- The court "concluded that in certain circumstances [interrogators] could assert a necessity defense. CAT, however, expressly provides that '[n]o exceptional circumstance whatsoever, . . . or any other public emergency may be invoked as a justification of torture.' CAT art. 2(2). Had the court been of the view that the . . . methods constituted torture, the Court could not permit this affirmative defense under CAT. Accordingly, the court's decision is best read as concluding that these methods amounted to cruel and inhuman treatment, but not torture."

Id. at 30-31.

An examination of the court's opinion in *PCATI v. Israel* led us to conclude that the Bybee Memo's assertions were misleading and not supported by the text of the opinion. The court's opinion was limited to three questions: (1) whether Israel's General Security Service (GSS) was authorized to conduct interrogations; (2) if so, whether the GSS could use "physical means" of interrogation, including the five specific techniques; and (3) whether the statutory necessity defense of the Israeli Penal Law could be used to justify advance approval of prohibited interrogation techniques. *PCATI v. Israel* at ¶ 17.

After determining that the GSS was authorized to interrogate prisoners, the court considered the methods that could be used to interrogate terrorist suspects. The court stated that, although the "law of interrogation" was "intrinsically linked to the circumstances of each case," two general principles were worth noting. *Id.* at ¶ 23.

The first principle was that "a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever." *Id.* The court added that Israeli case law prohibits "the use of brutal or inhuman means," and values human dignity, including "the dignity of the suspect being interrogated." *Id.* (citations and internal quotation marks omitted). The court noted that its conclusion was consistent with international treaties that "prohibit the use of torture, 'cruel,

inhuman treatment' and 'degrading treatment'." *Id.*[149] Accordingly, "violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice." *Id.* The court cited as a second principle, that some discomfort, falling short of violence, is an inevitable consequence of interrogation. *Id.*

After stating these general principles, the court considered the legality of each of the five techniques. In describing the GSS's use of the interrogation methods, the court observed that some of the techniques caused "pain," "serious pain," "real pain," or "particular pain and suffering"; that they were "harmful" or "harmed the suspect's body"; that they "impinge[d] upon the suspect's dignity" or "degraded" the suspect; or that they harmed the suspect's "health and potentially his dignity." *Id.* at ¶¶ 24-30. However, the court did not attempt to categorize any of the techniques as "torture" or "cruel, inhuman and degrading" treatment and did not define those terms or refer to other sources' definitions. The court simply concluded in each instance that the practice was "prohibited," "unacceptable," or "not to be deemed as included within the general power to conduct interrogations." *Id.*

Turning to the final issue, the court noted that, although the question of whether the necessity defense could be asserted by an interrogator accused of using improper techniques was open to debate, the court was "prepared to accept that in the appropriate circumstances, GSS investigators may avail themselves of the necessity defence, if criminally indicted." *Id.* at ¶¶ 34, 35. The court made it clear, however, that this was not the question that was under consideration. *Id.* at ¶ 35. At issue was whether Israel's statutory necessity defense could be invoked to justify advance authorization of otherwise prohibited interrogation techniques in emergency situations. *Id.* The court concluded that the statute could not be so used. *Id.* at ¶ 37.

The Bybee Memo's assertion that the court's opinion in *PCATI v. Israel* is "best read" as saying that EITs do not constitute torture was not based on the language of the opinion. The Israeli court did not consider whether the techniques constituted torture or cruel, inhuman and degrading treatment. There was therefore no basis for the Bybee Memo's statement that "the court carefully

[149] The court added: "These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing." *Id.*

avoided describing any of these acts as having the severity of pain or suffering indicative of torture" or that the court's "descriptions of and conclusions about each method indicate that the court viewed them as merely cruel, inhuman or degrading but not of the sufficient severity to reach the threshold of torture." Bybee Memo at 30.

One of Yoo's comments on an early draft of the Bybee Memo indicates that the authors knew the Israeli court's opinion did not provide direct support for their position. In his comments, Yoo wrote to (b)(6), (b)(7)(C) "[i]sn't there some language in the opinion that we can characterize as showing that the court did not think the conduct amounted to torture?" (b)(6), (b)(7)(C) responded, "Unfortunately, no."

We concluded that the Bybee Memo's argument on this issue was not based on the actual language and reasoning of the court's opinion, and was intended to advance an aggressive interpretation of the torture statute.

6. The Commander-in-Chief Power and Possible Defenses to Torture

The last two sections of the Bybee Memo, addressing the President's Commander-in-Chief power (Part V) and possible defenses to the torture statute (Part VI), differ in one important respect from the preceding sections. Although earlier sections interpreted the applicability of the torture statute to government interrogators and posited that the bar was very high for violations of the torture statute, the last two sections asserted that there were circumstances under which acts of outright torture could not be prosecuted.

In 2004, these parts of the Bybee Memo were characterized by Department and White House officials as "over-broad," "irrelevant," and "unnecessary," and were disavowed shortly after the memorandum was leaked to the press. Even before the memorandum was made available to the public, OLC AAG Goldsmith concluded that the reasoning in those sections was erroneous.[150] When the Levin Memo appeared in late 2004, it referred briefly to Parts V and VI of the Bybee

[150] Goldsmith initially reviewed and withdrew the Yoo Memo, which incorporated the arguments and reasoning of the Bybee Memo.

Memo, noted that those sections had been superseded, and concluded that further discussion was unnecessary. Levin Memo at 2.

Although portrayed as unnecessary and irrelevant, the sections were essential to what Goldsmith characterized as "get-out-of-jail-free cards," a "golden shield" for the CIA, and an "advance pardon." Goldsmith, *The Terror Presidency*, at 96-97, 162. In addition, he commented:

> In their redundant and one-sided effort to eliminate any hurdles posed by the torture law, and in their analysis of defenses and other ways to avoid prosecution for executive branch violation of federal laws, the opinions could be interpreted as if they were designed to confer immunity for bad acts. Its everyday job of interpreting criminal laws gives OLC the incidental power to determine what those laws mean and thus effectively to immunize officials from prosecutions for wrongdoing.

Id. at 149-150. Goldsmith also expressed concern that the Yoo Memo was a "blank check" for the military to engage in interrogation techniques beyond those specifically approved by OLC.[151]

We asked the OLC attorneys who worked on the Bybee Memo why the two sections were added to the memorandum shortly before it was signed. (b)(6), (b)(7)(C) told us that [redacted] did not know why the sections were added, but believed it was to give the client "the full scope of advice." Yoo stated that he was "pretty sure" they were added because he, Bybee, and Philbin "thought there was a missing element to the opinion." However, Philbin recalled that he told Yoo the sections should be removed, and that Yoo responded, "[T]hey want it in there." Yoo conceded, however, that the CIA may have indirectly given him the idea to add the two sections by asking him what would happen if an interrogator "went over the line." Bybee had no recollection of how the two sections came to be added, did not remember discussing their inclusion with Yoo or Philbin, and did not remember reviewing a draft that did not contain them.

[151] Despite these and other highly critical public and private remarks, Goldsmith's stated in his memorandum to Associate Deputy AG Margolis that he never believed that the analysis in the opinions "implicated any professional misconduct." Goldsmith June 5, 2009 Memorandum to Margolis at 1.

John Rizzo told us that the CIA did not ask OLC to include those sections and that he did not remember if he saw them before the final draft appeared. Alberto Gonzales did not recall how the sections came to be added to the Bybee Memo, but mentioned that David Addington had a general interest in the powers of the Commander-in-Chief and may have had some input into the memorandum.

David Addington testified before the House Judiciary Committee that Yoo met with him and Gonzales at the White House Counsel's Office and outlined for them the subjects he planned to address in the Bybee Memo, including the constitutional authority of the President apart from the statute and possible defenses to the statute. Addington testified that he did not advocate any position at the meeting, but that he responded to Yoo's outline by saying, "Good, I'm glad you're addressing these issues." Later in the hearing, however, Addington stated, "In defense of Mr. Yoo, I would simply like to point out that is what his client asked him to do."[152]

As discussed above, the two sections were drafted after the Criminal Division told the CIA, on July 13, 2002, that it would not provide an advance declination for the CIA's use of EITs.[153] On July 15, 2002, Yoo told [redacted] that he did not plan to address the Commander-in-Chief power or defenses in the memorandum and told [redacted] to note in the memorandum that those issues were not discussed because OLC had not been asked to address them. On July 16, 2002, Yoo and [redacted] met at the White House with Gonzales, Addington, and possibly Flanigan to discuss the memorandum. The next day, July 17, [redacted] and Yoo began working on those two new sections. Based on this sequence of events, it appears likely that the sections were added, following a discussion among the OLC and White House lawyers, to achieve indirectly the result desired by the client –

---

[152] There were no follow up questions or further testimony regarding who asked Yoo to address those issues. In their responses to OPR, Yoo and Bybee argued that Addington was Yoo's "client," and because Addington testified that Yoo did "what his client asked him to do," Addington's testimony establishes that he personally asked Yoo to add the sections. Although that is a possible interpretation, it appears to be inconsistent with Addington's earlier testimony that it was Yoo who announced that he would address the subject and that Addington simply agreed that it was a good idea. It is also inconsistent with Yoo's sworn statement to OPR.

[153] Sometime between July 13 and 16, at Chertoff's direction, [redacted] drafted a letter dated July 17, 2002, from Yoo to Rizzo, stating that the Department would not provide an advance declination, but Yoo apparently never signed or sent the letter.

immunity for those who engaged in the application of EITs – after Chertoff refused to provide it directly.

Yoo denied to OPR that the sections provided blanket immunity to CIA agents who violated the torture statute, although he conceded that he may have added the discussions in response to a question from the CIA about what would happen if an interrogator went "over the line." He also acknowledged that the section had "implications for the Criminal Division, which is, you know, why I showed it to Mike Chertoff and had him review it." Yoo asserted, however, that the Commander-in-Chief defense could not be invoked by a defendant unless there was an order by the President to take the actions for which the defendant was charged. Yoo admitted, however, that the Bybee Memo did not specify that the use of the Commander-in-Chief defense required a presidential order. He stated: "I'm pretty sure we would have made it clear. I don't know – we might have made it clear orally."

Philbin told OPR that he was not aware of any evidence of intent to provide immunity to CIA officers.

a. The President's Commander-in-Chief Power

As discussed above, Bradbury commented that Yoo's approach to the issue of Commander-in-Chief powers reflected a school of thought that is "not a mainstream view" and did not adequately consider counter arguments. Levin commented that he did not believe it was appropriate to address the question of Commander-in-Chief powers in the abstract and that the memorandum should have addressed ways to comply with the law, not circumvent it. Goldsmith believed that the section was overly broad and unnecessary, but also that it contained errors and constituted an "advance pardon."

The legal conclusion of Part V is stated conditionally in several places (the torture statute "may be" or "would be" unconstitutional under the circumstances), but is expressed without qualification elsewhere (the statute "must be construed"

not to apply; the factors discussed "preclude an application" of the statute; and the Department "could not enforce" the statute).

The memorandum's reasoning with regard to the Commander-in-Chief power can be summarized as follows:

- The United States is at war with al Qaeda. Bybee Memo, Part V. A.
- The President's Commander-in-Chief power gives him sole and complete authority over the conduct of war. *Id.* at Part V. B.
- Statutes should be interpreted to avoid constitutional problems, and a criminal statute cannot be interpreted in such a way as to infringe upon the President's Commander-in-Chief power. *Id.* at Part V. B.
- Accordingly, OLC must construe the torture statute as "not applying to interrogations undertaken pursuant to [the
- President's] Commander-in-Chief authority." Part V. B.
- In addition, the detention and interrogation of enemy prisoners is one of the core functions of the Commander-in-Chief. *Id.* at Part V. C.
- "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." Part V. C.
- Therefore, prosecution under the torture statute "would represent an unconstitutional infringement of the President's authority to conduct war." *Id.* at Part V. C.; Introduction; Conclusion.

The argument assumed, without explanation or reference to supporting authority, that enforcing the statutory prohibition against torture would interfere with the interrogation of prisoners during wartime. This proposition is not stated directly, and in fact, the word "torture" does not appear in Part V. Instead, the discussion is framed in terms of the President's "discretion in the interrogation of enemy combatants," or interrogation methods that "arguably" violate the statute.[154]

Torture has not been deemed available or acceptable as an interrogation tool in the Anglo-American legal tradition since well before the drafting of the United States Constitution. *See, e.g., A v. Secretary of State for the Home Department* [2005] UKHL 71 at ¶¶ 11-12 (H.L.) (discussing English common law's rejection of interrogation by torture and Parliament's abolition in 1640 of royal prerogative to interrogate by torture);[155] Waldron, *Torture and Positive Law* at 1719-20 (discussing Anglo-American legal system's "long tradition of rejecting torture and of regarding it as alien to our jurisprudence"); Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 Pepp. L. Rev. 661, 673-79 (2004) (discussing the views of the framers of the Constitution on interrogation by torture).

The Bybee Memo cited no authority to suggest that the drafters of the Constitution (or anyone else) believed or intended that the President's Commander-in-Chief powers would include the power to torture prisoners during times of war to obtain information. Thus, the Bybee Memo's conclusion that the torture statute "does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority" was wrong and most certainly did not constitute thorough, objective, and candid legal advice. Bybee Memo at 35.

[154] The tone of this section of the Bybee Memo is noticeably argumentative, and in many respects resembles a piece of advocacy more than an impartial analysis of the law. For example, at one point, the memorandum refers to the torture statute as an "unconstitutional . . . law[] that seek[s] to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States." Bybee Memo at 39. Bradbury characterized this section as "overly tendentious and one-sided." Goldsmith found the Yoo and Bybee Memos "tendentious in substance and tone." Goldsmith, *The Terror Presidency* at 151.

[155] The House of Lords opinion is available online at www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm.

The Bybee Memo also asserted that the President alone has the constitutional authority to interrogate enemy combatants and that any attempt by Congress to regulate military interrogation thus "would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." Bybee Memo at 39. This conclusion, which was specifically rejected by Bradbury in his January 15, 2009 memorandum, was not based on a thorough discussion of all relevant provisions of the Constitution. Among the enumerated powers of Congress are the following:

> To define and punish Piracies and Felonies committed on the high seas, and *Offences against the Law of Nations*;
>
> To declare War, grant Letters of Marque and Reprisal, and *make Rules concerning Captures on Land and Water* . . . .
>
> To make Rules for the Government and *Regulation of the land and naval Forces* . . . .
>
> To provide for *organizing, arming, and disciplining, the Militia* . . . .

U.S. Const., art. I, § 8 (emphasis added).

Congress has exercised the above powers to regulate the conduct of the military and the treatment of detainees in a number of ways, including enactment of the Articles of War, the Uniform Code of Military Justice, the War Crimes Act, and, more recently, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. The Bybee Memo should have addressed the significance of the enumerated powers of Congress before concluding that the President's powers were exclusive.[156]

[156] In Part V, the Bybee Memo cited a previous OLC memorandum that discussed the Captures Clause. Bybee Memo at 38 (citing Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations* (March 13, 2002) (the Bybee Transfer Memo) at 5-7). The Bybee Transfer Memo asserted that under the Constitution, "captures" were limited to the capture of property, not persons, and that Congress therefore had no authority to make rules concerning captures of persons. Bybee Transfer Memo at 5.

Goldsmith singled out "the unusual lack of care and sobriety" of the legal analysis of this section. Goldsmith, *The Terror Presidency* at 148. He added that:

> OLC might have limited its set-aside of the torture statute to the rare situations in which the President believed that exceeding the law was necessary in an emergency, leaving the torture law intact in the vast majority of instances. But the opinion went much further. "*Any* effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President," the August 2002 memo concluded. *This extreme conclusion has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law.*

Id. at 148-49 (emphasis in original).

In the draft of OPR's report that was reviewed by Yoo and Bybee, we noted that the Bybee Transfer Memo's conclusion was flawed because it inaccurately discussed a historical source, failed to acknowledge other historical sources that contradicted its thesis, and summarily asserted that an adverse Supreme Court case had been wrongly decided. Bybee responded that he was "wholly justified in relying on what was then good law," i.e., an OLC opinion that he himself signed five months earlier.

As discussed above, on January 15, 2009, OLC's outgoing Principal Deputy AAG, Steven Bradbury issued a Memorandum for the Files *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (January 15, 2009). That memorandum announced that the Bybee Transfer Memo and four other previous OLC opinions concerning "the allocation of authorities between the President and Congress in matters of war and national security" did not "currently reflect, and have not for some years reflected, the views of OLC." Bradbury cited numerous historical sources that contradicted the Bybee Transfer Memo's view of the Captures Clause, noted that the historical examples cited in the Bybee Transfer Memo did "not support that opinion's assertion that an 'unbroken historical chain' recognizes 'exclusive Presidential control over enemy soldiers,'" and cited a Supreme Court case (the same case that the Bybee Transfer Memo asserted was wrongly decided) in support of the conclusion that the Captures Clause does in fact grant Congress power over the detention and capture of enemy prisoners. January 15, 2009 Memo at 6 & n.2.

Accordingly, we concluded that the Bybee Memo's brief reference to the Bybee Transfer Memo did not constitute an adequate consideration of the relevance of the Captures Clause to the power of Congress to outlaw torture in the context of the CIA interrogation program.

Bradbury and Goldsmith, as well as commentators and other legal scholars, criticized the Bybee Memo for failing to discuss *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the leading Supreme Court case on the distribution of governmental powers between the executive and the legislative branches. *See, e.g.*, Luban, *Liberalism, Torture, and the Ticking Bomb* at 68; Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. Nat'l Sec. L. & Pol'y 455, 461 (2005). Although arguments can be made for or against the applicability of *Youngstown* to the question of the President's power to order the torture of prisoners during war, a thorough, objective, and candid discussion would have acknowledged its relevance to the debate.[157]

Finally, in its discussion of presidential powers, the Bybee Memo neglected to acknowledge the Executive's duty to "take Care that the Laws be faithfully executed. . . ." U.S. Const., art. II, § 3. Under the Constitution, international treaties "shall be the supreme Law of the Land . . . ." U.S. Const. art. VI. Before interpreting the Commander-in-Chief clause in such a way as to bar enforcement of a federal criminal statute implementing an international treaty, the authors of the Bybee Memo should have considered an alternate approach that reconciled the Commander-in-Chief clause with the Take Care clause.[158]

[157] Bybee told us that the Bybee Memo was "quite consistent" with *Youngstown*, and stated that:

> [w]e recognized that we're in Category 3, Congress has enacted a statute that might interfere with the Commander in Chief's authority and Justice Jackson's analysis sharpens the issues; it doesn't answer the question, you still have to define what is the substantive content of the vesting clause of Article II, and what is the substantive content of conferring the Commander-in-Chief authority on the President.

[158] As a matter of constitutional interpretation, the Commander-in-Chief clause should not have been considered in isolation from the Take Care clause. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."); *Cohens v. Virginia*, 19 U.S. 264, 393 (1821) (It is the duty of the Court "to construe the constitution as to give effect to both [arguably inconsistent] provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument."); *Prout v. Starr*, 188 U.S. 537, 543 (1903) ("The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.").

In his response to OPR's report, Bybee repeatedly asserted that the Bybee Memo was written for "sophisticated executive branch attorneys" and, as such, did not always explain basic concepts. Bybee wrote: "OLC attorneys were asked to answer difficult issues in a direct and succinct manner, and it is unreasonable to expect them to survey the case law in a manner more appropriate for a law review article." Bybee Response at 43.

Thus, Bybee argued that the recipients of the Bybee Memo "did not need a primer on the separation of powers." Bybee Response at 70. Specifically, Bybee asserted that the "decision not to reiterate" *Youngstown* was appropriate. *Id.* at 64. This assertion is belied by the fact that Goldsmith – a "sophisticated executive branch attorney," and an expert in this area – found that the memorandum was "flawed in so many respects that is must be withdrawn." Goldsmith commented in his first draft of a replacement memorandum that the Yoo Memo contained "numerous overbroad" assertions in the Commander-in-Chief section, and specifically pointed out that it failed to consider adequately "case law such as *Youngstown Sheet & Tube Co. v. Sawyer*." June 15, 2004 draft at 1, n.1 (citation omitted). Goldsmith also told others in the Department that it was his view that the Commander-in-Chief section was "misleading and under-analyzed to the point of being wrong." June 30, 2004 email. As such, we reject Bybee's assertion that the memorandum, although not as "fulsome" as it could have been, was sufficient for the audience for which it was intended.

Bybee also disputed that the Commander-in-Chief section in effect constituted an advance declination for future violations of the torture statute. Bybee stated:

> The Commander-in-Chief section never advised CIA officials that they would be immune from prosecution no matter what they did. To the contrary, the [Bybee Memo] explained that this section was only addressed to interrogations "ordered by the President" and to the interrogations "he believes necessary to prevent attacks upon the United States."

The Bybee Memo did not, in fact, make it clear that its conclusion that the torture statute could not be constitutionally applied to the CIA interrogation program was conditioned on the issuance of a direct order from the president. When Bybee was asked in his initial interview about whether a direct presidential

order was required, he answered: "Well, we haven't explored that in this memorandum. . . . That is not addressed here. We haven't reached that level of specificity." Nowhere in the Commander-in-Chief section does OLC lay out such a requirement. In fact, the sole reference to the requirement is made indirectly in the introduction to the Defenses Section, which follows the Commander-in-Chief section ("We have also demonstrated that Section 2340A, as applied to interrogations of enemy combatants ordered by the President pursuant to his Commander-in-Chief power would be unconstitutional." Bybee Memo at 39). We found this single reference did not adequately inform the reader that OLC's analysis may have assumed the existence of a presidential order.

When we asked Yoo why he did not explicitly state in the Bybee Memo that the torture statute would be unconstitutional only if the President directly ordered the CIA to torture a prisoner, he commented:

> I do think that orally we told [the CIA] that this is, you know, this argument to be triggered – if it's not in the opinion itself, that the argument to be triggered requires the President's direct approval. . . . I do remember we talked about it because we, I think Jay, Pat and I talked about, you know, the sort of chain of command issues and whether this defense could be claimed by people lower down. I don't know if we made a conscious decision to include it or not include it for, I don't know, appearance reasons, or whether – I do know we talked about it and that was sort of the conclusion we came to is that this was something the President would have to approve, and that it wasn't something that could just be claimed by everybody lower down, because then it would sort of be this kind of general immunity from everything anybody ever did.[159]

From Yoo's statement, we concluded that, although Yoo was aware of the possibility that that the Bybee Memo could become "this kind of general immunity from everything anybody ever did," he failed to clarify that his conclusions regarding the unconstitutionality of the torture statute presumed the existence of a direct presidential order.

[159] Yoo added that he did not believe it was a problem if the requirement of a direct presidential order was not included in the Bybee Memo because he thought it would be "perfectly clear for people who work in this area."

b. Criminal Defenses to Torture

The last section of the Bybee Memo discussed possible defenses to violations of the torture statute and concluded that, "even if an interrogation method might violate [the torture statute], necessity or self-defense could provide justifications that would eliminate any criminal liability." Bybee Memo at 46. Although the memorandum suggested that its analysis was based upon "[s]tandard criminal law defenses," *Id.* at 39, we found that not to be the case. At various points, the memorandum advanced novel legal theories, ignored relevant authority, failed to adequately support its conclusions, and relied on questionable interpretations of case law.[160]

(1) The Necessity Defense

The Bybee Memo concluded: "We believe that a defense of necessity could be raised, under the current circumstances, to an allegation of a Section 2340A violation." Bybee Memo at 39. The Bybee Memo based its definition of the necessity defense on two treatises, the Model Penal Code and LaFave & Scott's treatise on criminal law. One U.S. Supreme Court decision, *United States v. Bailey*, 444 U.S. 394 (1980), was cited for the proposition that "the Supreme Court has recognized the defense," but was not discussed further. Bybee Memo at 40. No other case law was cited or discussed.

A prosecution for violations of the torture statute would take place in federal district court, and the relevant controlling judicial authority would be the opinions of the U.S. Supreme Court or the U.S. Circuit Courts of Appeals.[161] At the time the Bybee Memo was drafted, the Supreme Court had discussed the necessity

[160] See Luban, *Liberalism, Torture, and the Ticking Bomb* at 62-67, for a critique of the Bybee Memo's analysis of self-defense and necessity. That article was expanded upon in a subsequent book by the same author, *Legal Ethics and Human Dignity* (2007), at pp.162-205, which raised several of the issues discussed in this report.

[161] Venue for violations of the torture statute could lie in any judicial district. *See* 18 U.S.C. § 3238 (venue for offenses committed out of the jurisdiction of any particular state or district shall be in the district where the defendant is first brought, in the district of the defendant's last known residence, or in the District of Columbia).

defense in two opinions: *United States v. Bailey*, 444 U.S. 394 (1980), and *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

In *Bailey*, the Court was asked to consider whether the common law defenses of necessity or duress were available to a defendant charged with escaping from a federal prison. The Court briefly discussed the nature of the defense at common law, but concluded that there was no need to consider the availability or the elements of a possible necessity or duress defenses because "[u]nder any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail." *Bailey* 444 U.S. at 410 (quoting LaFave & Scott). The Court held that because the crime of escape was a continuing offense, the defendant would have to prove that he had made an effort "to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force." *Id.* at 415. Based on the record before it, the Court concluded that the defendant could not meet his burden and that the necessity defense was therefore unavailable. *Id.*

In *United States v. Oakland Cannabis Buyers' Cooperative*, the respondent contended that, "because necessity was a defense at common law, medical necessity should be read into the Controlled Substances Act," and suggested that *Bailey* had established that the necessity defense was available in federal court. *Oakland* 532 U.S. at 490. The Court disagreed, noting that, although *Bailey* had "discussed the possibility of a necessity defense without altogether rejecting it," the respondent was "incorrect to suggest that *Bailey* has settled the question whether federal courts have authority to recognize a necessity defense not provided by statute. . . . It was not argued [in *Bailey*], and so there was no occasion to consider, whether the statute might be unable to bear any necessity defense at all."[162]

---

[162] *Id.* at 490 & n.3. The Court revisited this issue in *Dixon v. United States*, 548 U.S. 1 (2006), which discussed both *Bailey* and *Oakland*. In *Dixon*, the Court assumed that a defense of duress would be available to a defendant charged with a firearms violation. *Id.* at 6. The Court ruled that the defense would be an affirmative one, which the defendant must prove by a preponderance of the evidence, and concluded that there was no indication that Congress intended the government to bear the burden of disproving the defense beyond a reasonable doubt. *Id.*

The Bybee Memo did not cite or discuss *Oakland*, and apart from stating that the *Bailey* Court had "recognized" the necessity defense, no federal judicial opinions were cited or discussed. Although the *Oakland* Court's comments about *Bailey* were arguably *dictum* (as were the *Bailey* Court's comments about the necessity defense), the Court's opinion nevertheless explicitly rejected the very proposition for which the Bybee Memo cited *Bailey*.

During his interview with OPR, Yoo acknowledged that he was not familiar with the Court's decision in *Oakland*. He also told us that "what we did is looked at the standard criminal law authorities and, you know, didn't, you know, Shepardize all the authorities that we used."[163]

A large body of relevant federal case law on the necessity defense existed at the time the Bybee Memo was being drafted. Opinions discussing and setting forth the elements and limitations of the necessity defense were available from every federal judicial circuit except the Federal Circuit (which does not hear criminal cases). *E.g.*, *United States v. Maxwell*, 254 F.3d 21 (1st Cir. 2001); *United States v. Smith*, 160 F.3d 117 (2d Cir. 1998); *United States v. Paolello*, 951 F.2d 537 (3d Cir.1991);*United States v. Cassidy*, 616 F.2d 101 (4th Cir.1979); *United States v. Gant*, 691 F.2d 1159 (5th Cir. 1982); *United States v. Singleton*, 902 F.2d 471 (6th Cir.1990); *United States v. Mauchlin*, 670 F.2d 746 (7th Cir. 1982); *United States v. Griffin*, 909 F.2d 1222 (8th Cir.1990); *United States v. Schoon*, 971 F.2d 193 (9th Cir.1991) *cert. denied*, 504 U.S. 990 (1992); *United States v. Turner*, 44 F.3d 900 (10th Cir. 1995); *United States v. Bell*, 214 F.3d 1299 (11th Cir. 2000); *United States v. Bailey*, 585 F.2d 1087 (D.C. Cir. 1978), *rev'd*, *United States v. Bailey*, 444 U.S. 394 (1980); *United States v. Gaviria*, 116 F.3d 1498 (D.C. Cir. 1997).[164] *See also Federal Jury Instructions* at § 19.02 (surveying federal jury

---

[163] Judge Bybee was unaware of the *Oakland* decision when the memorandum was drafted, but told us that because *Oakland* came close to overruling *Bailey* but did not actually do so, it was not necessary to discuss it in the memorandum. He did not know whether Yoo and [redacted] were aware of *Oakland*, or simply overlooked it. (b)(6), (b)(7)(C) refused to discuss the legal research and analysis that went into the Bybee Memo saying, "[T]he document speaks for itself."

[164] A Westlaw search in the "ALLFEDS" data base for "necessity / 1 defense & before 4/2002" yielded 454 cases. Although many of those cases were not on point (for example, cases dealing with the doctrines of business or medical necessity), the search identified *Oakland Cannabis Buyers' Cooperative* and dozens of relevant opinions of the United States Circuit Courts of Appeals, including all of the cases cited above except *Paolello* (which refers to the defense as the

instructions and case law for coercion and duress defenses, including the necessity and justification defenses).

During his OPR interview, Bybee stated that a discussion of existing federal case law on the necessity defense was not needed in the Bybee Memo because the reported cases were "far afield" from a "ticking time bomb" situation.

Yoo told us:

> [W]e were trying to articulate what the . . . federal common law defense was generally, and we used the standard authorities to do that. . . . But the other thing was that other situations that would have arisen would just be so different than this one, because this was a case, this necessity defense in the context of torture, is such a sort of well-known, well-discussed hypothetical that, you know – like I say, that's almost all the writing about this hypothetical circumstances are written about is necessity and self-defense.[165]

A review of the cases mentioned above and other judicial opinions reveals that the elements of the necessity defense in federal court differ from the elements set forth in the Bybee Memo. Although the defense varies slightly among the circuits, most courts have endorsed the following elements:

> (1) the defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;[166]

"justification defense"). Several federal cases were also cited in the treatises relied upon by the Bybee Memo.

165 Yoo appears to have had a limited knowledge of criminal law, and may not have known that federal courts had considered the necessity defense in many reported decisions. In his OPR interview, Yoo stated that he told [redacted] to look at "every state court case" on the necessity defense "because that's the only way it would come up."

166 A few federal courts have adopted a "choice of evils" analysis similar to the "balancing of harms" described in the first element of the MPC definition. *See, e.g., United States v. Turner*, 44 F.3d at 902.

(2) the defendant did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

(3) the defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and

(4) a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.

See, e.g., United States v. Singleton, 902 F.2d at 472-73.[167]

A thorough, objective, and candid discussion of the necessity defense in the context of the CIA interrogation program would have included an element-by-element analysis of how the defense would be applied to a government interrogator accused of violating the torture statute. Such an analysis would have identified the following issues.

The first element of the defense, as noted above, requires a defendant to demonstrate as a preliminary matter that he (or arguably, a third party) faced an immediate, well-grounded threat of death or serious injury. The Bybee and Yoo Memos briefly acknowledged this issue, but did not explain how a government interrogator with a prisoner in his physical custody would make such a showing. *See, e.g., United States v. Perrin*, 45 F.3d 869, 874 (4th Cir. 1995) ("It has been only on the rarest of occasions that our sister circuits have found defendants to be in the type of imminent danger that would warrant the application of a justification defense"); *see also Singleton*, 902 F.2d at 472 (noting the infrequency with which a defense of justification is appropriate); *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989) (generalized fears will not support a defense of justification); *United States v. Panter*, 688 F.2d 268, 269 (5th Cir. 1982) (reversing a conviction for illegal possession of a firearm based on finding that possession of the firearm occurred "in the actual, physical course of a conflict" when defendant, after being

[167] In some cases involving escape from prison or unlawful possession of a firearm, the courts have added a fifth element – that the defendant did not maintain the illegal conduct any longer than necessary. *See e.g., Singleton*, 902 F.2d at 473 (*citing Bailey*, 444 U.S. at 399).

stabbed three times, discovered a gun lying within reach).[168]

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

---

[168] The Bybee Memo, in Part IV (International Decisions), briefly alluded to the "ticking time bomb" scenario. Bybee Memo at 31 n.17 (stating that the Israeli Supreme Court "drew upon the ticking time bomb hypothetical proffered by the [Israeli security service] as a basis for asserting the necessity defense . . . . Under those circumstances, the court agreed that the necessity defense's requirement of imminence . . . would be satisfied."). As noted above, in their OPR interviews, Bybee and Yoo both referred to the ticking time bomb hypothetical as support for their analysis of the necessity defense.

The ticking time bomb scenario is frequently advanced as moral or philosophical justification for interrogation by torture. *See, e.g.*, Eric A. Posner and Adrian Vermeule, *Terror in the Balance, Security, Liberty, and the Courts* 196-197 (2007); Alan M. Dershowitz, *Why Terrorism Works, Understanding the Threat, Responding to the Challenge* 132-163 (2002). However, other scholars have argued that the scenario is based on unrealistic assumptions and has little, if any, relevance to intelligence gathering in the real world. *See, e.g.*, Luban, *Liberalism, Torture, and the Ticking Bomb* at 68; Kim Lane Sheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. Nat'l Security L. & Pol'y 285, 293-95, 337-40 (2005); Henry Shue, *Torture*, 7 Phil. & Pub. Aff. 124-43 (1978). Reliance upon the scenario has been criticized because it assumes, among other things: (1) that a specific plot to attack exists; (2) that it will happen within hours or minutes; (3) that it will kill many people; (4) that the person in custody is known with absolute certainty to be a perpetrator of the attack; (5) that he has information that will prevent the attack; (6) that torture will produce immediate, truthful information that will prevent the attack; (7) that no other means will produce the information in time; and (8) that no other action could be taken to avoid the har Association for the Prevention of Torture, *Defusing the Ticking Bomb Scenario* (2007) (available at http://www.apt.ch/component/option,com_docman/task,cat_view/gid,115/Itemid,59/lang,en/).

To our knowledge, none of the information presented to OLC about Abu Zubaydah, KSM, Al-Nashiri, or the other detainees subjected to EITs approached the level of imminence and certainty associated with the "ticking time bomb" scenario. Although the OLC attorneys had good reasons to believe that the detainees possessed valuable intelligence about terrorist operations in general, there is no indication that they had any basis to believe the CIA had specific information about terrorist operations that were underway, or that posed immediate threats.

Moreover, any reliance upon the "ticking time bomb" scenario to satisfy the imminence prong of the necessity defense would be unwarranted in this instance, as the EITs under consideration were not expected or intended to produce immediate results. Rather, the goal of the CIA interrogation program was to condition the detainee gradually in order to break down his resistance to interrogation.

> The defense of necessity does not arise from a "choice" of several sources of action; it is instead based on a real emergency. It may be asserted only by a defendant who was confronted with a crisis as a personal danger, a crisis that did not permit a selection from among several solutions, some of which would not have involved criminal acts.

United States v. Lewis, 628 F.2d 1276, 1279 (10th Cir.), *cert. denied*, 450 U.S. 924 (1980); *see also United States v. Gaviria*, 116 F.3d at 1531 (defendant had ample opportunities to inform others of a threat to his daughter that caused him to participate unwillingly in a drug conspiracy distribution ring); *United States v. Jeanrette*, 744 F.2d 817, 820-21 (D.C. Cir. 1984) (congressman who claimed he accepted bribe only because he feared he was dealing with mobsters may not raise duress defense because he had opportunity to notify law enforcement officials during two days between agreeing to take bribe and actually taking it), *cert. denied*, 471 U.S. 1099 (1985).[169]

> The *Bailey* Court also stressed this element:
>
> Under any definition of these defenses [of duress or necessity] one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.

Bailey, 444 U.S. at 410 (citing LaFave & Scott at 379).[170] Thus, a government official charged with torture would have the burden of proving that no other method of persuasion or interrogation or any other way of getting information

[169] Although the Bybee Memo did cite LaFave & Scott's version of this element, it distilled the treatise's analysis, which included citations to six federal cases (including *Bailey*) to one short sentence: "the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm." Bybee Memo at 40 (apparently referring to, but failing to cite, LaFave & Scott at 638).

[170] *See The Diana*, 74 U.S. (7 Wall) 354, 361 (1869) (for the necessity defense to be available, the case must be one of "absolute and uncontrollable necessity; and this must be established beyond a reasonable doubt . . . . Any rule less stringent than this would open the door to all sorts of fraud.").

would have prevented the harm in question. The Bybee Memo did not explain how an interrogator could prove this element.

A similar issue is raised by the fourth element of the defense – that there be a direct causal relationship reasonably anticipated between the criminal action taken and avoidance of the threatened harm. Thus, a defendant would have to prove, by a preponderance of the evidence, that he reasonably anticipated that torture would produce information directly responsible for preventing an immediate, impending attack in a real-world situation.[171]

The only other aspect of the necessity defense that was discussed in detail by the Bybee Memo was LaFave & Scott's observation that the "defense is available 'only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values.'" Bybee Memo at 41 (quoting LaFave & Scott at 629).[172] As LaFave & Scott's treatise explains, when a criminal statute

[171] Bybee responded to this statement by claiming that the Bybee Memo did discuss "the ticking time bomb scenario as precisely such a real world situation." He cited as an example a footnote in the Bybee Memo's discussion of *PCATI v. Israel*. However, that footnote simply summarized the ticking time bomb hypothetical discussed in the Israeli court's decision. Bybee Memo at 31 n.17. Bybee offered a second example of a "real world" ticking time bomb scenario by claiming that:

> the OLC attorneys working on the [2002] Memo had been briefed on the apprehension of Jose Padilla on May 8, 2002. Padilla was believed to have *built and planted* a dirty bomb . . . *in New York City*.

Bybee Response at 74 n.6 (emphasis added). Bybee did not cite a source for that statement, but it is inconsistent with press accounts and with former Attorney General Ashcroft's announcement at a press conference that Padilla "was *exploring a plan* to build and explode a radiological dispersion device, or 'dirty bomb,' *in the United States*." (http:edition.cnn.com/transcripts/0206/10/bn.02.html (emphasis added).

[172] Although LaFave & Scott cited only state statutes for this proposition, it is likely that a federal court asked to permit the defense in a prosecution under the torture statute would consider, as an initial matter, whether the defense was contemplated by Congress when it enacted the law. *See Bailey*, 444 U.S. at 415 n.11 (recognizing "that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law . . . and that therefore a defense of duress or coercion may well have been contemplated by Congress when it enacted" the prison escape statute). *But see Oakland*, 532 U.S. at 490 n.3 (pointing out that the *Bailey* Court refused to balance the harms of the proposed necessity defense and that "we are construing an Act of Congress, not drafting it.").

expressly provides that a necessity defense is prohibited, or conversely, that it is available, the statute's determination is controlling. LaFave & Scott at 629.

The Bybee Memo advanced two arguments in favor of the proposition that Congress intended the necessity defense to be available to persons charged with violating the torture statute. First, the memorandum stated:

> Congress has not explicitly made a determination of values vis-à-vis torture. In fact, Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense.

Bybee Memo at 41.

In a footnote, the memorandum explained that argument as follows: the definition of torture in the CAT only applied when severe pain is inflicted for the purpose of obtaining information or a confession. *Id.* at n.23. Therefore:

> One could argue that such a definition represented an attempt to to [sic] indicate that the good of of [sic] obtaining information . . . could not justify an act of torture. In other words, necessity would not be a defense.

Id.

The memorandum then reasoned that when Congress defined torture under the torture statute and did not include the the CAT requirement that pain be inflicted for the purpose of obtaining information or a confession, it intended "to remove any fixing of values by statute." *Id.* Therefore, according to the Bybee Memo, Congress intended to allow defendants charged with torture to raise the necessity defense. *Id.*

That argument depends on the following series of assumptions, none of which is supported by the ratification history of CAT or the legislative history of the torture statute: (1) the CAT definition's reference to the purpose of torture was intended to signal that the necessity defense was unavailable; (2) Congress

interpreted the definition as such a signal; and (3) Congress adopted a broader definition of torture than the CAT definition in order to indicate that the necessity defense should remain available under United States law.

However, if Congress had intended to allow the necessity defense to apply to the torture statute, it could have made an explicit statement to that effect, rather than relying on attorneys and judges in future criminal prosecutions to discern a hidden reason for its decision to broaden the scope of the definition of torture. Moreover, the argument's underlying assumption – that the wording of the CAT definition was "an attempt to indicate" that necessity should not be a defense to torture – is unwarranted, as the treaty explicitly stated elsewhere that necessity was not a defense to torture. CAT art. 2(2).

In support of its second argument for concluding that Congress intended to allow the necessity defense to apply to the torture statute, the Bybee Memo cited CAT article 2(2). The memorandum reasoned that Congress was aware of article 2(2), "and of the [Model Penal Code] definition of the necessity defense that allows the legislature to provide for an exception to the defense, [but] Congress did not incorporate CAT article 2.2 into [the torture statute]." Bybee Memo at 41 n.23. Congress's failure to prohibit explicitly the defense, the memorandum concluded, should be read as a decision by Congress to permit the defense. *Id.*

The Bybee Memo failed to point out, however, that the fact that Congress has not specifically prohibited a necessity defense does not mean that it is available. *Oakland*, 532 U.S. at 491 n.4 ("We reject the Cooperative's intimation that elimination of the defense requires an explicit statement.") (citation and internal quotation marks omitted).

Moreover, the Bybee Memo's argument depends on the assumption that Congress intended to enact implementing legislation for one section of CAT that was inconsistent with the clear terms of another section. The memorandum did not address the possibility that a court might conclude that the torture statute should be interpreted in a manner that is consistent with article 2(2)'s prohibition of the necessity defense.[173] *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d at 887 n.20

[173] The authors of the Bybee Memo recognized the logic of such an argument when it supported a permissive view of the torture statute. In Part IV of the Bybee Memo (International Decisions), in arguing that harsh Israeli interrogation methods did not constitute torture, the

(referring to "the long-standing rule of construction first enunciated by Chief Justice Marshall: 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .'" (citing and quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 34, 67 (1804)). *See also* Restatement (Third) of Foreign Relations Law of the United States at § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

More importantly, the Bybee Memo's discussion of congressional intent ignored directly relevant material in the ratification history of the CAT that undermined or negated its position. As the drafters of the Bybee Memo knew, but did not discuss in the memorandum, the Reagan administration's proposed conditions for ratification of the CAT included the following understanding:

> The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others.

S. Exec. Rep. No. 101-30 at 16.

The first Bush administration deleted that understanding from the proposed conditions, with the following explanation:

> Paragraph 2 of Article 2 of the Convention states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." *We accept this provision, without reservation.* As indicated by President Reagan when he transmitted the Torture Convention to the Senate, no circumstances can justify torture.
>
> The Reagan administration, without in any way narrowing the prohibition on torture, had thought it desirable to clarify that the

---

authors concluded that the court must have interpreted Israeli law in a manner consistent with the prohibition of CAT article 2(2). Bybee Memo at 31.

> Convention does not preclude the availability of relevant common law defenses, including self-defense and defense of others. *That is, the Convention does not prevent a person from acting in self-defense, as long as he does not torture.* While there was no opposition to this concept, substantial concern was expressed that if this understanding were included in the instrument of ratification, *it would be misinterpreted or misused by other states to justify torture in certain circumstances.* We concluded that this concern was justified and therefore reviewed whether the understanding was necessary. We decided it was not, since nothing in the Convention purports to limit defenses of actions which are not committed with the specific intent to torture. *We would not object to your including this letter in the Senate report on the Convention, so that U.S. courts are clear on this point.*

S. Exec. Rep. No. 101-30 at 40-41 (App. B) (Correspondence from the Bush Administration to Members of the Foreign Relations Committee, Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Senator Pressler (April 4, 1990) (emphasis added) (Mullins Letter)).

Yoo and (b)(6), (b)(7)(C) knew that the Bush administration had withdrawn the Reagan administration's understanding on self-defense and defense of others. On July 31, 2002, (b)(6), (b)(7)(C) wrote to Yoo:

> Something we don't mention in our discussion of defense is the fact [that] the Reagan administration had submitted an understanding with respect to justification defenses that the Bush administration dropped. . . . The Bush Administration explained the decision to drop this understanding as follows: "Upon reflection, this understanding was felt to be no longer necessary." Thoughts on whether we should include this and, if so, where?

Yoo responded:

> I guess we should drop a footnote. In terms of whether it is no longer necessary, is there any further explanation given by the Bush administration[?] It could be because it was felt to be understood that the treaty did not preclude those defenses.

(b)(6), (b)(7)(C) replied:

> I just looked through the hearing on the Convention -- Sofaer's prepared testimony states that one [of] "the basic obligations of a state party" to the Convention was "[t]o make clear that torture cannot be justified and that no order from a superior or office or public authority may be invoked as a justification of torture." Sen. Exec. Rep. 101-30, at 7. He later describes the Reagan administration understanding as "widely misunderstood." But that's all I've found on it.

Neither the Bybee Memo nor the Yoo Memo acknowledged this issue in their discussions of common law defenses. A copy of the full Senate Executive Report cited above, including the Mullins Letter, was among the documents provided to us by OLC in a folder labeled (b)(6), (b)(7)(C) - Hard Drive and Hard Copy Files."

The Bybee Memo also failed to consider the possibility that a court might consult additional relevant statements from the Executive Branch, such as the State Department's initial report to the United Nations Committee Against Torture, documenting United States implementation of the CAT (prepared *"with extensive assistance from the Department of Justice"*) (emphasis added). That report included the following statement:

> No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a "state of public emergency") or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension.

United States Department of State, Initial Periodic Report of the United States of America to the UN Committee Against Torture at ¶ 6 (October 15, 1999).[174]

[174] In its 2005 report to the Committee Against Torture, the United States reaffirmed its position that "[n]o circumstance whatsoever . . . may be invoked as a justification for or defense to committing torture." United States Department of State, Second Periodic Report of the United

A court might also be influenced by the strong judicial condemnation of torture in other federal cases. For example, in interpreting CAT Article 3, one court wrote:

> The individual's right to be free from torture is an international standard of the highest order. Indeed, it is a *jus cogens* norm: the prohibition against torture may never be abrogated or derogated. We must therefore construe Congressional enactments consistent with this prohibition.

Cornejo-Barreto, 218 F.3d at 1016. *Accord, e.g., Filartiga*, 630 F. 2d at 884.

We also concluded that a thorough, objective, and candid discussion of the relevant case law would have noted that although the necessity defense has been considered by the federal courts on many occasions, it has rarely been allowed to be presented to a jury. *See Oakland* 532 U.S. at 491 n.4 ("we have never held necessity to be a viable justification for violating a federal statute") (citation to *Bailey* omitted). In most reported cases, courts have found, as in *Bailey*, that the defendant would be unable to prove the elements of the defense. *See., e.g., Singleton*, 902 F.2d at 472 (noting that a defense of justification is infrequently appropriate).

(2) Self Defense

The Bybee Memo's discussion of self-defense exhibits some of the same shortcomings as its treatment of the necessity defense. The description of the doctrines of self-defense and defense of others was based on secondary authorities – LaFave & Scott and the Model Penal Code. There was no analysis or discussion of how the defense has been applied in federal court, and no review of federal jury instructions for the defense.[175] In addition, as discussed above, significant aspects of the CAT ratification history relating to the availability of the defense were ignored.

States of America to the UN Committee Against Torture at ¶ 6 (June 29, 2005).

[175] The memorandum did mention one federal case, *United States v. Peterson*, 483 F.2d 1222, 1228-29 (D.C. Cir. 1973), but only to quote its summary of what Blackstone wrote about self-defense in the mid-eighteenth century.

The memorandum presented a two-page summary of the common law doctrines of self-defense and the defense of others, and acknowledged that the situation under consideration differed from "the usual self-defense justification" because it involved inflicting injury on a prisoner in custody, who posed no personal threat to the interrogator.[176] Bybee Memo at 44. However, the memorandum asserted that "leading scholarly commentators believe that interrogation of such individuals using methods that might violate [the torture statute] would be justified under the doctrine of self-defense . . . ." *Id.* Thus, terrorists who help create a deadly threat "may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion . . . ." *Id.*

The only authority cited for this proposition was a law review article: Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280 (1989). The author of that article was one person, not "leading scholarly commentators, or "some commentators," as he was described in the Bybee Memo.

We found evidence that Yoo knew he was exaggerating the legal authority for this argument and consciously chose to conceal that fact. The "track changes" feature of a February 2003 draft of the Yoo Memo (which incorporated the Bybee Memo's discussion of self-defense nearly verbatim) indicates that Bybee questioned at that time whether the reference to "commentators" should be plural. In response, the phrase "leading scholarly commentators" was changed to "some leading scholarly commentators" and a citation to another article from the same issue of the *Israel Law Review* was added: Alan M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists – and to Lie About It?* 23 Israel L. Rev. 192, 199-200 (1989) (the Dershowitz article). Yoo Memo at 79. The Yoo Memo cited

---

[176] In his response, Bybee claimed that "the [Bybee] Memo qualified its analysis by saying that self-defense 'would not ordinarily be available to an interrogator accused of torturing a prisoner who posed no personal threat to the interrogator.' Standards Memo [Bybee Memo] at 44." Bybee Response at 73. The quoted sentence does not appear in the Bybee Memo. Rather, the sentence is from OPR's draft report and Bybee mistakenly attributed it to the Bybee Memo.

In fact, the Bybee Memo stated that "this situation is different from the usual self-defense justification" but that "[u]nder the present circumstances, . . . even though a detained enemy combatant may not be the exact attacker . . . he still may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution." Bybee Memo at 44.

the Dershowitz article with the signal, "*see also,*" indicating that the "[c]ited authority constitutes additional source material that supports the proposition." The Bluebook: A Uniform System of Citation R.1.2(a) at 23 (Columbia Law Review Ass'n et al, eds., 17th ed. 2000).

However, the Dershowitz article does not address the doctrine of self-defense; it discusses the possible application of the broader necessity defense to interrogators charged with using illegal methods and systematically committing perjury to conceal the practice. In the passage cited by the Yoo Memo, Dershowitz stated:

> I lack the information necessary to reach any definitive assessment of whether the GSS [Israeli General Security Service] should be allowed to employ physical pressure in the interrogation of some suspected terrorists under some circumstances. (I am personally convinced that there are some circumstances – at least in theory – under which extraordinary means, including physical pressure, may properly be authorized; I am also convinced that these circumstances are present far less frequently than law enforcement personnel would claim.) My criticism is limited solely to the dangers inherent in using – misusing in my view – the open-ended "necessity" defense to justify, even retroactively, the conduct of the GSS.

Dershowitz article at 199-200 (footnote omitted).[177] We reviewed the Dershowitz article in its entirety and concluded that it offers no support for the statement that violations of the torture statute "would be justified under the doctrine of self-defense."[178]

Furthermore, Professor Moore's article was a theoretical exploration of the morality of torturing terrorists to obtain information. The article cited more

[177] We concluded that this was the paragraph cited by Yoo, as it continues from page 199 to page 200.

[178] The Dershowitz article briefly alluded to self-defense twice: once, in order to contrast the "subjective perceptions and priorities" of the necessity defense with the "established rules of action and inaction" of the self-defense doctrine, Dershowitz article at 196-197; and again, in a footnote, to explain when a prisoner being tortured out of "necessity" might be able to invoke the right of self-defense as justification for resisting his interrogators. *Id.* at 198 n.17.

scholarly and philosophical works than legal authorities, and made no attempt to summarize or analyze United States law. The arguments adopted by the Bybee Memo were based on hypothetical situations proposed by Moore or other legal theorists, and clearly represented Moore's personal views, which he did not claim were supported by legal authority. *See id.* at 322-33.[179] Thus, the Bybee Memo's conclusion that "a detained enemy combatant . . . may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution," Bybee Memo at 44, had no basis in the law; it was a novel argument that the authors misrepresented as a "standard" criminal law defense.[180]

The Bybee Memo presented another novel interpretation of the common law doctrine of self-defense, based on the principle that a nation has the right to defend itself in time of war and "the teaching of the Supreme Court in *In re Neagle*, 135 U.S. 1 (1890)." Bybee Memo at 44. According to the Bybee Memo, *Neagle* held that Deputy U.S. Marshal Neagle, "an agent of the United States and of the executive branch, was justified in [killing a man who attacked U.S. Supreme Court Justice Stephen Field] because, in protecting Justice Field, he was acting pursuant to the executive branch's inherent constitutional authority to protect the United States government." *Id.* at 44-45.

However, *Neagle* did not hold that the officer's action was justified by the President's authority to protect the government. The case involved an appeal from the U.S. Court of Appeals for the Ninth Circuit, which, pursuant to a writ of *habeas corpus* filed after Neagle was arrested on state homicide charges, ordered his release from county jail. At the time, the federal *habeas corpus* statute applied to prisoners held in custody for, among other things, "an act done in pursuance of the laws of the United States." *Neagle* 135 U.S. at 40-41. The sole question

[179] The author's conclusions were introduced with the phrases "to my mind," and "[m]y own answer to this question is . . . ." *Id.* at 323.

[180] As discussed earlier, the ratification history of the CAT shows that the first Bush administration, which submitted the reservations, understandings, and declarations to CAT that were ratified by the Senate, did not view self-defense to acts of torture as a possible defense. As the State Department explained in correspondence to Senator Pressler, "[b]ecause the [CAT] applies only to custodial situations, i.e., when the person is actually under the control of a public official, the legitimate right of self-defense is not affected by the Convention." S. Exec. Rep. No. 101-30 at 40 (App. B).

before the Court was whether Neagle was acting "in pursuance of the laws of the United States" when he shot and killed Justice Field's attacker.[181] *Id.*

The county sheriff, represented by the California Attorney General, argued that Neagle was not acting pursuant to federal law because no federal statute authorized a U.S. Marshal to protect federal judges. The Court rejected that argument, stating that "[w]e cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death . . . ." *Id.* at 67.[182]

The Court then noted that a federal statute granted United States Marshals the same powers as state law enforcement personnel, and that California law directed sheriffs to "prevent and suppress all . . . breaches of the peace." *Id.* at 68. Because a California sheriff would have had the power to do what Neagle did, the Court reasoned, "under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction." *Id.* at 76. We found no support in *Neagle* for the proposition advanced in the Bybee Memo that the right to defend the national government "can bolster and support an individual claim of self-defense in a prosecution . . . ." Bybee Memo at 44.[183]

181 Justice Field "did not sit at the hearing of this case and took no part in its decision." *Neagle*, 135 U.S. at 76.

182 This passage was quoted in the Bybee Memo to support its argument that an interrogator could defend himself against a charge of torture "on the ground that he was implementing the Executive Branch's authority to protect the United States government." Bybee Memo at 45.

183 *Neagle's* value as a criminal law precedent is arguably limited by the unusual factual background of the case. *See Neagle* 135 U.S. at 56 ("The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject"). Nevertheless, Bybee and Yoo argue that they appropriately relied upon *Neagle* because it has been cited in other OLC opinions to support the general proposition that the President has the inherent power to protect U.S. personnel and property. However, none of those OLC opinions relied solely on *Neagle*, or cited it to support a proposition comparable to the Bybee Memo's theory that the President's inherent power to protect a federal judge "can bolster and support an individual claim of self-defense in a prosecution" for torture. Bybee Memo at 44.

The Bybee Memo went on to discuss the nation's right to defend itself against armed attack, citing the United States Constitution, Article 51 of the United Nations Charter, and several U.S. Supreme Court cases. Bybee Memo at 45. Based on those authorities, the memorandum concluded:

> If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate [the torture statute], he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network. In that case, we believe that he could argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack. This national and international version of the right to self-defense could supplement and bolster the government defendant's individual right.

Id. at 46.

The authorities upon which this conclusion was based either spoke in general terms of national defense or addressed the law of war, not the domestic criminal law of the United States.[184] The Bybee Memo did not explain how those authorities would apply to a criminal prosecution, or how they would "bolster" an individual defendant's claim of self-defense in federal court. Like the preceding statements, this conclusion was a novel argument for the extension of the law of self-defense, without any direct support in the law, and without disclosure of its unprecedented, novel nature.

---

[184] One of the cited cases, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), held that the Fourth Amendment to the United States Constitution did not apply to the search of property in a foreign country owned by a non-resident alien. *Id.* at 261. The page cited by the Bybee Memo included a passing reference to the fact that the "United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security." *Id.* at 273. The case did not discuss the doctrine of self-defense.

[redacted]

7. Conclusion

For the reasons cited above, we found that the Bybee and Yoo Memos contained seriously flawed arguments and that they did not constitute thorough, objective or candid legal advice.[185]

B. The Legal Analysis Set Forth in the Bybee Memo Was Inconsistent with the Professional Standards Applicable to Department of Justice Attorneys.[186]

Yoo and Bybee told us that OLC was asked to provide a candid assessment of how the torture statute would apply to the use of EITs, and that no one at the White House or the CIA ever pressured them to approve the use of EITs or to provide anything other than an objective analysis of the law. They also maintained that their analysis was a fair and objective view of the torture statute's meaning and that they never intended to arrive at a preordained result. Despite these assertions, we concluded that the memoranda did not represent thorough, objective, and candid legal advice, but were drafted to provide the client with a legal justification for an interrogation program that included the use of certain EITs.

As an initial matter, we found ample evidence that the CIA did not expect just an objective, candid discussion of the meaning of the torture statute. Rather, as John Rizzo candidly admitted, the agency was seeking maximum legal protection for its officers, and at one point Rizzo even asked the Department for an advance declination of criminal prosecution. The CIA did not develop EITs with the limitations of the torture statute in mind; rather, it adopted them from the SERE program, which incorporated many of the techniques used by totalitarian

185 We note that none of the attorneys involved in drafting the Bybee and Yoo Memos asserted that they did not have sufficient time to complete the memoranda or that time pressures affected the quality of their work. Yoo told us that they had a "fairly lengthy" period of time to complete the unclassified Bybee Memo. [redacted] also stated that [redacted] had sufficient time to devote to [redacted] projects. We also note that, after the issuance of the Bybee Memos, the OLC had approximately six additional months to produce the Yoo Memo, which incorporated the Bybee Memo nearly verbatim.

186 As discussed above, the analysis which follows applies equally to the March 14, 2003 Yoo Memo.

[redacted]

regimes to extract intelligence or false confessions from captured United States airmen. OLC's approval was sought as a final step before implementing the EITs.

We also found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result, at the expense of their duty of thoroughness, objectivity, and candor. The specific techniques the agency proposed were described to the OLC attorneys in detail, and were presented as essential to the success of the interrogation program. The waterboard, in particular, was initially portrayed as essential to the success of the program.[187] As (b)(6), (b)(7)(C) told us, "[M]y personal perspective was there could be thousands of American lives lost" if the techniques were not approved.

Yoo provided the CIA with an unqualified, permissive statement regarding specific intent in his July 13, 2002 letter, and approved an equally permissive statement in the June 2003 Bullet Points that were drafted in part and reviewed in their entirety by Yoo and (b)(6), (b)(7)(C) for use by the CIA. Goldsmith viewed the Bybee Memo itself as a "blank check" that could be used to justify additional EITs without further DOJ review. Although Yoo told us that he had concluded that the mock burial technique would violate the torture statute, he nevertheless told the client, according to (b)(3) and Rizzo, that he would "need more time" if the client wanted it approved.

According to Rizzo, there was never any doubt that waterboarding would be approved by Yoo, and the client clearly regarded OLC as willing to find a way to achieve the desired result, as evidenced by Rizzo's 2003 comment to another CIA attorney that "this OLC has demonstrated an ingenious ability to interpret over, under and around Geneva, the torture convention, and other pesky little

187 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 . . . ."

international obligations." Finally, immediately after the Criminal Division stated that the Department would not provide an advance declination of prosecution for violations of the torture statute, Yoo added the Commander-in-Chief and defenses sections to the Bybee Memo.

Several of the memoranda's arguments were supported by authority whose significance was exaggerated or misrepresented. Neither of the two law review articles cited in the Yoo Memo to support the position that torture could be justified under U.S. law by the common law doctrine of self-defense in fact supported that argument. Nor did the 1890 Supreme Court case, *In re Neagle*, provide adequate support for the statement that "the right to defend the national government can be raised as a defense in an individual prosecution" for torture. In addition, Yoo's conclusions about the broad scope of the Commander-in-Chief power did not reflect widely-held views of the Constitution.

The memoranda relied upon the phrase "severe pain" in medical benefits statutes to suggest that the torture statute applied only to physical pain that results in organ failure, death, or permanent injury. Another case describing the statutory meaning of "willful" was used to suggest a heightened standard of specific intent. A case from the Supreme Court of Israel was, according to the memorandum, "best read" as saying that the use of certain EITs did not constitute torture, despite the fact that the question was not addressed in the court's opinion. That case and one other foreign case was relied on for the conclusion that international law permits "an aggressive interpretation as to what amounts to torture."

We found instances in which adverse authority was not discussed and its effect on OLC's position was not assessed accurately and objectively. For example, the Bybee Memo cited *United States v. Bailey* for the proposition that the U.S. Supreme Court "has recognized the [necessity] defense," but did not cite a later case, *United States v. Oakland Cannabis Buyers' Cooperative*, which stated it was "incorrect to suggest that *Bailey* has settled the question whether federal courts have authority to recognize a necessity defense not provided by statute."

In discussing the Torture Victim Protection Act, the Bybee Memo focused almost exclusively on *Mehinovic v. Vuckovic*, which involved extremely brutal conduct, to support the argument that TVPA cases were all "well over the line of

what constitutes torture."[188] However, two other cases, in which far less serious conduct was found to constitute torture, were relegated to the appendix and their significance was not fully discussed.

In taking the extreme position that acts of torture could not be punished under certain circumstances or could be justified by common law defenses, the memoranda did not refer to or discuss the relevance of article 2(2) of the Convention Against Torture, which explicitly states that no exceptional circumstances can be invoked to justify torture. The drafters were, however, aware of article 2(2) and invoked it to the extent it supported a permissive view of the torture statute.[189] Similarly, the memos failed to acknowledge the statement, in the United States' 1999 report to the United Nations Committee Against Torture, that no exceptional circumstances could ever justify torture, and ignored statements from the first Bush administration that undercut the authors' theory that Congress intended to permit common law defenses to torture, or that "severe pain" under the torture statute must be "excruciating and agonizing."

We also noted that the Bybee and Yoo Memos adopted inconsistent positions to advance a permissive view of the torture statute. The torture statute's ban on "threat[s] of imminent death" resulting in severe mental pain or suffering was minimized by the assertion that "[c]ommon law cases and legislation generally define imminence as requiring that the threat be almost immediately forthcoming." Bybee Memo at 12; Yoo Memo at 44 (citing LaFave & Scott at 655). According to the memoranda, only threats of immediate, certain death would be covered by the statute. Bybee Memo at 12; Yoo Memo at 44.

However, in the discussion of self-defense that appeared later in the memoranda, the authors interpreted that authority differently to minimize

[188] Where the court in *Mehinovic v. Vuckovic* found one example of less extreme treatment – hitting and kicking a detainee and forcing him into a kneeling position – to constitute torture, the Bybee Memo simply observed that "we would disagree with such a view based on our interpretation of the criminal statute." Bybee Memo at 27.

[189] As discussed above, the Bybee and Yoo Memos argued, without acknowledging adverse authority, that because Congress did not explicitly adopt article 2(2) in the torture statute, it must have intended the common law defense of necessity to remain available to persons accused of torture. CAT article 2(2) was also cited as support for the memoranda's contention that the Supreme Court of Israel did not consider harsh interrogation techniques to constitute torture.

possible problems with the defense. The same section of LaFave & Scott, along with the Model Penal Code's discussion of self-defense, were cited to support the conclusion that "[i]t would be a mistake . . . to equate imminence necessarily with timing – that an attack is immediately about to occur." Bybee Memo at 43; Yoo Memo at 78. The memoranda cited LaFave & Scott's example of a kidnapper telling a victim he would be killed in a week; in such a situation, the victim could use force to defend himself before the week passed. Based on that logic, a threat that would be sufficiently imminent to justify killing a person in self-defense could nevertheless be insufficiently immediate or certain to qualify as a "threat of imminent death" under the torture statute. Put differently, an interrogator could threaten a prisoner in such a way that would justify the prisoner killing the interrogator in self-defense, but would not constitute a "threat of imminent death" under the torture statute, even if it caused severe mental pain or suffering.

Some of the arguments in the memoranda were illogical or convoluted, but were nevertheless advanced to support an aggressive interpretation of the torture statute. For example, the use of medical benefits statutes to define "severe pain" as the pain associated with "death, organ failure, or permanent damage" was of no practical value in interpreting the statute. The memoranda also presented a particularly convoluted argument about the necessity defense, suggesting that subtle differences between the CAT and the torture statute meant that "Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense."

In his response, Bybee claimed that the Bybee Memo made it clear that the assertion of the necessity defense or self-defense by an interrogator accused of torture would be an extension of the law. Bybee argued that the purpose of the defenses sections "was to call attention to the fact that such defenses *might* be available to an official prosecuted under the statute" and "was not meant to be an exhaustive study of the common law defenses." Bybee Response at 74 (emphasis in original). Bybee also asserted that "[i]t is certainly not an ethical violation or incompetent lawyering to advance a position that extends the current case law to novel factual scenarios." *Id.* at 73.

First, we agree that it can be appropriate to advance a position that extends the case law to new factual situations. However, it is a violation of professional standards and Department standards to advance such a position as legal advice,

without making clear to the client that the advice is an extension of existing law and that there are countervailing arguments against such a position.

The Bybee Memo did not make clear that extension of these defenses to prosecutions for torture would be novel. For example, in the section on self-defense, the memorandum presented only one qualification, consisting of a brief acknowledgment that "this situation is different from the usual self-defense justification." The memorandum went on to assert that "leading scholarly commentators believe that interrogation of such individuals using methods that might violate [the torture statute] would be justified under the doctrine of self-defense . . . ." Bybee Memo at 44. Thus, the Bybee Memo concluded, terrorists who help create a deadly threat "may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion . . . ." *Id.*

The language of the section on self-defense gave the impression that the defense would be readily available. For example, the section began with the sentence: "Even if a court were to find that a violation of Section 2340A was not justified by necessity, a defendant could still appropriately raise a claim of self-defense." *Id.* at 42. The Memo added: "Under the circumstances, we believe that a defendant accused of violating Section 2340A could have, in certain circumstances, grounds to properly claim the defense of another." *Id.* at 43.

Similarly, the language in the Commander-in-Chief section created the impression that the memorandum was presenting a definitive view of the law. The Memo stated that "it could be argued" that Congress enacted the torture statute with the intention of restricting the president's discretion in the interrogation of enemy combatants, but went on to conclude as follows:

> Even were we to accept this argument, however, we conclude that the Department of Justice could not enforce Section 2340A against federal officials acting pursuant to the President's constitutional authority to wage a military campaign. . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.

Bybee Memo at 36, 39.

Bybee conceded in his response that "[s]ome language in the [Bybee Memo], viewed in isolation, could be read to suggest that Congress has no power to criminalize *any* interrogations." Bybee Response at 58 (emphasis in original). He went on to assert that the Commander-in-Chief section, "properly viewed as a whole," was narrowly confined to a power that the President must invoke personally. *Id.* However, the Bybee Memo failed to state anywhere in the Commander-in-Chief section that its analysis was conditioned upon issuance of an order by the President.[190] In addition, Bybee told OPR in his interview: "we haven't explored that [issue] in this memorandum."

Similarly, on the issue of specific intent, Bybee asserted that the Bybee Memo "includes numerous qualifications that would be counterproductive if the objective was to obtain the most robust defense for interrogators possible." Bybee Response at 46-47. In fact, as discussed above, the Bullet Points[191] said about specific intent:

> The interrogation of al-Qa'ida detainees does not constitute torture within the meaning of section 2340 where the interrogators do not have the specific intent to cause the detainee to experience severe physical or mental pain or suffering. The absence of specific intent is demonstrated by a good faith belief that severe physical or mental pain or suffering will not be inflicted upon the detainee. A good faith belief need not be a reasonable belief. The presence of good faith can be established through evidence of efforts to review relevant professional literature, consulting with experts, or reviewing evidence gained from past experience.

---

190 As noted, the sole reference to the requirement is made indirectly in the introduction to the Defenses section, which follows the Commander-in-Chief section. Bybee Memo at 39 ("We have also demonstrated that Section 2340A, as applied to interrogations of enemy combatants *ordered by the President* pursuant to his Commander-in-Chief power would be unconstitutional." (emphasis added)). We found this single reference was inadequate to make it clear to the reader that such an order was required.

191 Yoo denied to Goldsmith that he authored or approved the Bullet Points. We found, however, that the Bullet Points were drafted in part and reviewed in their entirety by Yoo and [redacted], and that neither of them expressed any disagreement with their contents.

Bybee and Yoo argued that there was little danger of people in the field using the Unclassified Bybee Memo to justify actions that went beyond those specifically approved in the Classified Bybee Memo. However, this argument ignores several key facts. First, it ignores Rizzo's contemporaneous written record that the general legal memo was intended to allow the CIA to make its own decisions on techniques in the future. As discussed above, Rizzo wrote:

> I do not intend, and Bellinger/Yoo do not expect, that I will brief them on every new variation or technique that comes up. Based on the relatively bright legal lines we have drawn, we will brief them as necessary where and if it appears that we are approaching one of those lines.

Second, it ignores that the CIA sent a cable to the field authorizing techniques in the interrogation of Abu Zubaydah, and summarizing some of the legal analysis in the Bybee Memo. The cable specifically stated that "the representatives from the OLC advised that the statute would not repeat not prohibit the methods proposed by the Interrogation Team, in light of the specific facts and circumstances of the interrogation process [because of] the absence of any specific intent to inflict severe physical or mental pain or suffering." It also advised the interrogation team that specific intent to cause severe mental pain or suffering would be negated by a showing of good faith, and that due diligence to meet the good faith standard "might include such actions as surveying professional literature, consulting with experts, or evidence gained from past experience."

Third, the argument that the Classified Bybee Memo narrowed the scope of the Bybee Memo does not apply in the case of the March 2003 Yoo Memo to the DOD. As recognized by Philbin and Goldsmith, the Yoo Memo was not limited to specific techniques or the interrogation of a specific individual. Both Philbin and Goldsmith told OPR that they were concerned that the Defense Department might improperly rely on the opinion in determining the legality of new interrogation techniques. Goldsmith later explained, in an email to other OLC attorneys, that he saw the Yoo Memo as a "blank check" to create new interrogation procedures without further DOJ review or approval.