These and other examples discussed above led us to conclude that the Bybee Memo and the Yoo Memo did not present a thorough, objective, and candid assessment of the law.

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

Based on the results of our investigation, we concluded that the Classified Bybee Memo did not constitute thorough, objective, and candid legal advice.

First, the Classified Bybee Memo did not consider the United States legal history surrounding the use of water to induce the sensation of drowning and suffocation in a detainee. The government has historically condemned the use of various forms of water torture and has punished those who applied it. After World War II, the United States convicted several Japanese soldiers for the use of "water torture" on American and Allied prisoners of war.[192] American soldiers also have been court-martialed for administering the "water cure." One such court-martial occurred for actions taken by United States soldiers during the American occupation of the Philippines after the 1898 Spanish-American War.[193]

[192] These trials took place before United States military commissions, and in the International Military Tribunal for the Far East (IMTFE),commonly known as the Tokyo War Crimes Trial. According to records from that time period, there were two main forms of water torture, which was also referred to as water treatment, the water test, or suffocation by immersions. In the first, the subject was tied or held down on his back and cloth placed over his nose and mouth. Water was then poured on the cloth. As the interrogation continued, he would be beaten and water poured down his throat "until he could hold no more." In the second, the subject was tied lengthways on a ladder, face upwards. He was then slipped into a tub of water and held there until "almost drowned." Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468, 490-494 (2007) (citing *United States of America v. Chinsaku Yuki*, Manilla (1946)) (citation omitted); Affidavit of J.L. Wilson, The Right Reverend Lord Bishop of Singapore, admitted as Prosecution Exhibit 1519A, December 16, 1946, IMTFE Record, at 12,935; *United States of America v. Hideji Nakamura, Yukio Asano, Seitara Hata, and Takeo Kita*, United States Military Commission, Yokohama, May 1-28, 1947; *United States of America v. Yagoheji Iwata*, Case Docket No. 135 31 March 1947 to 3 April, 1947, Yokohama (citation omitted); Judgment of the IMTFE, note 96 at 49,663 ("The practice of torturing prisoners of war and civilian internees prevailed at practically all places occupied by Japanese troops . . . . Methods of torture were employed in all areas so uniformly as to indicate policy both in training and execution. Among these tortures were the water treatment.").

[193] *See* Guenael Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to National Case Law on War Crimes*, 1 Oxford Journal of International Criminal Justice 135 (2003) (Major Edwin Glenn and Lieutenant Edwin Hickman were tried for

The general view that waterboarding is torture has also been adopted in the United States judicial system. In civil litigation against the estate of the former Philippine President Ferdinand Marcos, the district court found the "water cure," in which a cloth was placed over a detainee's mouth and nose and water poured over it to produce a drowning sensation, was both "a human rights violation" and a "form[ ] of torture." *In Re Estate of Marcos, Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995). The court's description of the "water cure" closely resembles that of the CIA in its request to use enhanced interrogation techniques.

In addition, the use of "water torture" was punished when it was used by law enforcement officers as a means of questioning prisoners. In 1983, Texas Sheriff James Parker and three of his deputies were charged by the Department of Justice with civil rights violations stemming from their abuse, including the use of "water torture," of prisoners to coerce confessions.[194] *United States v. Carl Lee*, 744 F.2d 1124 (5th Cir. 1984). All four men were convicted.

None of these cases involved the interpretation of the specific elements of the torture statute. Nor are there sufficient descriptions in the opinions to determine how similar the techniques were to those proposed by the CIA. However, a thorough and balanced examination of the technique of waterboarding would have included a review of the legal history of water torture in the United States.

In addition, in concluding that the CIA's use of ten specific EITs during the interrogation of Abu Zubaydah would not violate the torture statute, the Classified Bybee Memo relied almost exclusively on the fact that the "proposed interrogation methods have been used and continue to be used in SERE training" without "any negative long-term mental health consequences." Classified Bybee Memo at 17.

The Classified Bybee Memo did not address the warning in the CIA's July 24, 2002 fax to Yoo and (b)(6), (b)(7)(C) that the psychologists' conclusions regarding the effect of SERE techniques on volunteer trainees would not necessarily apply to "a

conduct to the prejudice of good order and military discipline by courts martial in May 1902 based upon infliction of the "water cure." The "water cure" was essentially forcing a subject's mouth open and pouring water down his throat. Glenn was convicted and Hickman acquitted.).

[194] The court did not describe what consisted the "water torture."

man forced through these processes and who will be made to believe this is the future course of the remainder of his life." In addition, the Classified Bybee Memo did not comment on the fact that SERE trainers were instructed to prevent trainees from developing "learned helplessness," and to ensure that trainees were not pushed beyond their means to resist and to learn from the experience. *See* discussion of PREAL manual, *supra*. In light of the fact that the express goal of the CIA interrogation program was to induce a state of "learned helplessness," we found that the Classified Bybee Memo's conclusion that use of the ten specific EITs in the interrogation of Abu Zubaydah would not violate the torture statute was not based on a thorough, objective, and candid analysis of the issues.

We also found that the Classified Bybee Memo's conclusion that the use of sleep deprivation would not result in severe physical pain or suffering was not based on a thorough, objective, and candid analysis of the issues. As noted in the 2005 Bradbury Memo, the Classified Bybee Memo's analysis "did not consider the potential for physical pain or suffering resulting from the shackling used to keep detainees awake." 2005 Bradbury Memo at 35. Rather, the OLC attorneys limited their analysis to the physical effects of lack of sleep, without inquiring about or considering how the subject would be kept awake. In light of the fact that prisoners were typically shackled in a standing position with their arms elevated, wearing only a diaper, we concluded that the Classified Bybee Memo's analysis was incomplete.

We note that the Bybee Memo did not discuss the fact that the use of sleep deprivation as an interrogation technique was condemned as "torture" in a report cited by the U.S. Supreme Court in *Ashcraft v. Tennessee*, 322 U.S. 143, 151, n.6 (1944). In that opinion, the Court quoted the following language from a 1930 American Bar Association report: "It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired." *Id.*

Similarly, the Classified Bybee Memo failed to consider how prisoners would be forced to maintain stress positions and thus there was an insufficient basis for the memorandum's conclusion that the use of stress positions would not result in severe physical pain or suffering. The memorandum recited that subjects subjected to wall standing would be "holding a position in which all of the individual's body weight is placed on his finger tips." In other stress positions, they would sit on the floor "with legs extended straight out in front and arms

raised above the head" or would be kept "kneeling on the floor and leaning back at a 45 degree angle." Classified Bybee Memo at 10. However, the authors did not consider whether subjects would be shackled, threatened, or beaten by the interrogators, to ensure that they maintained those positions.

Bybee argued that he should not be responsible for these omissions given his role as a "reviewer" of the Classified Bybee Memo. He stated that it was reasonable for him to rely on the work of his "extremely experienced staff" – (b)(6), (b)(7)(C) Yoo and Philbin. Indeed, Bybee conceded in his written response that he would have included the legal history of waterboarding had he been aware of it. He wrote:

> Without pre-existing knowledge of the charging specifications in the World War II war crimes trials, or the techniques employed by U.S. soldiers in the years following the 1898 Spanish-American War, there would be no reason for Judge Bybee to suspect that such legal precedent existed. Nor did the CIA inform Judge Bybee that the U.S. military had historically condemned this interrogation technique as torture – a fact he would expect to be told if it were true. . . . Consistent with this, Judge Bybee maintains that he was unaware of any legal history at the time and would have included such history in the [Classified Bybee Memo] had he known of it.[195]

Because of the authors' failure to address the issues detailed above, we concluded that the legal advice provided was not thorough, objective, and candid legal advice.

[195] Bybee Classified Response at 4. Bybee also notes that the Classified Bybee Memo did list one case on waterboarding in the Appendix, which Bybee asserts "demonstrates that [OLC] *did* consider reported decisions holding that practices satisfied the definition of torture, but likely found this particular case factually distinguishable." *Id.* at 4-5 (emphasis in original). We do not agree that listing a case in the Appendix without discussion satisfied the attorneys' professional obligations in this matter. Bybee also argued that the cases relating to waterboarding were "obscure" and "easily missed even by diligent researchers." *Id.* Again, we disagree.

D. The Yoo Letter[196]

On August 1, 2002, Yoo also issued a six-page letter to White House Counsel Gonzales, in response to Gonzales's question whether interrogation methods that did not violate the torture statute could nevertheless be found to (1) violate U.S. obligations under CAT, or (2) provide a basis for prosecution under the Rome Statute in the International Criminal Court.

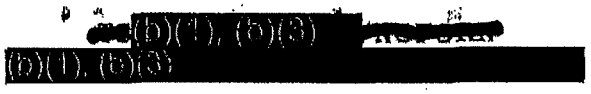
1. Violation of CAT

Yoo advised Gonzales that "international law clearly could not hold the United States to an obligation different than that expressed in [the torture statute]." Yoo Letter at 3. Yoo explained that the U.S. instrument of ratification to the CAT included a statement of understanding that defined torture in terms identical to the language of the torture statute. Citing "core principles of international law," Yoo concluded that "so long as the interrogation methods do not violate [the torture statute], they also do not violate our international obligations under the Torture Convention." *Id.* at 3, 4.

In arriving at that conclusion, Yoo blurred some important distinctions that are recognized by international law and by the foreign relations law of the United States. Yoo noted that the United States had submitted an "understanding" with its instrument of ratification as to the meaning of torture. He then discussed, in the next four paragraphs, the legal effect of a party's "reservation" to a treaty. Finally, Yoo concluded that the "understanding" was in fact a "reservation" that limited the United States' obligations under the CAT.[197]

[196] Yoo subsequently incorporated the substance of the Yoo Letter into the Yoo Memo. Yoo Memo at 55-57.

[197] Yoo explained, in a footnote, that the understanding might be a reservation, because although "the Bush administration's definition of torture was categorized as an 'understanding,' . . . we consider it to be a reservation if it indeed modifies the Torture Convention standard." Yoo Letter at 4, n.5 (citing Restatement (Third) of Foreign Relations Law of the United States at § 313 cmt g). In the very next footnote, however, Yoo stated that, "if we are correct in our suggestion that [CAT] itself creates a heightened intent standard, then the understanding attached by the Bush Administration is less a modification of the Convention's obligations and more of an explanation of how the United States would implement its somewhat ambiguous terms." Yoo Letter at 4, n.6.



Yoo did not elaborate on the well-established meanings of "reservation" and "understanding" in U.S. and international law:

- Reservations change U.S. obligations without necessarily changing the text [of a treaty], and they require the acceptance of the other party.

- Understandings are interpretive statements that clarify or elaborate provisions but do not alter them.

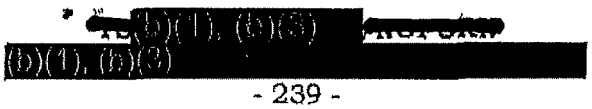
Congressional Research Service, *Treaties and Other International Agreements: the Role of the United States Senate*, 106th Cong., 2d Sess. 11 (Comm. Print prepared for the Senate Comm. on Foreign Relations, 1984); *accord, e.g., Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32 (April 9, 1987)).

Thus, a reservation to a duly ratified treaty "is part of the treaty and is law of the United States." Restatement (Third) of Foreign Relations Law of the United States at § 314 cmt. b. A treaty subject to an understanding "becomes effective in domestic law . . . subject to that understanding." *Id.* at cmt. d.

The difference between a reservation and an understanding could not have been lost on the first Bush administration or the Senate when the CAT was ratified, because – as Yoo subsequently observed in the Yoo Memo – the Bush administration intentionally "upgraded" one of the Reagan administration's proposed conditions to the CAT from an understanding to a reservation. Yoo Memo at 51. *See* Senate Hearing at 41 (1990) (testimony of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) ("that is why we have proposed the reservation, as a reservation, not merely an understanding . . . ."). Thus, it is likely that a court would consider the international obligations of the United States separately from the enforcement of domestic law implementing the treaty. Yoo did not acknowledge or discuss that possibility.

2. Prosecution Under the Rome Statute

In response to Gonzales's second question, the Yoo Letter stated that the U.S. is not a signatory to the ICC Treaty, and that the treaty therefore cannot bind the U.S. as a matter of international law, and that even if the treaty did apply, "the



interrogation of an al Qaeda operative could not constitute a crime under the Rome Statute." Yoo Letter at 5. According to the letter, this is because article 7 of the Rome Statute only applies to "a widespread and systematic attack directed against any civilian population," not interrogation of individual terrorists, and because article 8 is limited to acts that violate the provisions of the Geneva Conventions. *Id.*

The Yoo Letter went on to explain that article 8 would not apply because President Bush declared on February 27, 2002 that Taliban and al Qaeda fighters were not entitled to protection under the Geneva Conventions, consistent with OLC's January 22, 2002 opinion to that effect. Thus, "[i]nterrogation of al Qaeda members . . . cannot constitute a war crime because article 8 of the Rome Statute applies only to those protected by the Geneva Conventions." Yoo Letter at 6.

The Yoo Letter's analysis of article 8 was incomplete in two respects. First, the letter ignored a relevant provision of article 8. The Yoo Letter referred only to subsection 2(a), which defines war crimes as grave breaches of the Geneva Conventions. However, subsection 2(b) of article 8 also defines war crimes as "[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law." Those enumerated violations include "[c]ommitting outrages upon personal dignity, in particular humiliating and degrading treatment." Rome Statute, article 8(2)(b)(xxi). Because certain of the CIA EITs would likely be found by the international community to constitute humiliating and degrading treatment, we concluded that the Yoo Letter's assertion that "interrogation of an al Qaeda operative could not constitute a crime under the Rome Statute" was based on an incomplete analysis of the law.[198]

Second, Yoo's analysis was based on the assumption that a court in a nation that is party to the ICC treaty would accept the determination of the President of the United States – a non-party nation – that a given detainee was not protected under the Geneva Conventions. We believe that assumption was unwarranted.

198 (b) (5)

E. Analysis of the Bradbury Memos

Our review raised questions about the objectivity and reasonableness of some of the Bradbury Memos' analyses, although we did not conclude that those failings rose to the level of professional misconduct. The Bradbury Memos relied substantially upon the legal analysis of the Levin Memo (which corrected the most obvious errors of the Bybee and Yoo Memos) and applied that analysis to the facts and information provided to the Department by the CIA.[199] The Bradbury Memos were more carefully and thoroughly written than the Bybee and Yoo Memos, and unlike those memoranda, did not advance unsupported legal arguments that suggested that acts of torture were permitted or could be justified in certain circumstances. We nevertheless had some concern about the Bradbury Memos' analyses.

Others within the government expressed similar concerns. As discussed above, DAG Comey and Philbin objected to the issuance of the Combined Techniques Memo. In addition, Bellinger, then Legal Adviser to Secretary of State Condoleezza Rice, wrote to Bradbury and stated that he was "concerned that the [2007 Bradbury] opinion's careful parsing of statutory and treaty terms" would be considered "a work of advocacy to achieve a desired outcome." February 9, 2007 Bellinger letter at 11.

We found several indicia that the Bradbury Memos were written with the goal of allowing the ongoing CIA program to continue. First, we found some evidence that there was pressure on the Department to produce legal opinions which would allow the CIA interrogation program to go forward, and that Bradbury was aware of that pressure. Although Bradbury strongly denied that he was expected to arrive at a desired outcome, in Comey's April 27, 2005 email to Rosenberg, Comey stated that "[t]he AG explained that he was under great pressure from the Vice President to complete both memos, and that the President had even raised it last week." He wrote, "Patrick [Philbin] had previously reported that Steve [Bradbury] was getting constant similar pressure from Harriet Miers

[199] The May 2005 Bradbury Memos were in some respects replaced or updated by the 2007 Bradbury Memo, which adopted much of their analysis. Prior to President Obama's executive order of January 22, 2009, providing that no one was to rely upon any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001 and January 20, 2009, the 2005 Bradbury Memos had not been withdrawn by the Department.

and David Addington to produce the opinions." In addition, Bellinger told us that there was tremendous pressure placed on the Department to conclude that the program was legal and could be continued, even after the DTA and MCA were enacted.

The Bradbury Memos contained some of the flaws we noted in the Bybee and Yoo Memos. Although the Bradbury Memos, unlike the Classified Bybee Memo, acknowledged the substantial differences between SERE training and the use of EITs by the CIA, some sections of the Bradbury Memos nevertheless cited data obtained from the SERE program to support the conclusion that the EITs were lawful as implemented by the CIA. The SERE program was also cited as evidence that the CIA interrogation program and its use of EITs was "consistent with executive tradition and practice." In light of the significant differences, as pointed out by the CIA itself, between a training program and real world application of techniques, we found this argument to be strained.

We also noted that the Bradbury Memos frequently relied upon representations and assurances from the CIA concerning the procedures, monitoring, and safeguards that would accompany the use of EITs. For example, OLC's approval of the sleep deprivation technique was based on assurances from the CIA that medical officers would "intervene to alter or stop" the technique if they concluded in their "medical judgment that the detainee is or may be experiencing extreme physical distress." OLC's approval of waterboarding assumed "adherence to the strict limitations" and "careful medical monitoring," implicitly acknowledging that application of the techniques could constitute torture under certain circumstances.

Similar representations had accompanied the CIA's original request to use EITs in the interrogations of Abu Zubaydah, KSM and others, and as the CIA OIG Report determined, many abuses nevertheless took place. Under these circumstances, we question whether it was reasonable for Department officials to accept such representations at face value, given the CIA's previous history with EITs, the inevitable pressures faced by interrogation teams to achieve results, the CIA's demonstrated interest in shielding its interrogators from legal jeopardy, and the difficulty of detecting, through "monitoring," the largely subjective experiences of severe mental or physical pain or suffering.

The Bradbury Memos also reflect uncritical acceptance of the CIA's representations regarding the method of implementation of certain EITs. For example, in concluding that prolonged sleep deprivation, which involves shackling and diapering detainees, did not constitute cruel, inhuman, or degrading treatment, Bradbury noted that the CIA asserted that the use of diapers was necessary because releasing detainees from shackles to relieve themselves "would present a security problem and would interfere with the effectiveness of the technique" and that "diapers are used solely for sanitary and health reasons and not in order to humiliate the detainee." Article 16 Memo at 13; 2007 Bradbury Memo at 9-10. However, the CIA's 2002 list of proposed EITs described diapering as a separate EIT, in which the detainee "is forced to wear adult diapers and is denied access to toilet facilities for an extended period, in order to humiliate him."[200]

In addition, we question whether it was reasonable for OLC to rely on CIA representations as to the effectiveness of the EITs. The CIA Effectiveness Memo was essential to the conclusion, in both the Article 16 Memo, drafted in 2005, and the 2007 Bradbury Memo, that the use of EITs did not "shock the conscience" and thus did not violate the Due Process Clause because the CIA interrogations were not "arbitrary in the constitutional sense," that is, had a governmental purpose that the EITs achieved. However, as Bradbury acknowledged, he relied entirely on the CIA's representations as to the effectiveness of EITs, and did not attempt to verify or question the information he was given. As Bradbury put it, "[I]t's not my role, really, to do a factual investigation of that."[201]

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[200] We had similar concerns about two documents that were not the subject of this investigation – a letter and a memorandum from Bradbury to the CIA, both dated August 31, 2006, evaluating the legality of the conditions of confinement at the CIA's secret facilities. Some of the conditions were approved because, among other reasons, they were represented as essential to the facilities' security. However, these conditions were similar or identical to conditions that were previously described by the CIA or the military, in documents we found in OLC's files, as "conditioning techniques." Those conditions of confinement included isolation, blindfolding, and subjection to constant noise and light.

[201] Bellinger told OPR that he pushed for years to obtain information about whether the CIA interrogation program was effective. He said he urged AG Gonzales and White House Counsel Fred Fielding to have a new CIA team review the program, but that the effectiveness reviews consistently relied on the originators of the program. He said he was unable to get information from the CIA to show that, but for the enhanced techniques, it would have been unable to obtain the information it believed necessary to stop potential terrorist attacks.

We reviewed the CIA Effectiveness Memo, and found it to be conclusory and lacking in specific detail. The five-page memorandum relied on eleven bullet points to support its general assertion that "this program works and the techniques are effective in producing foreign intelligence . . . ." CIA Effectiveness Memo at 1. A total of nine detainees were listed as intelligence sources, including Abu Zubaydah and KSM. However, the memorandum included no information about what EITs were used on the detainees, or whether all of the detainees were in fact subjected to EITs.

We were able to obtain limited information about the interrogations of some of the nine detainees from other sources. As discussed above, the CIA Briefing Slides and the CIA OIG Report stated that Abu Zubaydah and KSM, the two main sources cited in the CIA Effectiveness Memo, were subjected to EITs and were waterboarded extensively by CIA interrogators. The CIA Briefing Slides stated that Khallad Bin Attash, another source cited in the memorandum, was subjected to three EIT interrogation sessions between May 17 and 19, 2003. He was not waterboarded, and we have no information about which EITs were used during those sessions. The CIA Briefing Slides provided the following summary of Khallad's interrogation:

> Khallad said he knew he could not hold out against the interrogation, so he had no reason to try to hold back. [He] agreed that he was suffering the will of Allah, and that Allah knew [he] had only the strength of a man and could not hold out against unrelenting interrogation. (Khallad has not been subjected to the waterboard. *Since the most recent use of enhanced techniques against him, his resistance to interrogation has grown stronger*) (emphasis added).

The CIA Briefing Slides predated the CIA Effectiveness Memo and were available to Bradbury. Bradbury was familiar with the CIA OIG Report and cited it in the Article 16 Memo.

Another source cited in the Effectiveness Memo, Ammar Al Baluchi, was subjected to five interrogation sessions between May 18 and 20, 2003, according to the CIA Briefing Slides. He was not waterboarded, and we have no other information about which other EITs were used on him.

Hassan Ghul was referred to in the Article 16 Memo as having been subjected to EITs. He was reportedly captured sometime around March 2004. We have no other information about his interrogations.

We were unable to obtain any information about the interrogation techniques used on the four other detainees cited in the CIA Effectiveness Memo – Hambali, Majid Khan, Zubair, and Lilie. The memorandum simply cited them as having confirmed information provided by KSM. It did not state that they were subjected to EITs.

According to CIA documents, by 2005, approximately thirty detainees had been subjected to EITs. As noted above, only nine persons were listed as sources of intelligence in the CIA Effectiveness Memo.[202] Among the high-value detainees not included in the CIA Effectiveness Memo was Al-Nashiri, the third detainee to be waterboarded, who, according to the CIA OIG Report, continued to be subjected to EITs – despite the objections of the on-site interrogators – because CIA headquarters officials believed he must be withholding information. Janat Gul, for whom the waterboard was authorized but apparently not implemented, is another high-value detainee not mentioned in the CIA Effectiveness Memo. Sharif al-Masri, described in a CIA letter to Acting AAG Levin as an al Qaeda operative with information on the location of Osama bin Laden, was not included in the CIA Effectiveness Memo. Levin authorized the waterboard for al-Masri's interrogation, although it reportedly was not used.

The CIA Effectiveness Memo also provided limited detail about the intelligence obtained from EITs.[203] We examined CIA assertions regarding specific

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202 No information was given in the CIA Effectiveness Memo as to whether the other twenty or so detainees provided useful information.

203 For example, the memorandum merely related that information about a plan to attack United States interests in Pakistan "was uncovered during the initial interrogations of Khallad Bin Attash and Ammar al-Baluchi and later confirmed by KSM, who provided additional information . . . ." CIA Effectiveness Memo at 2. No information was provided about the timing of the planned attack or how far the planning had progressed. More importantly, although the CIA Effectiveness Memo implied that all of the cited information resulted from the use of EITs, the memorandum provided no specific information to that effect.

disrupted terrorist plots.[204] The memorandum stated that Abu Zubaydah "provided significant information" about Jose Padilla and Binyam Mohammed, "who planned to build and detonate a 'dirty bomb' . . . ." CIA Effectiveness Memo at 4. FBI sources cited in the DOJ IG Report stated, however, that the information in question was obtained through the use of traditional interrogation techniques, before the CIA began using EITs.

More importantly, the CIA Effectiveness Memo provided inaccurate information about Abu Zubaydah's interrogation. It asserted that:

> Abu Zubaydah provided significant information on two operatives, Jose Padilla and Binyam Mohammed, who planned to build and detonate a "dirty bomb" in the Washington DC area. Zubaydah's reporting *led to the arrest of Padilla* on his arrival in Chicago in May 2003 [sic] and to the identification of Mohammad, who was already in Pakistani custody under another identity.

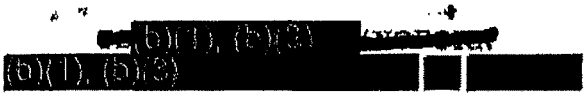
CIA Effectiveness Memo at 4 (emphasis added).

In fact, Padilla was arrested in May 2002, not 2003. Because the earliest DOJ authorization for the use of EITs was communicated by phone to the CIA on July 24, 2002, the information "[leading] to the arrest of Padilla" could not have been obtained through the authorized use of EITs. Yet, Bradbury relied upon this plainly inaccurate information in both the Article 16 Memo and the 2007 Bradbury Memo. In the Article 16 Memo, he wrote:

> You have informed us that Zubaydah also "provided significant information on two operatives, [including] Jose Padilla[,] who planned to build and detonate a 'dirty bomb' in the Washington DC area." (quoting CIA Effectiveness Memo at 4).

Article 16 Memo at 10.

[204] Much of the following information was made public in a September 6, 2006 speech by President Bush, and in a non-classified document issued by the Director of National Intelligence on September 6, 2006, "Summary of the High Value Terrorist Detainee Program."



The 2007 Bradbury Memo made the following assertion:

> Interrogations of Zubaydah – again, once enhanced techniques were employed – revealed two al Qaeda operatives already in the United States and planning to destroy a high rise apartment building and to detonate a radiological bomb in Washington, D.C.

2007 Bradbury Memo at 32.

Of the eleven bullet points in the CIA Effectiveness Memo, only four involved allegedly "disrupted terrorist plots." None of those plots appears to have been close to execution, and none of them approached a "ticking time bomb" scenario in terms of imminence or in degree of certainty that a plot was underway. Most of the cited information involved the identification of other terrorists, organizations, or cells, some of which do not appear to have been located or apprehended.

In addition, in considering whether the use of EITs is "arbitrary in the constitutional sense," we believe the failures as well as the claimed successes of the program should have been considered by Bradbury. As noted earlier, the CIA OIG Report, which was cited by Bradbury, related that Al-Nashiri continued to be subjected to EITs because headquarters officials erroneously found it "inconceivable" that he did not have more information, and Abu Zubaydah was subjected to EITs after he had begun to cooperate with his interrogators [redacted]

We also note that, to the extent the CIA Effectiveness Memo was relied upon by Bradbury in approving the legality of the waterboard as an EIT in 2005, most if not all of the CIA's past experience with that technique appear to have exceeded the limitations, conditions, and understandings recited in the Classified Bybee Memo and the Bradbury Memos.[205] As noted in the 2005 Bradbury Memo, the CIA OIG Report concluded that the CIA's past use of the waterboard "was different from the technique described in the [Classified Bybee] opinion and used in the

[205] Because CIA video tapes of its actual use of the waterboard were destroyed by the CIA, a definitive assessment of how that technique was applied may be impossible.

SERE training." 2005 Bradbury Memo at 41, n.51 (quoting CIA OIG Report at 37). In addition, the report found that "the expertise of the [former] SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant" and that there was no "reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe." *Id.* (citing CIA OIG Report at 21, n.26).

The 2005 Bradbury Memo stated that the CIA's proposed use of EITs in 2005 reflected "a number of changes in the application of the waterboard, including limits on the frequency and cumulative use of the technique." *Id.* However, even though the waterboard technique that allegedly produced valuable intelligence in 2002 and 2003 appears to have been changed substantially by 2005, the CIA Effectiveness Memo cited intelligence obtained from the earlier sessions as evidence that the 2005 technique would be effective. Moreover, the program approved by Bradbury in 2007, which did not include the use of the waterboard, was based upon the "effectiveness" of interrogation sessions that made extensive use of the waterboard. Thus, the programs approved by Bradbury in 2005 and 2007, largely on the basis of intelligence data cited in the CIA Effectiveness Memo, were significantly different from the program that produced the intelligence in question.

We also note that the Bradbury Memos' analysis rested in part on assurances provided by the CIA that EITs would be administered only to high-value detainees with knowledge of imminent al Qaeda threats, or, in the case of the waterboard, where there were "substantial and credible indicators" that the subjects had actionable information that could disrupt or delay an imminent terrorist attack. However, the CIA Effectiveness Memo does not indicate that the use of EITs ever resulted in intelligence about attacks that were underway or close to execution, or that any attacks took place because detainees were able to withhold information under conventional interrogation.

We question whether it was reasonable for Bradbury not to have demanded more specific information before concluding that the use of EITs was both essential and effective in disrupting terrorist attacks. Given the importance of the CIA Effectiveness Memo's conclusions to Bradbury's constitutional analysis, and in light of the CIA OIG report, he should have insisted that it set forth: the CIA's

basis for believing the subjects possessed information about imminent attacks; the type and sequence of EITs that were applied; the information obtained after EITs were used; and any verification or follow up use of that information. The CIA also should have described any instances where the use of EITs produced no useful information, or false information.[206] Absent this type of information and analysis, we question Bradbury' reliance on the CIA Effectiveness Memo to approve the use of EITs going forward.

Accordingly, based on our review of the CIA Effectiveness Memo, and in light of the questions that have been publicly raised about the effectiveness and usefulness of EITs, we question whether OLC's conclusion that the use of EITs does not violate substantive due process standards was adequately supported.

Our review of the Bradbury Memos raised additional concerns about OLC's legal analysis. Some of the memoranda's reasoning was counterintuitive. For example, the Article 16 Memo concluded that the use of thirteen EITs, including stress positions, forced nudity, cramped confinement, sleep deprivation, and the waterboard, did not violate the United States obligation under CAT to prevent "acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." The 2007 Bradbury Memo concluded that Common Article 3 of the Geneva Conventions, which requires the United States to ensure that detainees "shall in all circumstances be treated humanely," and which bars, among other things, "cruel treatment" and "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," did not bar the use of six EITs, including extended sleep deprivation that involves dietary manipulation, shackling and diapering. Those conclusions, although the product of complex legal analysis,

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[206] According to the September 8, 2006 report of the Senate Select Committee on Intelligence on "Postwar Findings About Iraq's WMD Programs and Links to Terrorism and How They Compare with Prewar Assessments" (the SSCI Report), the CIA "relied heavily on the information obtained [in 2002] from the debriefing of detainee Ibn al-Shaykh al-Libi, a senior al-Qa'ida operational planner, to assess Iraq's potential [chemical and biological weapons] training of al-Qa'ida." SSCI Report at 76. Al-Libi recanted that information in 2004, and claimed that, after he was subjected to harsh treatment by CIA debriefers, he "decided he would fabricate any information the interrogators wanted in order to gain better treatment and avoid being handed over to [a foreign government.]" *Id.* at 79-80. Al-Libi was in fact transferred to the custody of a foreign government and was allegedly subjected to threats and harsh physical treatment. *Id.* at 80-81. He later stated that he continued to fabricate information in order to avoid harsh treatment. *Id.* at 81.

appear to be inconsistent with the plain meaning and commonly-held understandings of the language of Common Article 3.

Moreover, the Article 16 Memo's and the 2007 Bradbury Memo's analysis of substantive due process appears incomplete. On the question of what would "shock the contemporary conscience" in light of executive tradition and contemporary practice, OLC looked to United States case law on coercive treatment, discussed the military's tradition of not using abusive techniques, noted the State Department's regular practice of condemning "conduct undertaken by other countries that bears at least some resemblance to the techniques at issue," and discussed the rulings of foreign tribunals. In each instance, the memoranda attempted to distinguish the CIA interrogation program from those accepted standards of conduct.

For example, criminal law prohibitions on coercive interrogation were distinguished because OLC found the governmental interest in preventing terrorism to be more important than conducting "ordinary law enforcement." Article 16 Memo at 33. Military doctrine was distinguished because al Qaeda terrorists are "unlawful combatants" and not prisoners of war. *Id.* at 35. Official United States condemnations of harsh interrogation in other countries "are not meant to be legal conclusions" and are merely "public diplomatic statements designed to encourage foreign governments to alter their policies in a manner that would serve United States interests." 2007 Bradbury Memo at 38. The judgments of foreign tribunals were distinguished because courts did not make any findings "as to any safeguards that accompanied the . . . interrogation techniques," because the foreign courts did not make inquiries into "whether any governmental interest might have reasonably justified the conduct," or because the cases involved legal systems where intelligence officials are "subject to the same rules as 'regular police interrogation[s].'" *Id.* at 40, 42.

Thus, OLC found that the condemnation of coercive or abusive interrogation in those contexts did not apply to the CIA interrogation program, and that executive tradition therefore did not prohibit the use of EITs by the CIA. However, the absence of an exact precedent is not evidence that conduct is traditional. Even though the OLC opinions found no "evidence of traditional executive behavior or contemporary practice . . . condoning an interrogation program" using coercive techniques, it concluded, based on the absence of any previous, explicit condemnation of a program that was virtually identical to the CIA interrogation

program, that "in light of 'an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them,' the use of [EITs by the CIA] as we understand it, does not constitute government behavior" that shocks the contemporary conscience. Article 16 Memo at 38.

Although we had serious concerns about the objectivity of the advice in the Bradbury Memos, as discussed above, we did not find that the shortcomings we identified rose to the level of professional misconduct.

F. Individual Responsibility

Having concluded that much of the legal analysis of the Bybee Memo, the Classified Bybee Memo, the Yoo Memo, Yoo's July 13, 2002 Letter, and the Yoo Letter fell short of the standards of thoroughness, objectivity, and candor that apply to Department of Justice lawyers, we now consider the levels of responsibility that apply to each of the subjects. As Yoo was the primary author of those documents, we first consider those questions with respect to him.

1. John Yoo

John Yoo accepted the initial assignment from the NSC and the CIA on behalf of the Department. He was directly responsible for the contents of the Bybee Memo, the Classified Bybee Memo, the Yoo Memo, the July 13 Letter, and the Yoo Letter. In addition, he signed the Yoo Memo, the July 13 Letter, and the Yoo Letter. He also directed and reviewed (b)(6), (b)(7)(C) research and drafting. We therefore concluded that he was primarily responsible for ensuring that the legal analysis in those documents was thorough, objective, and candid.

Under OPR's analytical framework, an attorney commits intentional professional misconduct when he violates a clear and unambiguous obligation purposefully or knowingly. We found, based on a preponderance of the evidence, that Yoo knowingly failed to provide a thorough, objective, and candid interpretation of the law.[207] The Bybee Memo had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute,

[207] Because subjects rarely acknowledge or announce their intent to disregard a professional obligation, our findings here, as in most cases, are largely based on circumstantial evidence.

the War Crimes Act, the Geneva Convention, and the Convention Against Torture, and Yoo's legal analyses justified acts of outright torture under certain circumstances, and characterized possible prosecutions under the torture statute as unconstitutional infringements on the President's war powers. We based our conclusion that Yoo committed intentional professional misconduct on the following:

First, we found that Yoo knowingly provided incomplete and one-sided advice in his analysis of the Constitution's Commander-in-Chief clause, which he asserted could bar enforcement of the torture statute in the context of the CIA interrogation program. Philbin told us that he thought the Commander-in-Chief section was aggressive and went beyond what OLC had previously said about executive power, and that he told Yoo to take it out of the Bybee Memo. In addition, given Yoo's academic and teaching background, we found that Yoo knew his view of the Commander-in-Chief power was a minority view and would be disputed by many scholars. As such, Yoo had an obligation to inform his client that his analysis was a novel and untested one.

We also found that Yoo knew that the Commander-in-Chief section might be used in an effort to provide immunity to CIA officers engaged in acts that might be construed as torture. We found significant the timing of the addition to the Bybee Memo of the Commander-in-Chief section directly after Criminal Division AAG Chertoff refused to provide an advance criminal declination in CIA interrogation cases. In addition, we found that Yoo was aware that, absent the requirement of a direct presidential order, the Commander-in-Chief section could become "this kind of general immunity from everything anybody ever did." Despite this knowledge, he failed to include in the memoranda that a direct presidential order was required to trigger the Commander-in Chief clause.

In addition, we found that Yoo was aware that the Bybee Memo's discussion of specific intent was insufficient. As discussed in detail above, that section suggested that an interrogator who inflicted severe pain and suffering during an interrogation would not violate the torture statute if his objective was to obtain information. Yoo told us that he had not dealt with the question of specific intent prior to the Bybee Memo, and that he "was very surprised to see that the Supreme Court cases were so confused about it." Yet, he only "looked at the cases quickly" and relied upon a relatively inexperienced attorney "to figure out . . . what the law really is." Yoo acknowledged that Chertoff and others told

him that the law of specific intent was "awfully confused." Philbin stated that he told Yoo his reasoning was incorrect. Yoo also remembered reading a law review article or treatise, possibly La Fave & Scott, that discussed "how they're not sure what the exact definition of specific intent is."

Despite Yoo's knowledge, the Bybee and Yoo Memos' advice on the issue of specific intent did not convey any of the uncertainty or ambiguity of this area of the law. This was even more apparent in Yoo's July 13, 2002 letter to Rizzo and in the Classified Bybee Memo, where Yoo provided a less complete explanation of the torture statute's specific intent element, and in the 2003 CIA Bullet Points, which Yoo tacitly approved. Given Yoo's background as a former Supreme Court law clerk and tenured professor of law, we concluded that his awareness of the complex and confusing nature of the law, his failure to carefully read the cases, and his exclusive reliance on the work of a junior attorney, established by a preponderance of the evidence that he knowingly failed to present a sufficiently thorough, objective, and candid analysis of the specific intent element of the torture statute.

We found additional evidence that Yoo knowingly provided incomplete advice to the client. Shortly before the Bybee Memo was signed, (b)(6), (b)(7)(C) told Yoo that the memorandum's discussion of common law defenses did not mention that one of the Reagan administration's proposed understandings to the CAT (the understanding that common law defenses would remain available to persons accused of torture under United States law), had been withdrawn prior to the treaty's ratification. (b)(6), (b)(7)(C) told Yoo that the understanding had been withdrawn "[t]o make clear that torture cannot be justified." Despite receiving this information contradicting the memorandum's assertion that self-defense could be invoked by CIA interrogators charged with torturing detainees, Yoo did not alter the memorandum. The Bybee Memo continued to rely on other aspects of the CAT ratification history to support its aggressive interpretation of the torture statute, while ignoring this important aspect of its history.

We also found that Yoo knowingly misstated the strength of the Bybee Memo's argument "that interrogation of [prisoners] using methods that might violate [the torture statute] would be justified under the doctrine of self-defense . . . ." The Bybee Memo asserted that "leading scholarly commentators" supported that proposition, even though a single law review article was the only support.

During the drafting of the Yoo Memo, Bybee questioned Yoo about the reference to "commentators," to determine whether there was more than one such commentator. Rather than change the memorandum to assert that there was one "commentator," Yoo added a citation to an article by Professor Dershowitz that did not support the proposition in question.[208] Accordingly, we concluded that Yoo knowingly misrepresented the authority that supported his statement that "some leading scholarly commentators believe that interrogation of such individuals using methods that might violate [the torture statute] would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot 'has culpably caused the situation where someone might get hurt.'"

Some of the other flaws discussed in the Analysis section of this report, considered in isolation, could be seen as the result of reckless action or mistake. However, the evidence of the knowing violations discussed above led us to conclude that Yoo put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice, and that he therefore committed intentional professional misconduct.

We recognize that the Bybee Memo was written at a difficult time in our nation's history, and that the fear and uncertainty that followed the September 11, 2001 attacks might explain why some Department of Justice lawyers were willing to conclude, contrary to core principles of American and international law, that the torture statute could not be enforced against CIA interrogators under certain circumstances, or that acts of outright torture could be justified by common law defenses. However, situations of great stress, danger, and fear do not relieve Department attorneys of their duty to provide thorough, objective, and candid legal advice, even if that advice is not what the client wants to hear. Accordingly, we concluded that the extraordinary circumstances that surrounded the drafting of the Bybee and Yoo Memos did not excuse or justify the lack of thoroughness, objectivity, and candor reflected in those documents.

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[208] We found by a preponderance of the evidence that Yoo added the Dershowitz citation. Both Yoo and [redacted] acknowledged that Yoo was responsible for the sections of the memorandum on common law defenses. In addition, Yoo told us that he recalled reading the symposium issue of the law review that contained the Moore and Dershowitz articles. We considered the possibility that Yoo may have misrecollected the substance of the Dershowitz article and simply added the citation without looking at the article. However, because the citation included a reference to specific page numbers, we discounted that possibility.

2. Judge Jay Bybee

We concluded that Bybee, as the head of OLC and signator of the Bybee Memo and the Classified Bybee Memo, was responsible for ensuring that the advice provided to the clients presented a thorough, objective, and candid view of the law. Although Bybee did not conduct the basic research that went into the memoranda and did not draft any sections, he reviewed many drafts, provided comments, and signed both memoranda. Philbin told us that Bybee "was so personally involved, he was kind of taking over" and, ultimately "churn[ed] through three drafts with comments on them per day."

We acknowledge that an Assistant Attorney General should not be held responsible for checking the accuracy and completeness of every citation, case summary, or argument in every legal memorandum submitted for his signature by a Deputy AAG. However, this was not a routine project that simply required Bybee to sign off as an administrative matter. Bybee's signature had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture, and he endorsed legal analyses that justified acts of outright torture under certain circumstances, and that characterized possible prosecutions under the torture statute as unconstitutional infringements on the President's war powers.

When Bybee reviewed and signed the Bybee Memo and the Classified Bybee Memo, he assumed responsibility for verifying that the documents provided thorough, objective, and candid legal analysis. He also assumed the responsibility for investigating problems that were apparent in the analysis or that were brought to his attention by others. Bybee's signature, which added greater authority to the memoranda, carried with it a significant degree of personal responsibility.[209]

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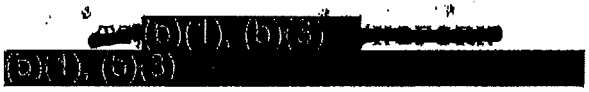
[209] Bybee did not have to sign the opinions. Yoo had the authority to sign OLC memoranda and did so on many other occasions.

Unlike Yoo, we found insufficient evidence to conclude that Bybee knew at the time that the advice in question was incomplete or one-sided.[210] Accordingly, we concluded that Bybee did not commit intentional professional misconduct.

However, we concluded, based on a preponderance of the evidence, that Bybee, at a minimum, should have known that the memoranda were not thorough, objective, or candid in terms of the legal advice they were providing to the clients and that thus he acted in reckless disregard of his professional obligations. As noted above, an attorney commits professional misconduct through reckless disregard of an obligation when he when (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard, (2) knows, or should know based on his experience and the unambiguous applicability of the obligation or standard, that his conduct involves a substantial likelihood that he will violate or cause a violation of the obligation or standard, and (3) engages in the conduct, which is objectively unreasonable under all the circumstances.

The memoranda were densely written in a confident and authoritative tone, and included citations to many historical sources and legal authorities. Moreover, Yoo had a reputation as an expert in presidential war powers, adding an additional air of authority to the drafts he submitted to Bybee. However, we believe an attorney of Bybee's background and experience, who had the opportunity to review and comment on numerous drafts over an approximately two-week period, should have recognized and questioned the unprecedented nature of the Bybee Memo's conclusion that acts of outright torture could not be

[210] To date, Bybee has not acknowledged that the Bybee and Yoo Memos were incomplete or otherwise deficient in any respect, but has conceded that certain sections could have been more thorough. In his response to a draft of this report, he commented that: (1) in discussing the ratification history of the CAT, "OLC may have unwittingly overstated the degree of unity between [the Bush and Reagan] Administrations' views"; (2) "certain portions of the [Commander-in-Chief and common law defenses] analysis would benefit from additional clarification"; (3) "in retrospect, this particular section [concluding that Congress had no power to regulate interrogation] could have been more fulsome"; (4) "even if it would have been better to cite *Oakland*, this is not evidence of an ethics violation"; and (5) "in retrospect, it would have been useful to cite either the Bush Administration's understanding of the availability of the necessity defense or both the Reagan Administration's and the Bush Administration's understanding . . . ." Bybee Response at 48, 54-55, 68, 72, 75.



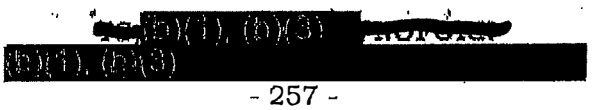
prosecuted under certain circumstances, or that common law defenses could be successfully invoked by a defendant in a prosecution for torture.

We also found that Bybee should have questioned the logic and utility of applying language from the medical benefits statutes to the torture statute, and should have recognized the potentially misleading nature of statements such as, "even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith."

Our conclusion that Bybee should have known about the serious flaws in the memoranda is reinforced by Philbin's statement that he voiced his doubts to Bybee about the accuracy of the Bybee Memo's specific intent discussion, and advised against discussing possible defenses or including the section on the Commander-in-Chief power. Although Philbin stated that he ultimately advised Bybee that he could sign the Bybee Memo because he thought the questionable sections were *dicta*, we would expect a reasonable attorney in Bybee's position to react to these significant concerns raised by one of his Deputy AAGs by verifying that the opinion was thorough, objective, and candid before signing it, even if that meant conducting independent research, reading the authorities that supported the questionable arguments, or obtaining comments from other Department attorneys or government national security experts. As such, we concluded that Bybee knew or should have known that there was a substantial likelihood the Bybee Memo did not present a thorough, objective, and candid view of the law, and, given the importance of the matter, his actions were objectively unreasonable under the circumstances. Consequently, we concluded that he acted in reckless disregard of his obligation to provide thorough, objective and candid legal advice.

3. Patrick Philbin

Philbin conducted the second Deputy reviews for the Bybee Memo, the Classified Bybee Memo, and the Yoo Memo. As with Bybee, we concluded that he was not responsible for checking the accuracy and completeness of every citation, case summary, or argument, and that he was responsible for verifying that the memoranda provided thorough, objective, and candid legal analysis. He also had the duty to bring any apparent problems to the attention of the OLC official who signed the document in question.



(b)(1), (b)(3)

We concluded that Philbin did not commit professional misconduct in this matter. Philbin raised his concerns about the memoranda with both Yoo and Bybee, he did not have ultimate control over the content of the memoranda, and he did not sign them. After Yoo and Bybee resigned from the Department, Philbin directed (b)(6), (b)(7)(C) to notify the Department of Defense that it could not rely on the Yoo Memo to approve any additional enhanced interrogation techniques. He later alerted Goldsmith to the flawed reasoning in the memoranda, and participated in the decision to formally withdraw the Bybee and Yoo Memos. Accordingly, we concluded that Philbin did not commit professional misconduct in this matter.

4. (b)(6), (b)(7)(C)

(b)(5), (b)(6), (b)(7)(C)

5. Steven Bradbury

Bradbury signed four OLC memoranda related to the CIA interrogation program: the 2005 Bradbury Memo, the Combined Techniques Memo, the Article 16 Memo, and the 2007 Bradbury Memo. As discussed above, we had serious concerns about some of his analysis, but we did not conclude that those problems rose to the level of professional misconduct. The Bradbury Memos incorporated the legal analysis of the Levin Memo, which Bradbury helped draft, and which substantially corrected the defects in the Bybee and Yoo Memos – specifically eschewing reliance on the Commander-in-Chief, necessity, and self-defense sections, correcting the inaccurate specific intent section, and removing the earlier memoranda's reliance on the health benefits statute. None of the analysis in the Bradbury Memos is comparable to the inadequately supported, unprecedented theories advanced in the Bybee and Yoo Memos to support the proposition that torture can be permitted or justified under certain circumstances.

(b)(1), (b)(3)

(b)(1), (b)(3)

In applying the facts to the law, Bradbury explicitly qualified his conclusions and explained the assumptions and limitations that underlay his analysis. Moreover, Bradbury distributed drafts of the memoranda widely, within and without the Department, for comments. The memoranda were written in a careful, thorough, lawyerly manner, which we concluded fell within the professional standards that apply to Department attorneys.

As previously discussed, in light of the interrogation abuses described in the CIA OIG Report and the ICRC report, as well as the fact that the SERE program was fundamentally different from the CIA interrogation program, however, we believe Bradbury should have cast a more critical eye on the conclusory findings of the Effectiveness Memo, which were essential to his analysis, in both the Article 16 Memo and the 2007 Bradbury Memo, that the use of EITs was consistent with constitutional standards and international norms. However, we found that these issues did not rise to the level of professional misconduct.

6. Other Department Officials

We did not find that the other Department officials who reviewed the Bybee Memo committed professional misconduct. We found Michael Chertoff, as AAG of the Criminal Division, and Adam Ciongoli, as Counselor to the AG, should have recognized many of the Bybee Memo's shortcomings and should have taken a more active role in evaluating the CIA program. John Ashcroft, as Attorney General, was ultimately responsible for the Bybee and Yoo Memos and for the Department's approval of the CIA program. Ashcroft, Chertoff, Ciongoli, and others should have looked beyond the surface complexity of the OLC memoranda and attempted to verify that the analysis, assumptions, and conclusions of those documents were sound. However, we cannot conclude that, as a matter of professional responsibility, it was unreasonable for senior Department officials to rely on advice from OLC.

G. Institutional Concerns

In addition to assessing individual responsibility in this matter, we noted, in the course of our investigation, several managerial concerns. First, we found that the review of the OLC memoranda within the Department and the national security arena was deficient. The memoranda were not circulated to experts on

(b)(1), (b)(3)

national security law in the Criminal Division, or to the State Department, which had an interest in the interpretation of treaties. Given the significance of the issue – opining on the CIA's use of EITs to gain intelligence in the absence of clear precedent on the issue – and the pressure of knowing that missed intelligence might result in another terrorist attack, the memoranda should have been circulated to all attorneys and policy makers with expertise and a stake in the issues involved.

We found that the limitations imposed on the circulation of the draft were, in part, based on the limited number of security clearances granted to review the materials. This denial of clearances to individuals who routinely handle highly classified materials has never been explained satisfactorily and represented a departure from OLC's traditional practices of widely circulating drafts of important opinions for comment. In the end, the restrictions added to the failure to identify the major flaws in the OLC's legal advice.

We commend the Best Practices as laid out by Bradbury and urge the OLC to adhere to them. In order to effect its mission of providing authoritative legal advice to the Executive Branch, the OLC must remain independent and produce thorough, objective, and candid legal opinions. The Department, and in particular the Attorney General and Deputy Attorney General, must encourage and support the OLC in its independence, even when OLC advice prevents its clients, including the White House, from taking the actions it desired.

CONCLUSION

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

We found that former AAG Jay Bybee committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.[211]

[211] Pursuant to Department policy, we will notify bar counsel in the states where Yoo and Bybee are licensed.

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

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