically painful, and that it had been administered to thousands of trainees in the SERE program.<sup>90</sup> *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.*

~~(TS)~~ [REDACTED] The 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. Since 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."<sup>91</sup> *Id.*

~~(TS)~~ [REDACTED] The 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.'" Bradbury Memo at 44.

~~(TS)~~ [REDACTED] The 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 expertise, and divergence from the SERE model in the CIA interrogation program. The Bradbury Memo stated that

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<sup>90</sup> ~~(TS)~~ [REDACTED] The 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. Bradbury Memo at 6.

<sup>91</sup> ~~(TS)~~ [REDACTED] The 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.

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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.

Bradbury Memo at 41, n. 51.

(TS) [REDACTED] Thus, "assuming adherence to the strict limitations" and "careful medical monitoring," the 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.

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

(TS) [REDACTED] The Combined Techniques Memo began by briefly recapping the 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 would be used in combination with only two EITs: dietary manipulation and sleep deprivation.<sup>92</sup>

(TS) [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]

<sup>92</sup> (TS) [REDACTED] 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

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... 'that he has no control over basic human needs . . . .'" Combined Techniques Memo at 5 (quoting CIA Background Paper at 4). The EITs included in this category are forced nudity, sleep deprivation, and dietary manipulation. *Id.*

(TS [REDACTED]) 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.

(TS [REDACTED]) 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.* (quoting CIA Background Paper at 7).<sup>93</sup>

(TS [REDACTED]) 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 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 . . . ." The memorandum noted that such procedures were "essential to our advice." *Id.* at 13-14. 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.* at 14.

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<sup>93</sup> (TS [REDACTED]) 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).

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(TS) [REDACTED] 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 as torture, the memorandum opined that "we believe that the combination of techniques in question here would not be 'extreme and outrageous'" and therefore "would not reach the high bar established by Congress" in the torture statute. *Id.* at 15.

(TS) [REDACTED] Noting that sleep deprivation could reduce a subject's tolerance for pain, and that it might therefore increase physical suffering, the memorandum observed that "you 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. 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. *Id.* at 16.

(TS) [REDACTED] With respect to the waterboard, the memorandum pointed to the 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. Combined Techniques Memo at 17.

(TS) [REDACTED] The memorandum then considered, in a brief, two-page discussion, 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

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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. Combined Techniques Memo at 19.

~~(TS)~~ [REDACTED] 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.

(U) Former DAG James Comey told us that he reviewed and approved the Bradbury Memo, but that after he reviewed the Combined Techniques Memo, he argued that it 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.

(U) In an email to Chuck Rosenberg dated April 27, 2005, Comey recounted a meeting on April 22, 2005 with Philbin, Bradbury, and Gonzales in which he 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

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pressure.)<sup>94</sup>

(U) After receiving a new draft of the 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, Comey stated that Philbin reported back that he had spoken to Bradbury, who "seemed 'relieved' that [DOJ] would not be sending out" the memorandum.

(U) However, Comey 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."

(U) In an email dated April 28, 2005 to Rosenberg, Comey recounted a telephone call he had with Ted Ulyot, Gonzales' Chief of Staff, about the imminent issuance of the memorandum. Ulyot had informed Comey that the memorandum was likely to be issued the next day and that he was aware of Comey's concerns about the prospective nature of the opinion. Comey wrote in the email:

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.

(U) Comey further commented in the email:

Anyhow, that's where we are. It leaves me feeling sad for

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<sup>94</sup> (U) 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 he had repeatedly marked up drafts to highlight the inadequacy of the analysis under that category, only to have his comments ignored.

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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.

(U) We asked Bradbury about Comey's objections. He told us that he felt OLC would have been giving incomplete legal advice if they 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.

(U) 3. The Article 16 Memo

(TS) [REDACTED] 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. 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.

(TS) [REDACTED] 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.

(TS) [REDACTED] 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]

[REDACTED] The Article 16 Memo concluded, based primarily on the Effectiveness Memo, that the use of EITs had produced critical information,

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including "specific, actionable intelligence." Article 16 Memo at 10.

(TS [REDACTED]) 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).

(TS [REDACTED]) The Article 16 Memo revisited and reaffirmed OLC's conclusion that Article 16 does not apply outside United States territory. 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 Eighth Amendment, the memorandum concluded, did not apply to CIA prisoners because it has been interpreted as applying only to persons convicted of crimes. Thus, the only restraint imposed on CIA interrogators by Article 16, according to the memorandum, was the substantive due process ban on "executive conduct that 'shocks the conscience.'" Article 16 Memo at 2.

(TS [REDACTED]) 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).

(TS [REDACTED]) 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

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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 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)).

(TS [REDACTED]) 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.’” Article 16 Memo at 31 (quoting *Lewis*, 523 U.S. at 849).

(TS [REDACTED]) 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.” 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.” Article 16 Memo at 32.

(TS [REDACTED]) The memorandum looked briefly at several cases in which the United States Supreme Court found that the conduct of police in domestic criminal investigations “shocked the conscience” – *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).

(TS [REDACTED]) 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

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considerably less invasive or extreme than much of the conduct at issue in these cases." 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 to prevent foreign terrorist attacks against the United States and its interests." Article 16 Memo at 35.

(TS [REDACTED]) 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 . . ." Article 16 Memo at 36.

(TS [REDACTED]) 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 executive 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 [often] bear[s] no resemblance to the CIA interrogation program." 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." Article 16 Memo at 36-37.

(TS [REDACTED]) 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 once again acknowledged the significant differences between SERE training and the CIA interrogation program, but balanced those

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differences against the fact that the CIA program furthered the "paramount interest 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 program did not "shock the conscience." Article 16 Memo at 37-38.

(TS) [REDACTED] 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.

(U) It is not clear who outside of OLC reviewed the Article 16 Memo. Comey told us that he reviewed the Bradbury Memo and the Combined Techniques Memo, but that 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 never saw a final version. 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."

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(U) 4. The 2007 Bradbury Memo

(U) a. Background

(U) In late Fall 2005, congressional efforts to legislate against the type of abuse that had taken place at Iraq's Abu Ghraib prison intensified. By that time, NSC attorneys Brad Wiegman and Stephen Hadley were negotiating with the Senate over the terms of what would eventually become the Detainee Treatment Act of 2005 (DTA).<sup>95</sup> Bradbury did not participate directly in those negotiations, but advised Wiegman on proposed statutory language.

(U) 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.

(U) Bradbury told us that he believed the CIA was also involved in the negotiations with Congress, and that the agency may have talked directly to one of the sponsors, Senator John McCain. At some point during those negotiations, the CIA reportedly agreed with the Senator that they would discontinue use of the waterboard.<sup>96</sup>

(U) 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.

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<sup>95</sup> (U) 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.

<sup>96</sup> (U) 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 legal adviser Stephen Hadley in late 2006, during negotiations over the Military Commissions Act of 2006 (MCA).

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(U) 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."

(TS) [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.

(U) On June 29, 2006, while Bradbury was drafting an opinion on the use of the seven EITs, the United States 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* 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.<sup>97</sup> Thereafter, 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.

(U) 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 program.

(U) An interagency effort was immediately launched to draft what would eventually become the Military Commissions Act (MCA) of 2006. The process went

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(U) In addition, the Court held that the military commissions established by the President to try captured al Qaeda terrorists were unlawful.

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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.

(U) 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.

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

(U) 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, 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.<sup>98</sup> 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.

(U) The MCA included one additional prohibition, against "cruel, inhuman or degrading treatment or punishment," defined as "cruel, unusual, and inhumane

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<sup>98</sup> (U) Thus, outrages upon personal dignity and humiliating and degrading treatment no longer constituted war crimes. 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.

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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, inhuman 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.

(U) b. **The 2007 Memo**

(U) After the MCA was enacted, Bradbury continued working on his memorandum on the legality of the revised interrogation program 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.

(TS) [REDACTED] On February 9, 2007, John Bellinger, then Legal Adviser to Secretary of State Condoleezza Rice, sent Bradbury an eleven-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 . . . .”;
- 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;
- 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;

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- 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;
- 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 . . . .";
- 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 . . . .";

(TS) [REDACTED] 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 114

(TS) [REDACTED] Bradbury responded on February 19, 2007, with a nineteen-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 rejected almost all of Bellinger's comments, including his criticism of forced nudity and extended sleep deprivation.

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(TS) [REDACTED] Bradbury's memorandum was issued on July 20, 2007, contemporaneously with President Bush's executive order. 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. After 79 pages of densely-reasoned analysis, relying in part on the reasoning and conclusions of the Bradbury Memo, the Combined Techniques Memo, and the Article 16 Memo, the 2007 Bradbury Memo concluded that the use of the EITs in question did not violate the DTA, the War Crimes Act, or Common Article 3.

(TS) [REDACTED] In concluding that the 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."<sup>100</sup> 2007 Memorandum at 30-31.

(TS) [REDACTED] On April 12, 2007 and again on August 2, 2007, Bradbury testified before the Senate Select Committee on Intelligence 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

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<sup>99</sup> (TS) [REDACTED] Bradbury also told us that as a result of the policy review the CIA had commenced in December 2005, and pursuant to the agency's subsequent understanding with Senator McCain, the Director made the decision, on policy grounds, to drop the use of the waterboard from the program.

<sup>100</sup> (TS) [REDACTED] The 2007 Bradbury Memo again cited the CIA Effectiveness Memo to support its conclusion that the use of EITs was not arbitrary. 2007 Memo at 31.

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government interest involved. Bradbury emphasized that, with regard to the CIA interrogation program, the government interest was of the "highest order." Bradbury April 2007 SSCI Testimony at 2-3.

(TS) [REDACTED] Bradbury stated that the War Crimes Act differed from the torture statute because, while the torture statute required "prolonged mental harm," the War Crimes Act required 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.*

(TS) [REDACTED] Finally, Bradbury explained that 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. Instead, to violate Common Article 3, humiliating and degrading treatment must rise to the level of an 'outrage upon personal dignity.'" *Id.*

(TS) [REDACTED] Bradbury provided the Committee with a written analysis of specific interrogation techniques under the new legal standards, and concluded that nudity, sleep deprivation, and dietary manipulation were permissible techniques under these standards.

## (U) II. ANALYSIS

### (U) A. Legal Standards

(U) 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 case is pending.<sup>101</sup> In this case, the legal advice in question was rendered in the District of Columbia. Therefore, the District of Columbia Rules of Professional Conduct

<sup>101</sup> (U) 28 C.F.R. § 77.3. These regulations implement Title 28, section 530B of the U.S. Code, which provides that an "attorney for the Government is subject to the state laws and rules, and local Federal court rules governing attorneys in each State where such attorney engages in that attorney's duties . . . ." The term "attorney for the Government" includes "any attorney employed in . . . a Department of Justice agency." 28 C.F.R. § 77.2.



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(D.C. Rules) are applicable.<sup>102</sup>

(U) 1. The Duty of Competence

(U) Rule 1.1(a) of the D.C. Rules 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." Rule 1.1 (b) states that: "A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters."

(U) Comment 2 to the rule identifies the following legal skills as essential: "the analysis of precedent, the evaluation of evidence, and legal drafting." Comment 5 adds that "[c]ompetent 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. . . . 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."

(U) We reviewed specific examples of "methods and procedures meeting the standards of competent practitioners" in cases cited in the ABA's Annotated Model Rules of Professional Conduct (5<sup>th</sup> ed. 2003) and in other reported decisions in which courts have judged the competence of attorneys' written work.<sup>103</sup> We also consulted some of the textbooks and treatises used to teach basic legal method, analysis and drafting to law students and other legal professionals. Finally, we reviewed a May 16, 2005 Memorandum by OLC's then Acting AAG Steven Bradbury, captioned "Best Practices for OLC Opinions" (OLC Best Practices

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<sup>102</sup> (U) In addition, we note that Judge Bybee, Patrick Philbin and [REDACTED] are all members of the District of Columbia Bar. Philbin is also a member of the Massachusetts bar. John Yoo is a member of the Pennsylvania bar. Those jurisdictions have all adopted the American Bar Association's (ABA) Model Rules of Professional Conduct, with no significant changes, and the rules applicable to this matter are identical in substance.

<sup>103</sup> (U) Such cases generally arise in the context of bar disciplinary proceedings, legal malpractice actions, the consideration of sanctions under Fed. R. Civ. P. 11, or judicial criticism that stops short of sanctions. See Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk Univ. L. R. 1 (1997).

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Memo).<sup>104</sup> Based on our review of those materials, we concluded that the following minimum standards of competence apply to Department attorneys who provide written legal advice to executive branch clients.

(U) As specifically noted in Comment 2 to Rule 1.1, the analysis of precedent is an essential element of competent legal advice. On a very basic level, this requires the ability to research the law and to identify controlling legal authority. See, e.g., *Massey v. Prince George's County*, 907 F. Supp. 138, 142 (D. Md. 1995) ("to provide competent representation [under Rule 1.1], a lawyer must be able to research the law") (quoting Jacobstein and Mersky, *Fundamentals of Legal Research* 13 (5th ed.)); William P. Statsky and R. John Wernet, Jr., *Case Analysis and Fundamentals of Legal Writing* 161-165 (1995) (Statsky & Wernet); Charles R. Calleros, *Legal Method and Writing* 77-81 (5th ed. 2006) (Calleros). An attorney must be able to distinguish controlling authority from persuasive authority or non-authority, and to determine whether the facts and law of a case are analogous to the matter under consideration. David J. Smith, *Legal Research and Writing* 203-210 (1996) (Smith); Statsky at 161-172; Calleros at 77-81.

(U) Conclusions of law should be supported by relevant authority. See, e.g., *In re Shepperson*, 164 Vt. 636 (1996) (court found, in bar disciplinary proceeding, that attorney's briefs fell below minimum standards because they failed to cite legal authority, contained numerous citation errors, and inaccurately represented cited cases); *Smith v. Town of Eaton, Indiana*, 910 F.2d 1469, 1471 (7th Cir. 1990) (court criticized counsel, citing Rule 1.1 and noting that a court "cannot be called upon to supply the legal research and organization to flesh out a party's arguments"); *Borowski v. DePuy, Inc.*, 850 F.2d 297, 304 (7th Cir. 1988) (legal claims with no support in existing law merit Rule 11 sanctions). See also, Michael D. Murray and Christy Hallam DeSanctis, *Objective Legal Writing and Analysis* 175-176 (2006) (Murray and DeSanctis); OLC Best Practices Memo at 2-3 ("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.").

(U) Legal research must be sufficiently thorough to identify all current, relevant primary authority. Christina L. Kunz et al., *The Process of Legal Research*

<sup>104</sup> (U) 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."

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2-3 (1989) (Kunz). See *United States v. Russell*, 221 F.3d 615, 620 (4<sup>th</sup> 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").

(U) Adequate steps must be taken to identify any subsequent authority that affirms, overrules, modifies or questions a cited authority. 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 United States 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 Shepardized his principle [sic] authority" and failed to identify later decisions that limited the cited authority to its facts); Calleros at 177-178.

(U) Secondary authority should be relied upon only when relevant primary authority is not available.<sup>105</sup> Murray and DeSanctis at 82-83. See *Randall v. The Salvation Army*, 100 Nev. 466, 470-471 (1984) (court declined to consider arguments supported solely by citation to secondary authority).

(U) Legal authorities must be described and cited accurately. *Wallace Computers Services, Inc. v. David Noyes & Co.*, 1994 WL 75201 at \*1 (N.D. Ill.) (court noted that the defendant's citation of three cases "in an inappropriate, out of context manner" was sufficiently misleading to justify sanctions); *Jones v. Hamelman*, 869 F.2d 1023 (7<sup>th</sup> Cir. 1989) ("We do not feel it is unreasonable to expect carefully drafted briefs clearly articulating the issues and the precise citation of relevant authority for the points in issue from professionals trained and educated in the law"); Kunz at 3; Smith at 172. See OLC Best Practices Memo at 3 (opinions "must undergo a thorough cite check by our paralegal staff to ensure

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<sup>105</sup> (U) "Primary authority includes constitutions, treaties, statutes and local ordinances, administrative rules and regulations, and judicial opinions. . . . Secondary authorities, such as treatises, restatements of the law, and law review articles, do not directly supply the rule of law in a legal dispute [and have] no mandatory or binding effect." Calleros at 78.

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the accuracy of all citations").

(U) Selective quotations that omit relevant information are at worst, misrepresentations, and at best, reflect sloppy research and writing. See *Northwestern National Insurance Co., v. Guthrie*, 1990 WL 205945 (N.D. Ill. 1990) (court assumed counsel's "glaring omission" of sentence explaining exception to a quoted rule was "the result of sloppy research and writing, and not an intentional effort to mislead or misdirect").

(U) 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; Statsky at 179. 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.<sup>106</sup>

(U) In order to determine whether the attorneys who drafted the Bybee Memo, the Classified Bybee Memo, and the Yoo Memo met the minimum standards of competence and objectivity that apply to Department attorneys, we reviewed the memoranda in question and identified the legal arguments and conclusions the authors presented. We examined the logic, 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 complete, accurate and current view of the law at the time the memoranda were written.

(U) The commentary to Rule 1.1 explains that the degree of thoroughness and attention an attorney is required to devote to a matter is determined by the importance and significance of that matter. See D.C. Rule 1.1, comment 5. 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.

(U) It is universally recognized that "the right to be free from official torture

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(U) While identifying and analyzing reasonable counterarguments is an important element of competent legal writing, it is also mandated by D.C. Rule 2.1 ("Advisor"), discussed below.

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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 (9<sup>th</sup> Cir. 1992), *cert. denied*, 507 U.S. 1017 (1992). See also, e.g., *Filartiga v. Pena-Orala*, 630 F.2d at 884.<sup>107</sup> It therefore seems self-evident 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 thoroughness and attention.

(U) 2. **The Duty to Exercise Independent Professional Judgment and to Render Candid Advice**

(U) 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"), to provide candid, realistic advice. The OLC Best Practices Memo observed 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.

(U) Rule 2.1 requires an attorney to "exercise independent professional judgment and render candid advice."<sup>108</sup> This requirement is further explained in the commentary as follows:

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

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<sup>107</sup> (U) "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).

<sup>108</sup> (U) 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. ABA, Annotated Rules of Professional Conduct, Preamble and Scope at ¶ 14 (6<sup>th</sup> ed. 2007); D.C. Rules, Scope at ¶ 1.

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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.

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

[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 . . . .

[The] position to be asserted must be one which the lawyer in good faith believes is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. This requires that there is some realistic possibility of success if the matter is litigated.

(U) We found little guidance for application of this standard in the case law and professional literature. We therefore approached our Rule 2.1 analysis by considering, as a threshold matter, whether there was evidence that the client desired a particular result or outcome, and whether the attorney was aware of the desired result. If so, we looked for the following acts or omissions by the attorney, all of which we considered evidence that the attorney failed to meet the obligations of Rule 2.1:

1. Exaggerating or misstating the significance of authority that supported the desired result;
2. Ignoring adverse authority or failing to discuss it accurately and fairly;
3. Using convoluted and counterintuitive arguments to support the desired result, while ignoring more straightforward and reasonable arguments contrary to the desired result;

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4. Adopting inconsistent reasoning or arguments to favor the desired result;
5. Advancing frivolous or erroneous arguments to support the desired result.

(U) We then considered whether the evidence, taken as a whole, established by a preponderance of the evidence that the attorney violated his duty to provide a straightforward, candid and realistic assessment of the law, without regard to the outcome desired by the client.

(U) As discussed below, our review of the Bybee Memo and the Yoo Memo revealed numerous failures of scholarship and analysis resulting in violations of Rules 1.1 and 2.1. While it may be that no single one of those failures, considered in isolation, would compel a finding of less than competent representation, we concluded that the many instances of unsupported arguments, incomplete analysis, failure to discuss adverse authority, and mischaracterization of precedent compelled the conclusion that the authors of the Bybee Memo and the Yoo Memo failed to meet their obligations under Rule 1.1 and thus committed misconduct.

(U) We also found evidence that the authors of the Bybee Memo and the Yoo Memo tailored their analysis to reach the result desired by the client. In many instances, the authors exaggerated or misstated the significance of cited legal authority, failed to acknowledge or fairly present adverse authority, took inconsistent approaches to favor the desired result, and advanced convoluted or frivolous arguments. Accordingly, we concluded that they also violated their duty under Rule 2.1 to provide a straightforward, candid and realistic assessment of the law.

**(U) B. Analysis of the Bybee Memo and the Yoo Memo**

(U) As noted, the withdrawal of two OLC opinions – the Bybee and Yoo Memos – by the same administration within such a short time was unprecedented. Therefore, we initially focused on those memoranda, and particularly the sections that were set aside or modified by the Department in 2004. We found the withdrawal of certain arguments and conclusions of law 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.

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(U) 1. **The Bybee Memo Did Not Constitute Competent Legal Advice Within the Meaning of Rule 1.1**<sup>109</sup>

(U) As discussed in detail in the following sections, we found errors, omissions, misstatements, and illogical conclusions in the Bybee Memo. We found that these problems resulted in incompetent legal advice from the OLC on this issue. As discussed above, "the required attention and preparation [to a legal matter] are determined in part by what is at stake."<sup>110</sup> In this matter, we concluded that the legal advice was of critical importance to the CIA and the White House and demanded the highest degree of care.

(U) The failure to provide competent legal advice to the CIA and White House on this issue constituted a violation of Rule 1.1. In the paragraphs that follow, we discuss seven areas of the Bybee Memo which we found, taken together, constituted incompetent legal advice.<sup>111</sup>

(U) a. **Severe Pain**

(U) 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.

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<sup>109</sup> (U) 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.

<sup>110</sup> (U) D.C. Rule 1.1, Comment 5.

<sup>111</sup> (U) Our view that the memoranda did not constitute competent legal advice was shared by others we interviewed. 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?" Jack Goldsmith found that key portions of the memoranda were "plainly wrong." 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.



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Various commentators described the definition as "absurd,"<sup>112</sup> "strained logic,"<sup>113</sup> or "bizarre."<sup>114</sup> After reviewing the analysis and the authority cited in the Bybee Memo, we concluded that the reasoning underlying this legal conclusion was illogical and unsupported by conventional legal analysis.

(U) The analysis began with the assertion that "Congress's use of the phrase 'severe pain' elsewhere in the United States Code can shed more light on its meaning." Bybee Memo at 5. In support of that proposition, the memorandum quoted the following language from *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100 (1991): "[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." Bybee Memo at 5 (quoting *West Virginia University Hospitals, Inc. v. Casey*).<sup>115</sup>

(U) The Bybee Memo went on to state that "[s]ignificantly, the phrase 'severe

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<sup>112</sup> (U) David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *The Torture Debate in America* 58, (Karen J. Greenberg ed., 2006).

<sup>113</sup> (U) 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. & Policy 409, 434 (2005).

<sup>114</sup> (U) Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memo*, 1 J. Nat'l Security L. & Policy 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.").

<sup>115</sup> (U) The quoted excerpt omitted a qualifying introductory phrase: "Where a statutory term presented to us for the first time is ambiguous, we construe . . . ." *Casey* at 100. Thus, under *Casey*, the Bybee Memo should have demonstrated that the term "severe pain" was ambiguous before turning to other statutory sources. One way of doing so 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.").

(U) However, any difficulty in interpreting "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). The Bybee Memo's attempt to clarify the term by associating it with "organ failure or death" was, if anything, more confusing than the plain language of the statute. There are many forms of death and organ failure, but there is no level of physical pain that can logically be associated with either event.

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pain' appears in statutes defining an emergency medical condition for the purpose of providing health benefits," and cited several nearly identical statutes that defined the term "emergency medical condition" as

[A medical condition] 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 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)).

(U) 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.<sup>116</sup>

(U) The excerpt from *West Virginia University Hospitals, Inc. v. Casey* quoted in the Bybee Memo did not include the authority cited by the Court in that case –

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<sup>116</sup> (U) This conclusion is restated several times in the Bybee Memo:

- (1) 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");
- (2) 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");
- (3) 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
- (4) 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").

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2 J. Sutherland, *Statutory Construction* § 5201 (3d F. Horack ed. 1943) – which discusses the “in pari materia” canon of statutory construction. That 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*.” *Id.* “Statutes are considered to be in pari materia . . . when they relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object.”<sup>117</sup> *Id.* at § 5202. *Accord*, e.g., 82 CJS *Statutes* § 352 (2006); 73 Am. Jur. 2d *Statutes* § 103 (2006); Black’s Law Dictionary (7<sup>th</sup> ed. 1990).

(U) The current edition of Sutherland also notes that

where the same subject is treated in several acts having different objects the statutes are not in pari materia. “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)). *Accord*, 82 CJS *Statutes* § 352 (“another dissimilar statute generally is not persuasive in construing a statute”) (footnote omitted); 73 Am. Jur. 2d *Statutes* § 103 (“statutes which have no common aim or purpose, and which do not relate to the same subject, thing, or person are not in pari materia”) (footnote omitted).

(U) Many United States Supreme Court opinions have discussed the in pari materia doctrine in greater detail than the one case cited in the Bybee Memo. *See*, e.g., *Vitebo v. Friedlander*, 120 U.S. 707 (1887) (“laws in pari materia, or upon the same subject-matter, must be construed with a reference to each other”) (emphasis added); *Ehrlenburg, et al. v. United States*, 409 U.S. 239 (1972) (statutes are in pari materia only if they “were intended to serve the same function”) (citations omitted); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (“Although we generally presume that identical words used in different parts of the same act are intended to have the same meaning, the presumption is not rigid, and

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<sup>117</sup> (U) The current edition of Sutherland’s treatise, N. Singer, *Sutherland on Statutes and Statutory Construction* (6<sup>th</sup> ed. 2000) (Sutherland), was available in the main DOJ library when the Bybee Memo was written. In fact, that treatise was cited elsewhere in the Bybee Memo to define the doctrine “expression unius est exclusio alterius.” Bybee Memo at 8.

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the meaning of the same words well may vary to meet the purposes of the law") (citation and internal quote marks omitted) (emphasis added).

(U) We know of no authority, and the Bybee Memo cited none, in support of the proposition that identical words or phrases in two unrelated statutes are relevant in interpreting an ambiguous term. Because the medical benefits statutes relied upon in the Bybee Memo were unrelated to the torture statute, we concluded that it was unreasonable to use the language of those statutes to define terms used in the torture statute.<sup>118</sup>

(U) In his OPR interview, Bybee explained his use of the medical statutes:

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.

(U) Although Bybee stated that he did not rely upon the in pari materia doctrine, he pointed to no other authority for his use of the medical benefits statutes. Moreover, as noted, the sole authority cited in the Bybee Memo - the

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(U) The Bybee Memo acknowledged that the benefits statutes "address a substantially different subject from" the torture statute, but asserted, without citing any authority, that "they are nonetheless helpful for understanding what constitutes severe physical pain." Bybee Memo at 6.

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Casey case – for turning to the medical benefits statutes was premised upon the in pari materia doctrine. As such, we found that the section on severe pain in the Bybee Memo was not supported by relevant legal authority.

(U) As noted by a number of critics, the Bybee Memo's definition of severe pain could be interpreted as advising interrogators that they may legally inflict pain up to the point of organ failure, death, or serious physical injury.<sup>119</sup> Indeed, several early 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 removed the reference to "broken bones" and 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.

(U) b. **Specific Intent**

(U) The torture statute states that in order to constitute torture, an act must be "specifically intended to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2340(1). In examining this element of the statute, the Bybee Memo engaged in a lengthy discussion of the common law concepts of general and specific intent, drawing on language from a handful of Supreme Court cases and secondary authorities to suggest that under certain circumstances, it would be difficult for the government to prove that a government interrogator acted with the requisite intent to violate the torture statute.

(U) In making such a broad finding, the Bybee Memo failed to adequately analyze the legal complexities of the issue of specific intent, and thus failed to adequately advise the client on the availability of the defense. As the Levin Memo later 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

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<sup>119</sup> (U) See, e.g., Andrew C. McCarthy, *A Manufactured Scandal*, National Review Online, June 25, 2004, <http://www.nationalreview.com/mccarthy/mccarthy200406250856.asp> (to "equate 'severe physical pain' with pain 'like that accompanying death . . . ' would suggest that any pain which is not life-threatening cannot be torture.").

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R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 n. 79 (2d ed. 2003)).

(U) The United States 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.<sup>120</sup>

(U) 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).

(U) The *Bailey* Court observed that "[i]n a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *Bailey* at 405. However, "[i]n the case of most crimes, the limited distinction between knowledge and purpose has not been considered important since there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the result[s]." *Id.* at 404 (quoting *United States Gypsum* at 445) (internal quotation marks omitted).

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(U) 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* at 403 (quoting W. LaFave & A. Scott, *Handbook on Criminal Law* § 28, 201-202 (1972)).

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(U) 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 found that "[t]he specific intent required . . . includes *reckless disregard* for the interests of the plan." *United States v. Krinsky*, 230 F.3d 855 860-861 (6<sup>th</sup> Cir. 2000) (emphasis added). See also, *United States v. Woods*, 877 F.2d 477, 480 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 1991) (district court correctly instructed the jury that reckless disregard is equivalent to intent to injure or defraud).

(U) In an obstruction of justice case, the specific intent issue was addressed as follows:

We see no need to undertake an extended excursion into the subtleties of specific intent. In our view, the defendant need only have had *knowledge or notice* that success in his fraud would have likely resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one's acts.

*United States v. Neiswender*, 590 F.2d 1269, 1273 (4<sup>th</sup> Cir. 1979) (emphasis added).

(U) The current trend, as noted by the Supreme Court in *Bailey*, is exemplified by the Model Penal Code. Thus, "the ambiguous and elastic term 'intent' [has been replaced] with a hierarchy of culpable states of mind . . . , commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence." *Bailey* at 403-404 (citing W. LaFare & A. Scott, Handbook on Criminal Law 194 (1972) and American Law Institute, Model Penal Code § 2.02 (Prop. Off. Draft 1962)).

(U) This trend is also reflected in the current model jury instructions for federal criminal cases. 1A Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions § 17.03 (5<sup>th</sup> ed. 2000 & 2006 Supp.) (Federal Jury Instructions). That treatise's circuit by circuit survey on the subject includes the following observation:

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No jury instruction is provided or should be given for the term "specific intent" because the law has grown and now developed away from charging the jury on this concept. . . . Each of the jury instruction committees of the circuit courts of appeals have followed suit and discouraged the use of jury instructions on specific intent. Where a precise mental state is an element of the offense charged, that mental state should be clearly set out in the "elements of the offense charged" instruction to the jury.

*Id.*

(U) None of the uncertainty or ambiguity of federal case law was reflected in the Bybee Memo's analysis.<sup>121</sup> As such, the memorandum failed to adequately advise the client of the state of the law. Instead, the memorandum made broad assertions about the torture statute's specific intent requirement and based those conclusions on brief excerpts from a limited number of cases or, more commonly, on secondary sources.

(U) An example of the Bybee Memo's failure to accurately present relevant authority lies in the memorandum's analysis of *Ratzlaf v. United States*, 510 U.S. 135 (1994). The first paragraph of the Bybee Memo's discussion of specific intent included a citation to *Ratzlaf*, and summarized that case as follows:

[I]n *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.

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<sup>121</sup> (U) The omission is surprising in light of the fact that *Bailey*, which commented on the complexity and ambiguity of the issue, was cited in the memorandum's specific intent discussion and elsewhere in the memorandum. The Levin Memo noted the complexity and ambiguity of this area of the law, 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 and 16 n. 27.



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Bybee Memo at 3 (citing and quoting *Ratzlaf* at 141). The summary 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.

(U) However, the *Ratzlaf* decision did not address the meaning of specific intent. 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* at 136-137 and 141-149. 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*).

(U) In addition, the Bybee Memo has been criticized for implying that an interrogator who knowingly inflicted severe pain with some other objective, or goal, in mind (such as obtaining information) would not violate the torture statute. *See, e.g.,* Andrew C. McCarthy, *supra*, ("the 'specific objective' qualification [in the Bybee Memo] seems especially unworthy, conflating the separate legal (and common sense) issues of intent and motive"). The memorandum suggested as much in several instances, in statements such as "the infliction of . . . pain must be the defendant's precise objective" or "a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering." Bybee Memo at 3-4.

(U) In response, the Levin Memo explicitly stated 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, 200-201 (1991)).

(U) Finally, the Bybee Memo's discussion of a potential good faith defense to violation of the torture statute is overly simplistic. 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

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defendant's belief." *Id.*

(U) 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 applied only in fraud or tax prosecutions. See Federal Jury Instructions § 19.06 at 857 ("The defense of good faith is discussed in the context of mail, wire, and bank fraud, and in tax prosecutions, *infra.*").<sup>122</sup>

(U) The Bybee Memo failed to acknowledge the possibility that a court might refuse to extend the good faith defense to a crime of violence such as torture. For example, in *United States v. Wilson*, 721 F.2d 967 (4<sup>th</sup> 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 "[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.

(U) 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 (8<sup>th</sup> 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 (6<sup>th</sup> 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"). See also S. Exec. Rep. No. 101-30 at 36 (App. A) (1990) (changes to U.S. CAT understanding regarding "acquiescence" of public officials to torture intended "to make it clearer that both actual knowledge and willful blindness fall within the meaning of acquiescence."). Thus, a CIA interrogator who argued that he lacked the specific intent to torture, based on information provided to him by the CIA and the Bybee Memo, could be accused of deliberately ignoring contradictory information from outside sources.

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(U) 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.

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## (U) c. Prolonged Mental Harm

(U) The Bybee Memo's discussion of what constituted "prolonged mental harm" under the torture statute made conclusions that were unsupported by legal authority. In an introductory paragraph, the Bybee Memo stated that "[f]or purely mental pain or suffering to amount to torture . . . it must result in significant psychological harm of significant duration, e.g., lasting for months or even years." Bybee Memo at 1. This analysis was not based on any judicial interpretation or legislative history. Rather, it is based on a summary finding by the authors that "prolonged mental harm" is harm "that is endured over some period of time." Bybee Memo, Part I.C.1. The authors went on to assert that the mental harm must be "lasting, though not necessarily permanent," and that the mental stress of a typical police interrogation would not violate the statute, but "the development of a mental disorder such as posttraumatic stress disorder, which can last months or even years . . . might satisfy the prolonged harm requirement." *Id.* The Bybee Memo noted that the phrase "prolonged mental harm" appeared nowhere else in the United States Code, and cited no other legal authority to support its conclusion that "prolonged mental harm" would have to last "months or even years" to constitute evidence of torture.

(U) The Levin Memo conducted a similar analysis but rejected the Bybee Memo's conclusion that mental harm must last months or years, noting that "[a]lthough we believe that the mental harm must be of some lasting duration to be 'prolonged,' to the extent that that formulation was intended to suggest that the mental harm would have to last for at least 'months or even years,' we do not agree." Levin Memo at 14, n. 24.

(U) Based on our review, we concluded that the Bybee Memo's conclusion that mental harm must last months or years in order to constitute evidence of torture was supported by no legal authority.<sup>123</sup>

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<sup>123</sup> (U) This section of the Bybee Memo also incorporated, in a somewhat expanded form, the paragraph from Yoo's July 13, 2002 letter to Rizzo, in which he stated that specific intent to cause severe mental pain or suffering could be negated by a showing of good faith. The memorandum advised the client that a "defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience." Bybee Memo at 8. The final draft of the Bybee Memo retreated somewhat from Yoo's and [REDACTED] view of the law in earlier drafts. The following sentence, which appeared in drafts of the Bybee Memo as late as July 31, 2002, was deleted from the final version: "[I]f a defendant threatens a prisoner with the imminent death of his fellow prisoners fully knowing that prolonged mental harm will result from this threat, but he does so solely to extract information

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(U) d. Ratification History of the United Nations  
Convention Against Torture

(U) The Bybee Memo's analysis of this issue was incomplete and misleading. 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 mental and physical harm." Bybee Memo at 16. Drawing 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 CAT is "in substance not different from" pain that is "excruciating and agonizing."<sup>124</sup>

(U) The memorandum failed to disclose that those conditions were never ratified by the Senate, in part because, "in number and substance, [they] 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 from human rights groups, the American Bar Association, and members of the Senate Foreign Relations Committee, the 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*, 101<sup>st</sup> Cong. 8-10 (1990) (Senate Hearing) (testimony of Hon. Abraham D. Sofaer, Legal Adviser, Department of State).

(U) The Bybee Memo minimized the importance of the revision, stating that "it might be thought significant that the Bush administration 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 'excruciating and agonizing' mental pain." *Id.* at 19.

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from the prisoner, the defendant has not acted with specific intent." July 31, 2002 draft at 8.

<sup>124</sup> (U) *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 2 (citation and footnote omitted).

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(U) It is inaccurate and misleading to state that the Reagan administration language was changed solely to clarify the definition of mental pain. While that was one reason for the revisions, it was addressed by inserting a detailed definition of mental pain or suffering. However, it is clear from the ratification history that the Bush I administration's proposed definition, 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 . . . ." Senate Hearing at 9-10 (Sofaer testimony).

(U) Finally, the Bybee Memo's almost exclusive reliance on the Reagan administration's proposed conditions is difficult to understand, since those conditions were never ratified by the Senate, and should 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 are effective only if ratified or acceded to by the United States with the advice and consent of the Senate).

**(U) e. United States Judicial Interpretation**

(U) Part III of the Bybee Memo accurately stated 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.

**(U) (1) Implementation of Article 3 of the Convention Against Torture**

(U) 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). Like the CAT, the 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

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does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.”)

(U) At the time the Bybee Memo was being drafted, a number of courts had already interpreted the regulation’s definition, providing additional examples of how courts have distinguished between torture and less severe conduct. *E.g.*, *Al-Saher v. I.N.S.*, 268 F.3d 1143 (9<sup>th</sup> Cir. 2001); *Kourteva v. I.N.S.*, 151 F. Supp. 2d 1126 (N.D. Cal. 2001); *Khanuja v. I.N.S.*, 11 Fed. Appx. 824 (9<sup>th</sup> Cir. 2001). While the case law and the regulations are generally consistent with the Bybee Memo’s conclusion that torture is an aggravated form of cruel, inhuman, and degrading treatment, a thorough and competent discussion of the issue would have identified and discussed these cases.<sup>125</sup>

**(U) (2) The Torture Victim Protection Act**

(U) 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 and 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 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, in a two-and-a-half page discussion, the brutal physical treatment that the court found to constitute torture in that case. Bybee Memo at 24-27. Thirteen additional TVPA cases were summarized in an appendix to the memorandum.

(U) 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, “there are no cases that

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(U) As discussed below, one of the cases, *United States v. Cornejo-Barreto*, 218 F.3d 1004, 1016 (9<sup>th</sup> Cir. 2000), included language that undercuts the Bybee Memo’s analysis of the necessity defense.

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analyze what the lowest boundary of what constitutes torture." [sic] *Id.*

(U) That assertion was misleading. In fact, conduct far less extreme than that described in *Mehinovic v. Vuckovic* was held to constitute torture in one of the TVPA cases cited in the appendix to the Bybee Memo. That case, *Dalbierti v. Republic of Iraq*, 146 F. Supp. 2d 146 (D.D.C. 2001), 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. *Id.* 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.* The court made no findings regarding severe pain and only general findings of psychological harm in concluding that the claimants were entitled "to compensation for their mental and physical suffering during their incarceration, since their release, and in the future" *Id.*

**(U) f. International Decisions**

(U) 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. (sec. 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.

(U) 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 extreme 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

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applied only where extreme circumstances exist.” *Id.* at 2, 31 (emphasis added).<sup>126</sup> We therefore concluded that the memorandum’s discussion of the two foreign cases was intended to add support to its “aggressive” definition of torture.<sup>127</sup>

(U) (1) *Ireland v. the United Kingdom*

(U) 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: wallstanding (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.

(U) Based on our review of *Ireland v. U.K.*, we concluded that the Bybee Memo overlooked or ignored the following significant aspects of the European Court’s opinion:

- 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.*

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<sup>126</sup> (U) The suggestion that the two cases supported an aggressive interpretation of what constituted torture “under international law” was inaccurate. A competent 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 States. See Restatement (Third) of Foreign Relations Law of the United States at § 102 (summarizing the sources of international law).

<sup>127</sup> (U) In his OPR interview, Yoo acknowledged that his purpose in discussing the two foreign cases was not to gauge possible international reaction, but to show how other common law jurisdictions had addressed the issue of torture. Because of then prevailing disputes between the State Department and DOJ over the effect of international law “on the way American law was to be interpreted,” he prefaced his discussion by stating that it was intended to show “how other nations will likely react” to OLC’s interpretation. Yoo told us that he personally believes that international law “has no formal binding effect . . . but, you know, one part of common law is looking at how other reasonable people interpret similar phrases.”



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U.K. at ¶ 147(iv).

- The respondent government, the United Kingdom, did not contest the Commission's findings that the interrogation techniques constituted torture. *Id.* at ¶ 8(b).
- 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 the methods were illegal under domestic law. *Id.* at ¶ 100.
- 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.
- The case was decided by a seventeen 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.
- 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.

(U) A thorough and objective discussion of *Ireland v. U.K.* would have mentioned some or all of the above facts.<sup>128</sup> 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.<sup>129</sup>

<sup>128</sup> (U) 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, 1705-1706 (2005).

<sup>129</sup> (U) Much of that case law in fact supports the Bybee Memo's conclusion that the term "torture" should be applied to more severe forms of cruel, inhuman and degrading treatment. See, e.g., *Aksoy v. Turkey* at ¶ 63.

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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, since that case cited the definitions of torture and cruel, inhuman, and degrading treatment of the CAT. *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.

*Selmouni* at ¶ 101. Thus, *Selmouni* raised questions about the continuing validity of the European Court's findings in *Ireland v. U.K.* A thorough, candid assessment of the law would have included a discussion of that case.

(U) (2)

***Public Committee Against Torture in Israel v. Israel***

(U) 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 extreme 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.<sup>130</sup>

(U) 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:

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<sup>130</sup> (U) 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.

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- "[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."
- 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.' 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.

(U) 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.

(U) 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.

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(U) 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.*<sup>131</sup> 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.*

(U) 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.*

(U) 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.

<sup>131</sup> (U) The court added: "These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing." *Id.*

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(U) 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 never considered 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 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.<sup>132</sup> We concluded that the Bybee Memo's argument on this issue was based on the authors' speculation as to what the court may have intended to say, not the actual language and reasoning of the court's opinion, and that it therefore violated basic principles of legal reasoning and analysis.

(U) **g. The Commander-in-Chief Power and Possible  
Defenses to Torture**

(U) 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. Earlier sections were generally responsive to the CIA's request for advice concerning the limits on interrogation created by the torture statute. The last two sections went beyond that request and outlined circumstances under which acts of outright torture would not be prosecutable under the statute. Because of OLC's recognized role as the definitive interpreter of the law within the Executive Branch, these sections in effect constituted an advance declination of prosecution for future violations of the torture statute, notwithstanding Criminal Division AAG Chertoff's refusal to provide a formal declination.

(U) In 2004, these parts of the Bybee Memo were criticized by the 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

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<sup>132</sup> (U) 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] "isn'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."

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AAG Goldsmith concluded that the reasoning in those sections was erroneous.<sup>133</sup> When the Levin Memo appeared in late 2004, it referred briefly to Parts V and VI of the Bybee Memo, noted that those sections had been superseded, and concluded that further discussion was therefore unnecessary. Levin Memo at 2.

(U) 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 believed the sections were added 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."<sup>134</sup> However, Philbin recalled that he told Yoo the sections should be removed, and that Yoo responded, "they want it in there." 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 seeing a draft that did not contain them.

(U) 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 that section. 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 told Yoo, "Good, I'm glad you're addressing these issues."

(U) As discussed above, the two sections were drafted after the Criminal Division declined to provide an advance declination for the CIA's use of EITs. Based on this timing, we believe the sections were added to achieve indirectly the result they were unable to obtain - immunity for those who engaged in the application of EITs.

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<sup>133</sup> (U) Although Goldsmith initially reviewed and withdrew the Yoo Memo, that document incorporated the arguments and reasoning of the Bybee Memo.

<sup>134</sup> (U) 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."

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(U) (1) The President's Commander-in-Chief Power

(U) In Part V, the Bybee Memo in effect advised the client that the Department of Justice would not prosecute CIA interrogators for violating the torture statute during the questioning of al Qaeda suspects, because such a prosecution would be an unconstitutional interference with the President's Commander-in-Chief power. Critics both inside and outside the Department characterized this argument as a minority view, one that did not acknowledge or address more widely-held, mainstream views as to the scope of executive power.<sup>135</sup> We agreed with the criticisms of the opinion, and concluded that in light of the importance of the subject matter, the analysis in Part V was not adequately supported by authority.

(U) 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). In light of the overall tone of Part V, the fact that the purpose of the memorandum was to assess the lawfulness of EITs, and the fact that the Commander-in-Chief discussion was added to the memorandum within days of a request for a prospective declination of prosecution, we concluded that Part V was, in effect, a declaration that the Department of Justice would not prosecute CIA interrogators.

(U) The memorandum's reasoning can be summarized as follows:

- The United States is at war with al Qaeda. Part V. A.
- The President's Commander-in-Chief power gives him sole and complete authority over the conduct of war. 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

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<sup>135</sup> (U) 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 contained errors.

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upon the President's Commander-in-Chief power. 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. 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." Part V. C.; Introduction; Conclusion.

(U) The argument assumed, without explanation or reference to supporting authority, that enforcing the statutory prohibition against torture would somehow regulate or 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.<sup>136</sup> Notwithstanding the authors' careful choice of words, interrogation methods that violate the torture statute are acts of torture.

(U) 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 and 12 (H.L.) (discussing the English common law's rejection of interrogation by torture and Parliament's abolition in

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(U) 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 one of an unspecified number of "unconstitutional laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States." Bybee Memo at 39.



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1640 of the royal prerogative to interrogate by torture);<sup>137</sup> Waldron, *Torture and Positive Law*, *supra*, at 1719-1720 (2005) (discussing the 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, 673-679 (2004) (discussing the views of the framers of the Constitution on interrogation by torture).

(U) 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. In the absence of any reason to believe that the legal restrictions imposed by the torture statute are in conflict with the President's ability to conduct war, we concluded that Part V of the Bybee Memo was based upon an argument without legal support.

(U) 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.<sup>138</sup> Whatever the merits of this conclusion, it 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

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<sup>137</sup> (U) The House of Lords opinion is available online at [www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm](http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm).

<sup>138</sup> (U) The Bybee Memo asserted that "the Supreme Court has unanimously stated that it is 'the President alone [] who is constitutionally invested with the entire charge of hostile operations.'" Bybee Memo at 33-34 (emphasis added in Bybee Memo) (citing and quoting *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874)). The excerpted language overstated the significance of the Court's comment in *Hamilton*. The complete sentence is as follows:

Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject.

*Hamilton* at 87. In fact, the *Hamilton* decision can be read to support the view that Congress and the President have concurrent powers in this area. See *Hamilton* at 87-88.

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*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).

(U) 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.<sup>139</sup>

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<sup>139</sup> (U) In Part V, the Bybee Memo cited another OLC memorandum that discussed two of the relevant enumerated powers of Congress: the Captures Clause and the power to regulate the armed forces. 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 Transfer Memo) at 5-7). The Transfer Memo's discussion of the Captures Clause concluded that the word "captures" was limited to the capture of property, not persons, and that Congress therefore had no authority to make rules concerning captures of persons. Transfer Memo at 5. This conclusion was based on quotations from two historical sources that used the word "captures" in connection with the seizure of property, but did not mention persons. *Id.*

(U) The Transfer Memo also cited language in the Articles of Confederation that granted Congress power to establish "rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated." *Id.* (quoting Articles of Confederation, art. IX, reprinted in *Encyclopedia of the American Constitution* app. 2, at 2094 (Leonard W. Levy ed., 1986)). The Transfer Memo asserted that because persons cannot be divided or appropriated, the word "captures" as used in the Articles of Confederation must exclude persons. However, the language in question referred to "prizes," not "captures." A prize is a vessel or cargo captured by a nation at war and subject to condemnation or appropriation as enemy property. Black's Law Dictionary (8<sup>th</sup> ed. 2004). Thus, a "prize" can readily be "divided or appropriated."

(U) In fact, other historical sources refer to the capture of both persons and property. See,

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(U) Commentators and legal scholars have also 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, *supra* n. 112, at 68; Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. Nat'l Sec. L. & Policy 455, 461 (2005). As noted above, AAG Goldsmith and other OLC attorneys also criticized the omission in their review of the Yoo Memo. While 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, we believe a competent attorney providing objective advice to his client would have acknowledged its relevance to the debate.<sup>140</sup>

(U) Finally, in its discussion of presidential powers, the Bybee Memo neglected to acknowledge the executive's duty to "take Care that the Laws be

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e.g., Joseph Story, *Commentaries on the Constitution of the United States*, § 573 at 412 (reprinted 1987)(1833) (congressionally granted letters of marque and reprisal "contain an authority to seize the bodies or goods of the subjects of the offending state"); 3 The Papers of Alexander Hamilton (Harold C. Syrett et al., eds.) (reprinted 1979)(1801) (available at [http://press-pubs.uchicago.edu/founders/documents/al\\_8\\_11s11.html](http://press-pubs.uchicago.edu/founders/documents/al_8_11s11.html)), (discussing the power "to capture and detain . . . cruisers with their crews" and the right of warring parties "to capture the persons and property of each other") (emphasis added).

(U) In addition, the Transfer Memo inaccurately claimed that Congress has never enacted a statute addressing the treatment of enemy combatants. Transfer Memo at 6. In fact, the Transfer Memo itself mentioned three such statutes, *id.* at 9-12, but dismissed their relevance with the conclusory statement that "Congress may have acted outside the scope of its constitutionally granted powers in passing at least some of these statutes." *Id.* at 9, n. 15. A fourth statute addressing the treatment of enemy combatants, the Act of July 6, 1812, ch. 128, 2 Stat. 777 ("An Act for the safe keeping and accommodation of prisoners of war"), was perfunctorily dismissed as "at best . . . a recognition by Congress of powers that President Madison already enjoyed." Transfer Memo at 12-13. A Supreme Court case that took the contrary view of that statute, and which noted that Congress, not the President, has the power to regulate enemy persons and property, was cited in the Transfer Memo, but summarily dismissed as having been wrongly decided. Transfer Memo at 12 (citing *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814)).

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(U) 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.

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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.<sup>141</sup>

(U) Bybee defended the Commander-in-Chief section of the report, but stated that "at the time [he] had the impression that the section was not as fulsome as it might be." Bybee said he did not want the opinion to be overly long because he was "afraid that would overblow the question because this is more in the sense of sort of directing their attention to the issue."

(U) (2) Criminal Defenses to Torture

(U) 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 misinterpreted case law.<sup>142</sup>

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<sup>141</sup> (U) 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.").

<sup>142</sup> (U) See Luban, *supra* n. 112, 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.

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## (U) (a) The Necessity Defense

(U) 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 United States 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.

(U) Of course, any 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 United States Supreme Court or the United States Circuit Courts of Appeal.<sup>143</sup> At the time the Bybee Memo was drafted, the Supreme Court had discussed the necessity defense in two opinions: *United States v. Bailey supra*, and *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

(U) 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 it was not necessary 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* 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 defense could not meet its burden and that the necessity defense was therefore unavailable. *Id.*

(U) 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.

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<sup>143</sup> (U) Venue for violations of the torture statute could lie in any judicial district. 18 U.S.C. § 3238 (venue for offenses committed out of the jurisdiction of any 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).

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*Oakland* 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."<sup>144</sup>

(U) 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.<sup>145</sup> While the *Oakland* Court's comments about *Bailey* were arguably dictum, they nevertheless explicitly rejected the very proposition for which the Bybee Memo cited *Bailey*.<sup>146</sup>

(U) In addition, 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 (1<sup>st</sup> Cir. 2001); *United States v. Smith*, 160 F.3d 117 (2d Cir. 1998); *United States v. Paoello*, 951 F.2d 537 (3d Cir. 1991); *United States v. Cassidy*, 616 F.2d 101 (4<sup>th</sup> Cir. 1979);

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<sup>144</sup> (U) *Id.* at 490 and 490 n. 3. The Court revisited this issue in *Dixon v. United States*, 126 S.Ct. 2437 (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 2442. 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.*

<sup>145</sup> (U) A simple cite check of *Bailey* would have revealed the existence of *Oakland* and dozens of relevant federal appellate decisions.

<sup>146</sup> (U) During his interview with OPR, John 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."

(U) 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, "the document speaks for itself."

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*United States v. Gant*, 691 F.2d 1159 (5<sup>th</sup> Cir. 1982); *United States v. Singleton*, 902 F.2d 471, 472 (6<sup>th</sup> Cir.1990); *United States v. Mauchlin*, 670 F.2d 746 (7<sup>th</sup> Cir. 1982); *United States v. Griffin*, 909 F.2d 1222 (8<sup>th</sup> Cir.1990); *United States v. Schoon*, 955 F.2d 1238, 1239-1240 (9<sup>th</sup> Cir.1991); *United States v. Turner*, 44 F.3d 900 (10<sup>th</sup> Cir. 1995); *United States v. Bell*, 214 F.3d 1299 (11<sup>th</sup> 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).<sup>147</sup> See also Federal Jury Instructions, *supra*, at § 19.02 (surveying federal jury instructions and case law for coercion and duress defenses, including the necessity and justification defenses).<sup>148</sup>

(U) A review of these 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. While 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

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<sup>147</sup> (U) 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 "justification defense"). Several federal cases were also cited in the treatises relied upon by the Bybee Memo.

<sup>148</sup> (U) During his OPR interview, Judge 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.

(U) John 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.

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apprehension of death or serious bodily injury;<sup>149</sup>

(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 472-473.<sup>150</sup>

(U) A thorough and competent discussion of the necessity defense 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.

(U) The first element of the defense, as noted above, required a defendant to demonstrate as a preliminary matter that he faced an immediate, well-grounded threat of death or serious injury. It is difficult to imagine a real-world scenario in which a government interrogator with a prisoner in his physical custody would be able to demonstrate that he personally faced such a threat. *See, e.g., United States v. Perrin*, 45 F.3d 869, 874 (4<sup>th</sup> 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, however, United States v. Newcomb*, 6 F.3d 1129, (6<sup>th</sup> Cir. 1993) (justification defense should be understood to apply when a defendant acts to prevent harm to a third person, if threat of death or serious injury was immediate and well-

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<sup>149</sup> (U) 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., U.S. v. Turner*, 44 F.3d at 902.

<sup>150</sup> (U) 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. *E.g., United States v. Singleton*, 902 F.2d at 473 (citing *Bailey* at 399).

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grounded).<sup>151</sup>

(U) Another element of the federal defense that merited discussion was the requirement that a defendant prove that he had no reasonable, legal alternative to violating the law. As one court noted:

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. 1980), *cert. denied*, 450 U.S. 924 (1980).<sup>152</sup>

(U) 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.

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<sup>151</sup> (U) The Bybee Memo, in Part IV (International Decisions), briefly alluded to the "ticking time bomb" scenario, which is often used as moral justification for interrogation by torture. Bybee Memo at 31, n. 17. As many scholars have noted, that scenario is based on a number of unrealistic assumptions and has little, if any, relevance to intelligence gathering in the real world. See, e.g., Luban, *supra* n. 112, at 44-47; Kim Lane Sheppelle, *Hypothetical Torture in the "War on Terrorism,"* 1 J. Nat'l Security L. & Policy 285, 293-295, 337, 340 (2005); Henry Shue, *Torture*, 7 Phil. & Pub. Aff. 124, 141-43 (1978). Moreover, any reliance upon the "ticking time bomb" scenario to satisfy the imminence prong of the necessity defense would be unwarranted in this instance, since none of the EITs under consideration were designed or intended to produce immediate results. Rather, the goal of the CIA program was to gradually condition the detainee in order to break down his resistance to interrogation.

<sup>152</sup> (U) While 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).

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*Bailey* at 410.<sup>153</sup> Thus, a government official charged with torture would have the burden of proving that no other method of persuasion or interrogation would have prevented the harm in question. The Bybee Memo did not address this issue.

(U) 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. Again, it is difficult to imagine a real-world situation where this would be likely.

(U) 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).<sup>154</sup> As LaFave & Scott's treatise explains, in a passage not cited in the Bybee Memo, when a criminal statute expressly provides that a necessity defense is prohibited, or conversely, that it is available, the statute's determination is controlling. LaFave & Scott at 629.

(U) 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 that "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

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<sup>153</sup> (U) See also, *United States v. The Diana*, 7 Wall. (74 U.S.) 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").

<sup>154</sup> (U) 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 *U.S. v. Bailey* 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). See, however, *Oakland* 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").

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by the necessity defense." Bybee Memo at 41. In a footnote, the memorandum explained that argument as follows: the definition of torture in Convention Against Torture only applied when severe pain is inflicted for the purpose of obtaining information or a confession. *Id.* at n. 23. "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 went on to reason that when Congress defined torture under the torture statute and did not include 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.*

(U) 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.

(U) Of course, it would be far simpler and much more logical to conclude that if Congress had intended to allow the necessity defense to apply to the torture statute, it would 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 Bybee Memo's premise – that the wording of the CAT definition was "an attempt to indicate" that necessity should not be a defense to torture – is unreasonable, since the treaty explicitly provided elsewhere that necessity was not a defense to torture. CAT Art. 2(2). We concluded that the Bybee Memo's argument on this point was plainly frivolous.

(U) 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 explicitly prohibit the defense, the memorandum concluded,

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should be read as a decision by Congress to permit the defense. *Id.*

(U) 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. *U.S. v. Oakland Marijuana Buyers' Cooperative*, 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).

(U) 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.<sup>155</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (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. 64, 67 (1804)). See also Restatement (Third) of Foreign Relations Law of the United States at § 114 ("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.")

(U) More importantly, the Bybee Memo's convoluted arguments regarding congressional intent ignored directly relevant material in the ratification history of the CAT that undermined or negated its arguments. As the drafters of the Bybee Memo apparently 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.

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<sup>155</sup> (U) The authors of the Bybee Memo were able to recognize 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 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.

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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 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

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Pressler (April 4, 1990) (emphasis added)).<sup>156</sup>

(U) Moreover, in considering whether Congress had made a "determination of values" as to the applicability of the necessity defense to the torture statute, the Bybee Memo failed to consider the following provision of the United States Sentencing Guidelines:

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct . . . .

U.S.S.G. § 5K2.11 (Policy Statement). As one state court has held, when a legislature has addressed the factors that would give rise to the common law necessity defense in the sentencing provisions of a statute, it has in effect made a "determination of values" that the defense should not be available. *Long v. Commonwealth of Virginia*, 23 Va. App. 537, 544 (1966).

(U) While it can be argued that the guidelines do not constitute a legislative determination with respect to the entire body of federal criminal law, much of which predates Congress's creation of the United States Sentencing Commission in 1984 or the implementation of the Sentencing Guidelines in 1987, a thorough discussion of the necessity defense would have considered the relevance of U.S.S.G. § 5K2.11. If, as the Bybee Memo contended, Congress was aware of the Model Penal Code's definition of the necessity defense when it enacted the torture statute, thereby making a "determination of values" that the defense was available, Bybee Memo at 41, n. 23, it is equally reasonable to conclude that lawmakers were aware of the Sentencing Guidelines and intended that the defense's factors should be addressed at sentencing, rather than as a defense to criminal liability.

(U) 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

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(U) On the copy of the Senate report we found in [REDACTED] files, sections of the Reagan administration's proposed understanding regarding common law defenses and the Bush administration's explanation for its deletion were underlined or marked in the margins.

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assistance from the Department of Justice"). 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).<sup>157</sup>

(U) 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.

*United States v. Cornejo-Barreto*, 218 F.3d 1004, 1016 (9<sup>th</sup> Cir. 2000). Accord, e.g., *Filartiga v. Pena-Orala*, 630 F. 2d at 884.

(U) We also concluded that a thorough 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 and, to our knowledge, has never resulted in an acquittal. See *Oakland* at 491, n.4 ("we have never held necessity to be a viable justification for violating a

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<sup>157</sup> (U) In its most recent 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 States of America to the UN Committee Against Torture at ¶ 6 (June 29, 2005).

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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., *United States v. Singleton*, 902 F.2d at 472 (noting that a defense of justification is infrequently appropriate).

(U) We also found it significant that the memorandum failed to mention that the necessity defense is an affirmative defense, and that even if a court were to allow it, a defendant would bear the burden of proving each element of the defense by a preponderance of the evidence. E.g., *Bailey* at 415. Accord, MPC § 1.12(3)©; LaFave & Scott at § 3.01.

#### (U) (b) Self Defense

(U) The Bybee Memo's discussion of self-defense suffers from 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.<sup>158</sup> In addition, significant aspects of the CAT ratification history relating to the availability of the defense were ignored.

(U) The memorandum presented a two-page summary of the common law doctrines of self-defense and the defense of others, and acknowledged that those defenses would not ordinarily be available to an interrogator accused of torturing a prisoner who posed no personal threat to the interrogator. 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.*

(U) The only authority cited for the Bybee Memo's extension of the doctrine of self-defense was a law review article: Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280 (1989) (Moore Article). The author of that article was one person, not "leading scholarly commentators, or "some commentators," as he

<sup>158</sup> (U) The memorandum did mention one federal case, *United States v. Peterson*, 483 F.2d 1222, 1228-1229 (D.C. Cir. 1973), but only to quote its summary of what Blackstone wrote about self-defense in the mid-eighteenth century.

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was described in the Bybee Memo.<sup>159</sup>

(U) Moreover, Professor Moore's article was a theoretical exploration of the morality of torturing terrorists to obtain information. The article cited more 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 322-323.<sup>160</sup> 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

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<sup>159</sup> (U) 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 AAG Bybee questioned at that time whether the reference to "commentators" should be plural. In response, either [redacted] or Yoo changed "leading scholarly commentators" to "some leading scholarly commentators" and added another cite from the same issue of the *Israel Law Review* – 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 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., 17<sup>th</sup> ed. 2000). However, the Dershowitz article does not address the doctrine of self-defense – it discusses the possible application of the necessity defense to interrogators charged with using illegal methods and systematically committing perjury to conceal the practice. The passage apparently cited by the Yoo Memo offers the following comment:

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). We reviewed the entire Dershowitz article and concluded that it offers no support for the statement that "leading scholarly commentators believe" violations of the torture statute "would be justified under the doctrine of self-defense."

<sup>160</sup> (U) The author's conclusions were introduced with the phrases "to my mind," and "[m]y own answer to this question is . . . ." *Id.* at 323.

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argument that the authors misrepresented as a "standard" criminal law defense.<sup>161</sup>

(U) The Bybee Memo presented another unprecedented interpretation of the 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 United States 1 (1890)." *Id.* at 44. According to the memorandum, *Neagle* held that "a federal officer not only could raise self-defense or defense of another, but also could defend his actions on the ground that he was implementing the Executive Branch's authority to protect the United States government." *Id.* at 45. The Bybee Memo asserted that *Neagle* "suggests" that "the right to defend the national government can be raised as a defense in an individual prosecution." *Id.*

(U) We found the Bybee Memo's characterization of *Neagle* to be misleading. The question before the Court in *Neagle* was whether a Deputy Marshal assigned to protect Supreme Court Justice Stephen Field during his travels as Circuit Justice for the Ninth Circuit was acting "in pursuance of the laws of the United States" when he shot and killed a man who attacked Field. *Id.* at 41. The issue arose because Deputy Marshal Neagle was arrested and jailed on state murder charges after the incident. *Id.* at 7. The United States Court of Appeals for the Ninth Circuit ordered his release pursuant to a writ of habeas corpus, and the county sheriff, represented by the California Attorney General, appealed to the United States Supreme Court. *Id.* at 7.

(U) At the time, the 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." *Id.* at 40-41. The sole question before the Court was whether Neagle was acting "in pursuance of the laws of the United States" when he shot the attacker, and whether the Ninth Circuit had correctly ordered Neagle's release from the county jail where he was being held. *Id.*

(U) The Court reasoned that because a federal statute granted United States Marshals the same powers as state law enforcement personnel, and because a California sheriff would have had the duty to defend Justice Field, Neagle was

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<sup>161</sup> (U) The first Bush administration's proposal of CAT reservations, understandings and declarations to the Senate Foreign Relations Committee reveals that the administration 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).

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authorized by federal law to resist the attack, and "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.

(U) The *Neagle* Court did observe 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. However, the Court did not modify or enlarge the common law doctrine of self-defense. In fact, California's criminal self-defense statute was cited as the applicable law. *Id.* at 68 (citing and quoting section 197 of the Penal Code of California).<sup>162</sup>

(U) The Bybee Memo's assertion that *Neagle* would allow a government official accused of torture to "defend his actions on the ground that he was implementing the Executive Branch's authority to protect the United States government," Bybee Memo at 45, is an unreasonable and misleading characterization of the holding of *Neagle*.<sup>163</sup>

(U) The memorandum 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 United States Supreme Court cases. Bybee Memo at 45. Based on those authorities, the memorandum concluded:

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<sup>162</sup> (U) The Court summarized and quoted the statute as follows:

[H]omicide is justifiable when committed by any person "when resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person," or "when committed in defense of habitation, property, or person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony."

*Id.* at 68.

<sup>163</sup> (U) *Neagle*'s value as precedent is arguably limited by the unusual factual background of the case, very little of which was reported in the Court's opinion. See Robert Kroniger, *The Justice and the Lady*, in the Supreme Court Historical Society 1977 Yearbook, available at [http://www.supremecourthistory.org/04\\_library/subs\\_volumes/04\\_c02\\_c.html](http://www.supremecourthistory.org/04_library/subs_volumes/04_c02_c.html). See also, *Neagle* 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").

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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.

(U) However, 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.<sup>164</sup> 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.

**(U) h. Conclusion**

For the reasons cited in Sections a through g above, we found that the Bybee Memo did not constitute competent legal advice within the meaning of Rule 1.1. Accordingly, we concluded that the authors failed to meet their professional obligations under the rule.

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<sup>164</sup> (U) One of the cited cases, *United States v. Verdugo-Urquidez*, 494 United States 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.

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**(U) 2. The Bybee Memo and the Yoo Memo Did Not Represent Independent Professional Judgment and Candid Advice Within the Meaning of Rule 2.1<sup>165</sup>**

(U) The drafters of the Bybee Memo and the Yoo Memo told us that OLC was asked to provide an honest 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 statute's meaning and that they never intended to arrive at a foreordained result. Despite these assertions, we concluded that the memoranda did not represent independent professional judgment or candid legal advice, but were drafted to provide the client with a legal justification to engage in its planned course of conduct.<sup>166</sup>

(U) As an initial matter, we found ample evidence that the CIA was not looking for an objective, neutral explanation of the meaning of the torture statute. Rather, as John Rizzo candidly admitted, the agency was seeking "the Attorney General's blessing" to use EITs, 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, they adopted them wholesale from the SERE program, which incorporated techniques used by totalitarian regimes to extract intelligence or false confessions from captured United States airmen. OLC's approval was sought as a final step before putting the EITs into practice.

(U) We also found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda that supported that result. 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

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<sup>165</sup> (U) As discussed above, the analysis which follows applies equally to the March 14, 2003 Yoo Memo.

<sup>166</sup> (U) We were unable to determine why the Bybee Memo was issued, in light of the fact that the Classified Bybee Memo provided specific, detailed advice to the CIA on what was permissible in the interrogation of a specific individual. Goldsmith commented that it was "deeply strange" that two opinions were prepared. Rizzo told OPR that he had told Yoo that the unclassified opinion was not "essential" to what the CIA needed from the OLC.

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of the program.<sup>167</sup> As [REDACTED] told us, "my personal perspective was there could be thousands of American lives lost" if the techniques were not approved.

(TS) [REDACTED] Yoo provided the CIA with an unqualified, permissive statement regarding specific intent in his July 13, 2002 letter, and provided an equally permissive statement in the June-2003 bullet points he and [REDACTED] reviewed and approved for use by the CIA. Goldsmith viewed the Yoo 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 mock burial technique would violate the torture statute, he nevertheless told the client, according to Fredman and Rizzo, that he would "need more time" if they wanted it approved.

(TS) [REDACTED] 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] Finally, immediately after the Criminal Division stated that the Department would not provide an advance declaration of prosecution for violations of the torture statute, Yoo added two sections to the Bybee Memo that had the same practical effect.

(U) As set forth in this report, our review of the Bybee Memo led us to conclude that the OLC attorneys tailored their research and analysis to achieve the result desired by the client. This is particularly disturbing because of the role that OLC plays in the Executive Branch as the final arbiter on a large number of legal issues. Because of this unique role, the OLC Best Practices Memo specifically stated: "In general, we strive in our opinions for . . . a balanced presentation of

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<sup>167</sup> (TS) [REDACTED] On July 24, 2002, the CIA told the OLC attorneys that:

[w]ithout the water board, the remaining [EITs] would constitute a 50 percent solution and their effectiveness would dissipate progressively over time, as the subject figures out that he will not be physically beaten and as he adapts to cramped confinement.

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 . . . ."

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arguments on each side of an issue . . . , taking into account all reasonable counter arguments." OLC Best Practices Memo at 3. As demonstrated above, that practice was not followed in this case.

(U) For example, 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 by the common law doctrine of self-defense in fact supported that argument. Nor did the 1890 Supreme Court case, *In re Neagle*, provide any real support for the view that "the right to defend the national government can be raised as a defense in an individual prosecution." In addition, Yoo's conclusions about the broad scope of the Commander-in-Chief power were based upon a one-sided and idiosyncratic view of the Constitution.

(U) A case citing the "in pari materia" doctrine was unjustifiably relied upon to support an argument that language taken from an unrelated medical benefits statute was relevant by analogy to the torture statute. Another case describing the statutory meaning of "willful" was selectively used to misleadingly 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. The memorandum's authors exaggerated the significance of two foreign court decisions to support the conclusion that "under international law, an aggressive interpretation as to what amounts to torture [is permitted]."

(U) We also found several instances in which adverse authority was not discussed and its effect on OLC's position was not assessed accurately and fairly. For example, the Bybee Memo cited *United States v. Bailey* for the proposition that the United States Supreme Court "has recognized the [necessity] defense," but did not cite a later case, *United States v. Oakland Cannabis Buyers' Cooperative*, which explicitly rejected the same proposition.

(U) 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

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what constitutes torture."<sup>168</sup> However, another case, in which far less serious conduct was found to constitute torture, was relegated to the appendix and was not fully discussed.

(U) In taking the extreme position that acts of torture could not be punished under certain circumstances or could be justified by common law doctrines, the memoranda did not refer to or discuss the relevance of the Convention Against Torture Article 2(2), 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 was useful to them. Thus, they relied on it in two separate, convoluted arguments to support a permissive view of the torture statute.<sup>169</sup> 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."

(U) The authors of the memos also adopted inconsistent positions to advance a permissive view of the torture statute. The statute's provision outlawing "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 § 5.7, 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.

(U) However, in the discussion of self-defense that appeared later in the memoranda, the authors interpreted that authority differently to minimize possible problems with the defense. The same section of LaFave & Scott, along with the

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<sup>168</sup> (U) 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.

<sup>169</sup> (U) As discussed above, the memorandum 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.

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Model Penal Code's discussion of self-defense, was used to support the conclusion that "[it 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.

(U) We also found that some of the arguments advanced in the memoranda were convoluted, counterintuitive, or frivolous, albeit useful in achieving the client's desired result. The use of medical benefits statutes to limit the application of the torture statute to acts involving pain so severe that it is associated with "death, organ failure, or permanent damage" falls within that category. Another particularly convoluted argument concerning the necessity defense suggested 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."

(U) These and other examples discussed above led us to conclude that the authors of the Bybee Memo and the Yoo Memo violated their duty under Rule 2.1 to provide a straightforward, candid and realistic assessment of the law.

**(U) C. Analysis of the Classified Bybee Memo (August 1, 2002)**

(U) Based on the results of our investigation, we similarly concluded that the Classified Bybee Memo did not constitute thorough, competent, and candid legal advice, and thus violated D.C. Rules of Professional Responsibility 1.1 and 2.1.

(TS) [REDACTED] First, the Classified Bybee Memo did not consider the United States legal history surrounding the technique of waterboarding. The government has historically condemned the use of waterboarding and has punished those who applied it. After World War II, the United States convicted several Japanese

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soldiers for waterboarding American and Allied prisoners of war.<sup>170</sup> American soldiers also have been court-martialed for administering waterboarding. 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.<sup>171</sup>

(TS) [REDACTED] 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."<sup>172</sup> In addition, its use was punished when it was applied 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.<sup>173</sup> All four men were convicted.

(TS) [REDACTED] None of these cases involved the interpretation of the specific elements of the torture statute, and as such are not precedential. However, a thorough and complete examination of the technique of waterboarding surely

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<sup>170</sup> (TS) [REDACTED] 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. See Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in United States Courts*, 45 Colum. J. Transnat'l L. 468 (2007) (citing *United States of America v. Chinsaku Yuki*, Manila (1946) (citation omitted); *United States of America v. Hideji Nakamura, Yukio Asano, Seitara Hata, and Takeo Kitz*, United States Military Commission, Yokohama, 1-28 May, 1947 (citation omitted); *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 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.")

<sup>171</sup> (TS) [REDACTED] See Guenael Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contributions to National Case Law of War Crimes*, 1 Oxford Journal of International Criminal Justice 135 (2003) (Major Edwin Glenn and Lieutenant Edwin Hickman were tried for conduct to the prejudice of good order and military discipline by courts martial in May 1902 based upon infliction of the "water cure." Glenn was convicted and Hickman acquitted.)

<sup>172</sup> (U) *In Re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Hawaii, 1995).

<sup>173</sup> (U) *United States v. Carl Lee*, 744 F.2d 1124 (5<sup>th</sup> Cir. 1984).

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would have included a review of the legal history of waterboarding in the United States.

(TS) [REDACTED] 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.

(TS) [REDACTED] In light of the fact that the express goal of the CIA interrogation program was to induce a state of "learned helplessness," we concluded that the Classified Bybee Memo's analysis failed to provide a basis for concluding that use of the ten specific EITs in the interrogation of Zubaydah would not violate the torture statute.

(TS) [REDACTED] We also found that there was an insufficient basis for the Classified Bybee Memo's conclusion that the use of sleep deprivation would not result in severe physical pain or suffering. As noted in the 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." 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 standing positions with their arms elevated, wearing only a diaper, we concluded that the Classified Bybee Memo's analysis was insufficient.<sup>174</sup>

<sup>174</sup> (U) The use of sleep deprivation as an interrogation technique was condemned as "torture" in a report cited by the United States Supreme Court in *Ashcroft v. Tennessee*, 322 United States 143, 151n. 6 (1944). In that opinion, the Court quoted the following language from a 1930 American Bar Association report: "It has been known since 1500 that deprivation of sleep is the most effective torture and certain to produce any confession desired."

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(TS) [REDACTED] 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, or threatened or beaten by the interrogators, to ensure that they maintained those positions.

(U) Because of the authors' failure to address the issues detailed above, we concluded that the legal advice provided was not competent or independent and candid legal advice within the meaning of D.C. Rules of Professional Conduct 1.1 and 2.1.

**(U) D. Analysis of Individual Responsibility**

(U) Based on the results of our investigation, we concluded that former AAG Jay S. Bybee failed to meet his responsibility under D.C. Rule of Professional Conduct 1.1 to provide competent representation to his client, the United States. We found that Bybee failed to correct a significant number of analytical errors and inadequately supported arguments in the Bybee Memo, the Yoo Memo, and the Classified Bybee Memo. Given the importance of the matter in question, we concluded that Bybee's review of those documents and his attention to the arguments and analysis fell far short of the standards expected of competent Department of Justice attorneys. Although Yoo was responsible for drafting the memoranda, Bybee, as the signator on two of them, was fully responsible for their content.

(U) We also concluded that Bybee violated his duty to exercise independent legal judgment and to render candid legal advice, pursuant to D.C. Rule of Professional Conduct 2.1, because he failed to discuss or acknowledge significant adverse authority and did not present a candid, realistic assessment of the likelihood that a court would sustain the positions advocated in the memorandum. Rather, he provided the client with the legal justification to engage in conduct OLC knew the client wanted and intended to engage in. We concluded that, in violating D.C. Rules 1.1 and 2.1, Bybee committed professional misconduct.

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(U) We concluded that former Deputy AAG John Yoo failed to meet his obligations under the D.C. Rule of Professional Conduct 1.1 to provide competent representation to his client, the United States. We found that Yoo, as the principal drafter of the Bybee Memo, the Classified Bybee Memo, and the Yoo Memo, was responsible for the significant number of analytical errors and inadequately supported arguments in those documents. Given the importance of the matter in question, and in light of the number of errors and oversights we identified, we concluded that Yoo's research and analysis fell far short of the standards expected of competent Department of Justice attorneys.

(U) We also concluded that Yoo violated his duty to exercise independent legal judgment and to render candid legal advice, pursuant to D.C. Rule of Professional Conduct 2.1 because he failed to discuss or acknowledge significant adverse authority and did not present a candid, realistic assessment of the likelihood that a court would sustain the positions advocated in the memorandum. Rather, he provided the client with the legal justification to engage in conduct OLC knew the client wanted and intended to engage in. We concluded that in violating these rules of professional conduct, Yoo committed professional misconduct.

(U) Pursuant to Department policy, we will inform Bybee and Yoo's respective state bars of our findings.

(U) We concluded that Patrick Philbin did not commit professional misconduct in this matter because he did not participate in the drafting and did not sign the memoranda. [REDACTED]

(U) We concluded that [REDACTED] because of [REDACTED] relative inexperience and subordinate position, did not commit misconduct. Although [REDACTED] appears to bear initial responsibility for a number of significant errors of scholarship and judgment, [REDACTED] work was reviewed by, and [REDACTED] was under the direction of, more experienced attorneys who bear ultimate responsibility for the errors.

(U) We did not find that the other Department officials involved 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

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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. We note that Ashcroft was at least consistent in his deference to OLC. When Goldsmith and Comey recommended that the Yoo Memo be withdrawn, Ashcroft did not hesitate to support them.

**(U) E. Analysis of the Bradbury Memos**

(U) We did not subject the four Bradbury Memos to the same degree of scrutiny as we did the Bybee Memo, the Classified Bybee Memo, and the Yoo Memo.<sup>175</sup> The Bradbury Memos were not rescinded by the Department, and were based in large part on the legal analysis of the Levin Memo, which corrected the most obvious errors of the Bybee and Yoo Memos. However, our review raised a number of questions about the objectivity and reasonableness of some of the Bradbury Memos' analysis.

(U) 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, although a draft of the 2007 Bradbury Memo did a "careful job analyzing the precise meaning of relevant words and phrases," he was "concerned that the 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.

(U) We found several indicia that the Bradbury Memos were written with the goal of allowing the ongoing CIA program to continue. First, we found evidence that there was pressure on the Department to complete legal opinions which would allow the CIA interrogation program to go forward, and that Bradbury was aware of that pressure. Although Bradbury denied that he was obligated to arrive at a desired outcome, in Comey's April 27, 2005 email to Rosenberg, Comey stated that

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<sup>175</sup> (U) The May 2005 Bradbury Memos were in some respects superseded by the 2007 Bradbury Memo, but part of their analysis was adopted by incorporation in the 2007 memorandum, and they were not withdrawn by the Department.

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"[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 expressed that Steve [Bradbury] was getting constant similar pressure from Harriet Miers and David Addington to produce the opinions."

~~(TS)~~ [REDACTED] We also found that the Bradbury Memos shared some of the faults that we criticized 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 under consideration were lawful as implemented by the CIA. In another argument, the SERE program was cited as evidence that the CIA interrogation program and its use of EITs was "consistent with executive tradition and practice." In light of the vast 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.

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(TS) [REDACTED] 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 and the 2007 Bradbury Memo, that the use of EITs did not "shock the conscience" and thus 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, "it's not my role, really, to do a factual investigation of that."

[REDACTED]

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(TS) [REDACTED] 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 that were approved because, among other reasons, they were represented as essential to the facilities' security, 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.

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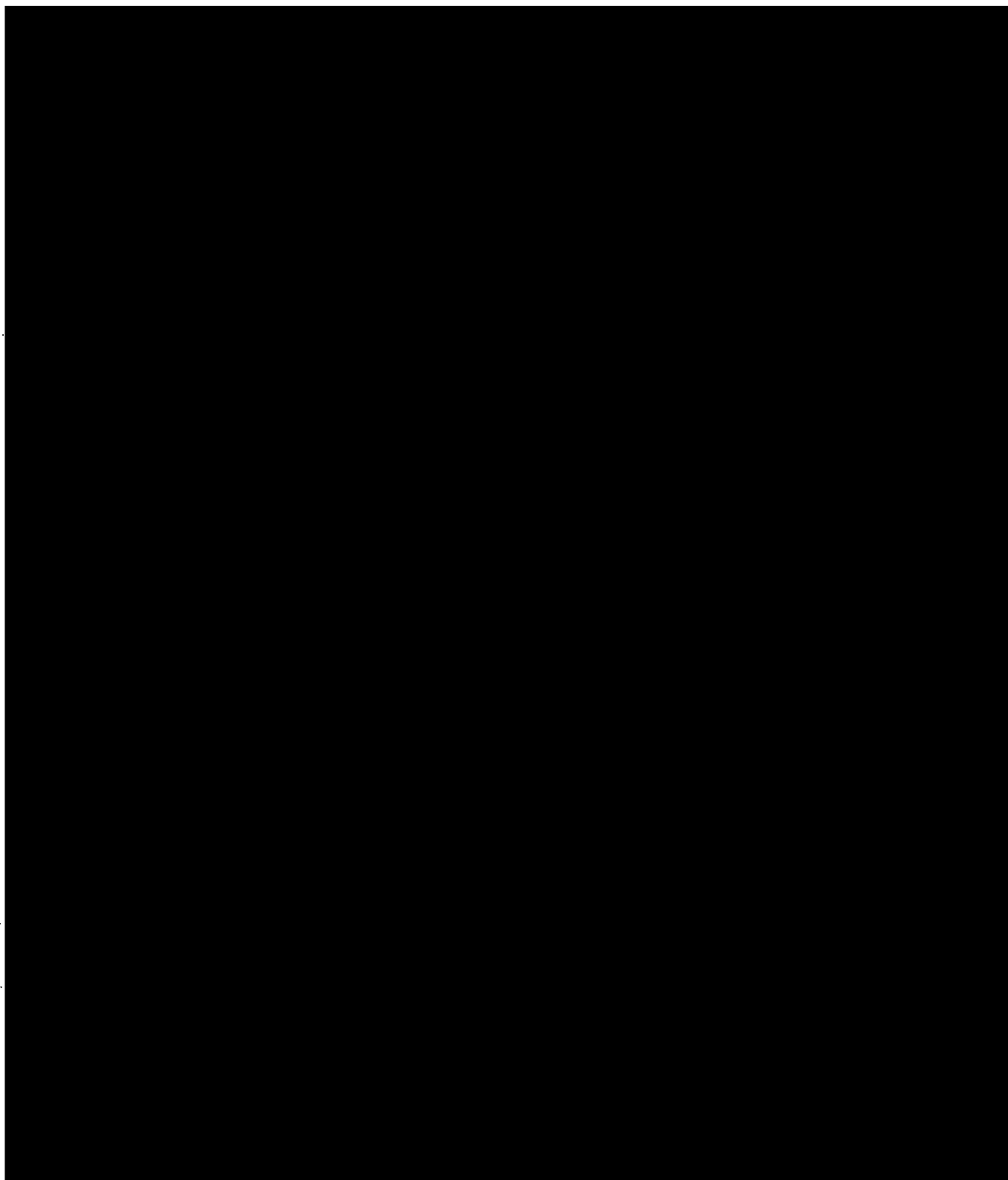
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According to CIA documents, approximately thirty detainees

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have been subjected to EITs. [REDACTED]

[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]

(TS) [REDACTED]

[REDACTED] We examined CIA assertions regarding specific disrupted terrorist plots.<sup>179</sup> The memorandum stated that Abu Zubaydah “provided significant information” about Jose Padilla and Binyam Mohammed, “who planned to build and detonate a ‘dirty bomb’ . . . .” 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.

<sup>179</sup> (U) Much of the following information was made public in a February 9, 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.”

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(TS) [REDACTED] In addition, in considering whether the use of EITs is "arbitrary in the constitutional sense," we believe the failures as well as the alleged successes of the program should have been considered. [REDACTED]

[REDACTED]

(TS) [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 applications of that technique appear to have exceeded the limitations, conditions and understandings recited in the Bradbury Memos. Moreover, the program approved by Bradbury in 2007, which does not include the use of the waterboard, is based upon the "effectiveness" of interrogation sessions that made extensive use of the waterboard. Thus, the programs approved by Bradbury in 2005 and 2007 differed significantly from the one that produced the intelligence data cited in the CIA Effectiveness Memo.

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(U) 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.<sup>181</sup>

(TS) [REDACTED] Our review of the Bradbury Memos raised additional concerns about the reasonableness and objectivity of OLC's legal analysis. Some of the memoranda's reasoning could be considered 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

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(U) We also found that, since March 2, 2005, when the CIA Effectiveness Memo was provided to OLC, a number of reliable sources have questioned whether EITs are in fact useful in obtaining intelligence. The Intelligence Science Board, an organization of intelligence professionals in the public and private sectors whose mission it is to advise "the Office of the Director of National Intelligence and senior Intelligence Community leaders on emerging scientific and technical issues of special importance to the Intelligence Community," issued a lengthy report titled, "Educing Information - Interrogation: Science and Art" which found, among other things, that there is no scientific basis to believe that coercive interrogation techniques are effective and may be "counterproductive to the elicitation of good information."

(U) In addition, on June 10, 2008, former FBI agent John Cloonan testified before the Senate Judiciary Committee that "based on a 27 year career as a Special Agent and interviews with hundreds of subjects in custodial settings, including members of al Qaeda, [I believe] that the use of coercive interrogation techniques is not effective." Cloonan further testified that an alternative, rapport-based approach is "more effective, efficient and reliable."

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diapering. Those conclusions, although the product of complex legal analysis, appear to be inconsistent with the plain meaning and commonly-held understandings of the language of Common Article 3.

~~(TS)~~ [REDACTED] Moreover, the Article 16 Memo's and the 2007 Bradbury Memo's analysis of substantive due process appears incomplete in some respects. 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 program from those accepted standards of conduct.<sup>182</sup> Thus, OLC found that the condemnation of coercive or abusive interrogation in those contexts did not apply to the CIA interrogation plan, 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. The OLC opinions failed to consider the fact that the official, DOJ-sanctioned use of EITs was a unique event in this country's history.

(U) We also note that Bradbury and others told us that it was not appropriate for OLC to address moral or policy considerations when considering the legality of government action. However, no one else in the Department appears to have addressed those issues in any meaningful fashion.<sup>183</sup> Apart from concerns Comey

<sup>182</sup> ~~(TS)~~ [REDACTED] 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 criminal investigations." Military doctrine was distinguished because al Qaeda terrorists are "unlawful enemy combatants" and not prisoners of war. 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." 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]."

<sup>183</sup> (U) As noted above, D.C. Bar Rule 2.1 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."

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communicated orally to Gonzales about the Combined Techniques Memo, we found no evidence that the Department formally considered or identified any of the many policy issues that were implicated by the Department's approval of the CIA interrogation program. While consideration of moral, social and political factors is not mandatory as a matter of professional responsibility, we believe it is appropriate and necessary with regard to the Department's interpretation of the torture statute, the CAT, Common Article 3, the DTA and the MCA, and that the analysis is incomplete without reference to such factors.

(U) Because of the concerns outlined above, we recommend that the Department review the Bradbury Memos carefully and consider whether the memoranda appropriately relied upon CIA representations, whether they provided reasonable and objective legal advice, and whether the Department has identified and evaluated all relevant moral and policy considerations associated with the CIA interrogation program. Any such review should, we believe, include consideration of the views of the Criminal Division, the National Security Division, the Department of State, and the intelligence community, including the FBI and the United States military.

(U) CONCLUSION

(U) Based on the results of our investigation, we concluded that former AAG Jay S. Bybee and former Deputy AAG John Yoo failed to meet their responsibilities under D.C. Rule of Professional Conduct 1.1 to provide competent representation to their client, the United States, and failed to fulfill their duty to exercise independent legal judgment and to render candid legal advice, pursuant to D.C. Rule of Professional Conduct 2.1. In violating D.C. Rules 1.1 and 2.1, Bybee and Yoo committed professional misconduct. Pursuant to Department policy, we notify their respective state bars of our findings.

(U) We concluded that Patrick Philbin did not commit professional misconduct [REDACTED]

[REDACTED] Finally, we concluded that [REDACTED] because of her relative inexperience and subordinate position, did not commit misconduct.

(U) We did not find that the other Department officials involved 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

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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. They 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. We note that Ashcroft was at least consistent in his deference to OLC. When Goldsmith and Comey recommended that the Yoo Memo be withdrawn, Ashcroft did not hesitate to support them.

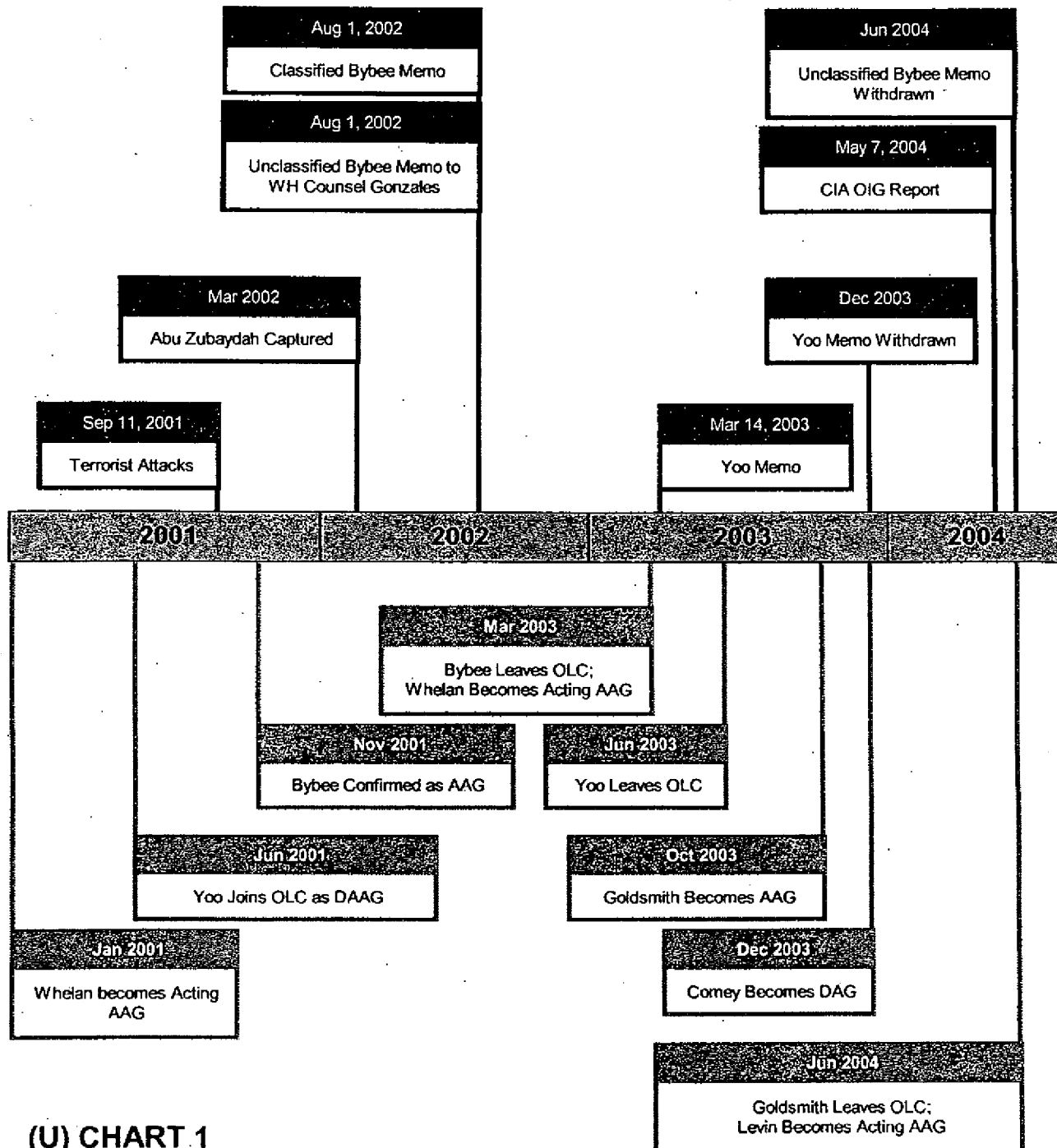
(U) We recommend that, for the reasons outlined in this report, the Department reexamine the declination decisions made with respect to potential criminal prosecutions referred to the Department by the CIA.

(U) Finally, we recommend that the Department review the Bradbury Memos carefully and consider whether the memoranda appropriately relied upon CIA representations, whether they provided reasonable and objective legal advice, and whether the Department has identified and evaluated all relevant moral and policy considerations associated with the CIA interrogation program. Any such review should, we believe, consider the views of the Criminal Division, the National Security Division, the Department of State, and the intelligence community, including the FBI and the United States military.

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# Office of Legal Counsel's Memoranda Timeline



(U) CHART 1



