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

PREAL Manual, ¶¶ 1.6 and 5.3.1.[34]

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

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

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

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

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

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

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

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

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

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

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

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

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

(12) **Mock Burial:** The subject is placed in a box that resembles a coffin, with hidden air holes to prevent suffocation, and is taken to a prepared site, where he hears the sound of digging. The site has a prepared hole, dug in such a way that the box can be lowered into the ground and shovels of dirt thrown in

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

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on top without blocking the air holes or actually burying the subject. The procedure is part of a "threat and rescue scenario" where the burial is interrupted by a concerned party, who then uses the subject's fear of being returned to the persons trying to bury him.

According to Rizzo, CIA personnel were concerned that they might face criminal liability for employing some of the EITs. Although CTC legal staff had concluded that most of the proposed techniques were lawful, they had not made a determination with respect to waterboarding and mock burial, and recommended asking the Department's Office of Legal Counsel for guidance on the legality of all the proposed techniques.[36] According to CTC attorney (b)(3), CIA OGC wanted confirmation that CTC's legal analysis was correct, and also wanted to obtain a prospective "declination of prosecution" from DOJ regarding the proposed use of EITs on Abu Zubaydah.

Rizzo recalled that sometime in early April 2002, he called then NSC Legal Adviser John Bellinger, told him that the agency was developing an interrogation plan for Abu Zubaydah that included EITs, and stated that they wanted to ask OLC about the legality of those techniques. Rizzo believed Bellinger passed that information on to Yoo sometime around early April 2002,and scheduled a meeting on the subject with OLC, NSC, and the CIA for April 16, 2002.

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

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

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

According to Yoo, Bellinger told him during their initial telephone conversation that access to information about the program was extremely restricted and that the State Department should not be informed.[37] Bellinger told us that he did not make the decision that the State Department be excluded and believed the CIA must have done so. Bellinger said the CIA made clear to him that the matter was so sensitive that he was not to share the information with anyone and that the CIA was not going to share the information with either the State or Defense Departments.[38] Rizzo told us, however, that he did not make any such statement to Bellinger; rather, he told Bellinger the CIA would defer "to the White House/NSC as to whether, what and when to brief other Government officials about the program." Yoo recalled telling Bellinger that he would have to report on the matter to Attorney General Ashcroft and the AG's Counselor, Adam Ciongoli, and that additional OLC attorneys would be needed to work on it.

Bellinger reported that there was "pressure" from the CIA from the outset to approve the program. Bellinger said the CIA made a compelling case for the use of its EITs, arguing that (1) there was information that further terrorist attacks would occur; (2) the CIA had a person in custody who had information about terrorist attacks; (3) the CIA interrogation program was safe and effective; and (4) without the interrogation program and the use of the specific interrogation techniques, the CIA did not believe that they could get the information necessary to prevent the attacks and save American lives. Bellinger believed that this kind

[37] Yoo told OPR that he did not know why the NSC excluded the State Department from the drafting process, but speculated that it may have been because of concerns about operational security. Bybee stated that he had no recollection of being told that the draft was not to be distributed to the State Department. Rizzo told us that he did not know why the State Department was excluded, and declined to offer an opinion.

[38] Bellinger added that he had struggled to have the State Department included in the consideration of other legal issues, especially the application of the Geneva Convention to terrorist detainees, and that he would not have excluded the State Department on his own initiative. Bellinger added that, by the Spring of 2002, he had confrontations with John Yoo over the OLC's failure to include him, as the NSC Legal Adviser, in OLC opinions that affected national security and that, in some cases, he was not even aware that OLC opinions had been issued on important legal issues.

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of presentation by the CIA "boxed in" both the White House and the Department by making it impossible to reject the CIA's recommendations. Bellinger concluded that Yoo was "under pretty significant pressure to come up with an answer that would justify [the program]" and that, over time, there was significant pressure on the Department to conclude that the program was legal and could be continued, even after changes in the law in 2005 and 2006.

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

Yoo told us that shortly after his conversation with Ashcroft, he met with AAG Bybee and Deputy AAG Philbin to tell them about the assignment and to determine which OLC line attorney should work on the project with him.[40] According to Yoo, they agreed that (b)(6), (b)(7)(C) was the best choice, probably because (b)(6), (b)(7)(C) . Philbin was the "second Deputy" on the project.[41]

Email records indicate that the matter was recorded on an OLC log sheet on April 11, 2002, with (b)(6), (b)(7)(C) and Yoo designated as the assigned attorneys.

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

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

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

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

On Tuesday, April 16, 2002, Yoo met at the NSC with Bellinger, Rizzo, and CIA CTC attorneys [redacted] and [redacted]. The purpose of the meeting was to discuss the CIA's interrogation plan for Abu Zubaydah.[44]

At the meeting, the CIA attorneys explained that the plan developed by CIA psychologists relied on the theory of "learned helplessness," a passive and depressed condition that leads a subject to believe that his resistance to disclosing information is futile. The condition reportedly creates a psychological dependance and instills a sense that, because resistence is futile, cooperation is inevitable.

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

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

[44] Most of the witnesses we asked about meetings on interrogation issues had only general recollections of the dates and attendees. To our knowledge, the DOJ participants did not take notes or prepare written summaries relating to any of the meetings. Our factual summary is therefore based on the witnesses' recollections, occasionally substantiated by contemporaneous email messages or calendar entries, and in some instances by a post-meeting Memorandum for the Record (MFR) prepared by the CIA attendees. Although we have summarized the CIA MFRs to describe what may have occurred, we recognize that those reports reflect the author's view of the proceedings. Our description of this meeting is based on the CIA's April 16, 2002, three-page MFR, which was prepared by [redacted] and [redacted]. Although email traffic suggests that [redacted] may have planned to attend the meeting, [redacted] is not listed as an attendee in the MFR.

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To bring about this condition, the CIA planned to disorient Abu Zubaydah by rendering him unconscious through sedation, shaving his face and scalp, and moving him to the interrogation site. He would then be placed in a featureless, white, brightly-lit room and prevented from sleeping for one or two days to disorient him further. Medical care and meals would be provided at unpredictable intervals, and he would be interrogated at random times.

The CIA personnel at the meeting asked Yoo for guidance on the legality of their plan under the torture statute, the CAT, and European and Israeli case law.[45] According to the MFR, Yoo stated that his research into the torture statute had revealed that there were no reported decisions interpreting the law, and that findings of torture under the TVPA involved extremely shocking mistreatment that went far beyond what was contemplated under the CIA's interrogation plan. He stated that the closest applicable authority was Common Article Three of the Geneva Conventions, but that OLC had already determined that members of al Qaeda were not entitled to the protection of Common Article Three.[46]

The CIA attendees reportedly outlined the effects of learned helplessness, citing the psychologist who had developed the theory for them, (b)(3)

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

The CIA summary of the meeting noted that although the Israeli Supreme Court case found several interrogation techniques to be illegal, the CIA was not planning to use any of those techniques, and one of the Israeli techniques being considered by the CIA – sleep deprivation – was permissible when used as incidental to interrogation and not as a deliberate technique to tire or "break" the prisoner. The CIA MFR then asserted that "we are only using the technique of sleep deprivation and not excessively or for the purposes prohibited by the Israeli Supreme Court." This was an obvious misstatement, as the CIA was in fact planning to use sleep deprivation as a deliberate technique to disorient the subject and render him compliant.

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

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(b)(3) They told Yoo that (b)(3) had concluded that learned helplessness does not result in a permanent change in a subject's personality, and that full recovery can be expected once the conditions inducing learned helplessness are removed.

According to the MFR, Yoo told the group that for an action to constitute torture, an interrogator must have specific intent to cause severe physical or mental pain or suffering. The MFR pointedly stated, "That is clearly not our intent."

Yoo also reportedly stated that he would provide a memorandum outlining the status of the law pertaining to torture under the statute and conventions, but that it would be a general memorandum without specific mention of the facts surrounding the interrogation, "due to the highly classified and sensitive nature of this operation."

Rizzo noted, in CIA internal correspondence dated April 22, 2002, that he explained the specifics of the proposed EITs to Yoo in considerable detail at the April 16, 2002 meeting. Rizzo also reported that immediately after the meeting, Bellinger briefed NSC Advisor Condoleezza Rice, NSC Legal Adviser Stephen Hadley, and White House Counsel Alberto Gonzales, and Yoo separately briefed Gonzales, AG Ashcroft, and Criminal Division AAG Michael Chertoff. Rizzo further noted that Bellinger and Yoo reported back to him that none of those officials objected to the techniques under consideration, and that "Yoo is drafting a short anodyne memo back to us confirming their legal conclusion."

Rizzo concluded his message as follows:

> 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.

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2. Drafting the Bybee Memo

After the meeting, (b)(6), (b)(7)(C) and Yoo began drafting what would eventually become the Bybee Memo.[47] Working together, they produced at least four drafts before reporting back to the CIA and NSC in July 2002. Their normal practice was for (b)(6), (b)(7)(C) to prepare a draft that incorporated whatever comments or direction Yoo had provided. Yoo would then review (b)(6), (b)(7)(C) work and provide additional comments by email, usually within a few days. They also met from time to time to discuss the project.[48]

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

From the outset, the drafts took the position that the torture statute's definition of torture applied only to extreme conduct, and that lesser conduct, which might constitute "cruel, inhuman or degrading" treatment, did not rise to the level of torture. Yoo and (b)(6), (b)(7)(C) supported this position through analysis of the text and legislative history of the torture statute, the text and ratification history of the CAT, case law relating to the TVPA, and the Israeli and European Court of Human Rights (ECHR) cases mentioned above. As the drafts progressed, they emphasized this point more strongly.

[47] (b)(6), (b)(7)(C)

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

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For example, in the first draft, (b)(6), (b)(7)(C) noted that in order to constitute physical torture under the statute, conduct must result in the infliction of "severe pain" and cited two dictionary definitions of "severe," suggesting that the degree of pain must be intense and difficult to endure. The torture statute's legislative history, the text and ratification history of the CAT, the statements of fact in several cases applying the TVPA, and the two international cases mentioned above were also cited to support the conclusion that torture was "extreme conduct" that went beyond cruel, inhuman, or degrading treatment.

In his comments of May 23, 2002, Yoo responded to the above definition of "severe" by asking (b)(6), (b)(7)(C), "[I]s severe used in this way in other parts of the US Code?"[49] In the next draft, dated June 26, 2002, (b)(6), (b)(7)(C) cited several essentially identical health care benefits statutes, which listed symptoms that would lead a reasonable person to conclude that someone was suffering an "emergency medical condition." The term "severe pain" was not defined in the health care statutes, but was listed as a possible indicator that a person was experiencing an emergency medical condition.

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

On July 10, 2002, Yoo told (b)(6), (b)(7)(C) by email, "We're going over to visit with the NSC at 10:45 on Friday [July 12, 2002] morning with the GC at CIA, and give them at that time our draft of the opinion to comment on." The subject line of

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

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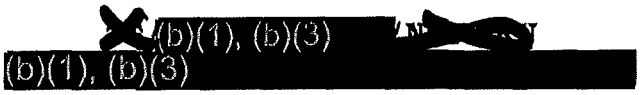


Yoo's email was "bad things opinion." (b)(6), (b)(7)(C) responded by sending Yoo a copy of a draft dated July 8, 2002, with the comment, "I like the opinion's new title." [redacted] also stated:

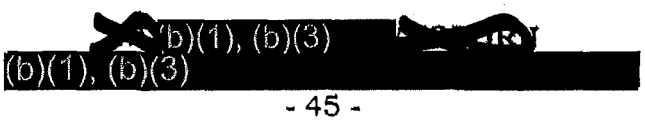
> I'm a little concerned about the use of the phrase "life threatening."[50] Did you mean for that [to] apply beyond the physical pain context? As drafted, I think it suggests that mental pain would somehow have to rise to that level as well. While I think that's a wholly legitimate characterization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

On July 11, 2002 (b)(6), (b)(7)(C) provided a copy of the draft opinion to OLC paralegal (b)(6), (b)(7)(C) for cite checking, and two meetings were scheduled – one with White House Counsel on Friday, July 12, 2002, and one with AAG Chertoff, the FBI, CIA, and NSC on Saturday, July 13, 2002. From emails, it appears that (b)(6), (b)(7)(C) and Yoo had a briefing session with AAG Chertoff on July 11, 2002. A few minor changes and cite-checking corrections were made to the memorandum prior to the meeting at the White House, and a new draft dated July 12, 2002 was produced by Yoo and (b)(6), (b)(7)(C)

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

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

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



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

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

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

On Friday morning, July 12, 2002, Yoo told (b)(6), (b)(7)(C) by email, "Let's plan on going over [to the White House] at 3:30 to see some other folks about the bad things opinion. Please stamp draft on it and make two copies (and one for me and you, of course)." Yoo and (b)(6), (b)(7)(C) met Gonzales at the White House Counsel's Office later that day. It is likely that either Deputy White House Counsel Tim Flanigan or Counsel to the Vice President David Addington was present, but (b)(6), (b)(7)(C) and Yoo were not certain who else attended this meeting. (b)(6), (b)(7)(C) orally summarized the memorandum's conclusions for the group and they gave Gonzales and the other attendee a copy of the memorandum for review. According to Yoo, none of the attendees provided any feedback or comments at this meeting.

The following day, Saturday, July 13, 2002, at 11:00 a.m., Yoo, (b)(6), (b)(7)(C) and Chertoff met at the NSC with Bellinger, his deputy, Bryan Cunningham, CIA attorneys Rizzo and (b)(3), and Dan Levin, who was then serving as Chief of Staff to FBI Director Robert Mueller. According to Rizzo, he described the CIA's

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proposed EITs to the group and asked for either advance approval or an advance declination of prosecution from DOJ. Rizzo told us he wanted to ensure that the CIA was acting in accordance with the law, but also wanted to obtain "maximum legal protection" for CIA officers.

An internal CIA document describing the July 13 meeting, dated August 2, 2002, and authored by (b)(3) ,[51] stated that the CIA told the other attendees that they did not intend to permit Abu Zubaydah to die as a result of the EITs, and that trained medical personnel would be present at all times, but that there was a risk that he could suffer a heart attack or stroke and die during the interrogation. According to the CIA account of the meeting, Yoo and (b)(3), (b)(7)(C) advised the group that the torture statute did not prohibit use of the proposed EITs because, under the circumstances, there was no specific intent to inflict severe physical pain or mental pain or suffering.

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

According to several sources, Levin stated that the FBI would not conduct or participate in any interrogations employing EITs, whether or not they were found to be legal, and that the FBI would not participate in any further discussions on the subject. At some point during the meeting, Yoo provided Bellinger and Rizzo copies of the July 12, 2002 draft memorandum.

(b)(3) account of the meeting related that the CIA lawyers opened the discussion of the torture statute by asking the group "to consider the provisions of [the torture statute] (aside from the legal doctrines of necessity or of self-

[51] The CIA allowed us to read this document and take notes, but we were not permitted to retain a copy.

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defense) as well as other applicable U.S. law." We asked Rizzo to explain the reference to the necessity and self-defense doctrines. He stated that the CIA attorneys may have raised the subject at the meeting, but that he had no such recollection.

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

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

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

Some time between July 13, 2002 and July 16, 2002, Chertoff asked Yoo to draft a letter to the CIA stating that the Department does not issue pre-activity declination letters. On July 16, 2002, Yoo told (b)(6), (b)(7)(C) to prepare a draft, and on July 17, 2002, after consulting with Chertoff, Criminal Division Deputy AAG Alice Fisher, and other OLC attorneys (b)(6), (b)(7)(C) sent Yoo a one-page draft of a letter from Yoo to Rizzo, which included the following statement:

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

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

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

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

On July 15, 2002, Yoo sent the following email message to (b)(6), (b)(7)(C)

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

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

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

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

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

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

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

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

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sections and whether to include them in the memorandum, and he believes that Bybee went back and forth on that question before the memorandum was finalized. Yoo acknowledged that the CIA may have indirectly suggested the new sections by asking him what would happen in a case where an interrogator went "over the line" and inadvertently violated the statute. Although he initially thought (b)(6), (b)(7)(C) may have worked on a draft of the two sections, when we showed him a copy of the first draft to include them, Yoo told us, "I think I wrote this. I don't think (b)(6), (b)(7)(C) wrote this. It's sort of written in my style. And it's all red-lined, which means I probably e-mailed it . . . to [redacted] and had [redacted] cut and paste it into the thing."

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

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

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

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

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

With regard to why the two new sections were added to the draft Bybee Memo, we found it unlikely that Philbin and Bybee played a part in the decision, notwithstanding Yoo's recollection to the contrary. We noted that on July 15, 2002, Yoo told (b)(6), (b)(7)(C) by email that he did not intend to address possible defenses or the powers of the Commander-in-Chief in the memorandum, and that the day after their July 16, 2002 meeting with Gonzales (and possibly Addington and Flanigan), he and (b)(6), (b)(7)(C) began working on the two new sections. Although (b)(6), (b)(7)(C) at Chertoff's direction, drafted a letter from Yoo to Rizzo confirming that the Department would not provide an advance declination of prosecution, Yoo does not appear to have signed or transmitted the letter. In view of this sequence of events, we believe it is likely that the sections were added because some number of attendees at the July 16 meeting requested the additions, perhaps because the Criminal Division had refused to issue any advance declinations.

On July 19, 2002, (b)(3) met with (b)(6), (b)(7)(C) and Yoo at the Department to give them a more complete briefing on the specific EITs the CIA planned to use on Abu Zubaydah. Later that day, (b)(3) sent Yoo a ten-page fax that listed and described twelve EITs, along with a summary of the findings of CIA experts on their psychological effects.

On July 22, 2002, Yoo sent an email to (b)(6), (b)(7)(C), asking him to explain how common law defenses were incorporated into federal criminal law.[55] (b)(6), (b)(7)(C) responded that [redacted] was "just

[55] Yoo's email reads as follows:

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

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

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

On July 24, 2002, Yoo telephoned Rizzo and told him that the Attorney General had authorized him to say that the first six EITs (attention grasp, walling, facial hold, facial slap, cramped confinement, and wall standing) were lawful and that they could proceed to use them on Abu Zubaydah. In a note to [redacted], Rizzo reported that as for "the two more controversial techniques" [waterboarding and mock burial], Yoo had told him that DOJ was waiting for more data from the CIA. [redacted] responded to Rizzo that he would send word about the approval by cable to the facility where Abu Zubaydah was being held, and that he would tell them "that we are still pressing on the remaining ones."

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

mentions them?

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

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

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

At some point thereafter, according to Rizzo and (b)(3), OLC told the CIA that approval for the remaining techniques would take longer if mock burial were part of the EIT program. Rizzo remembered Yoo asking how important the technique was to the CIA, because it would "take longer" to complete the memorandum if it were included. According to the summary of (b)(3) CIA OIG interview, he stated that DOJ advised CTC during the Summer of 2002 that approval of the EITs would take longer if mock burial were included in the package of proposed techniques. The CIA decided that approval for the mock burial technique was not worth pursuing, and dropped it from the interrogation plan.

During his OPR interview, Yoo told us that mock burial was so clearly illegal that he never seriously considered approving its use. According to Yoo, the technique would have created the sensation of impending death, a form of mental pain or suffering that constituted torture.

On the afternoon of July 24, 2002, CTC attorney (b)(3) sent Yoo and (b)(6)(7)(C) by fax a memorandum prepared by the CIA's Office of Technical Service (b)(3) titled "Psychological Terms Employed in the Statutory Prohibition on Torture" (OTS Memo). The OTS memorandum discussed the proposed EITs and included the following qualification regarding the SERE training experiences:

> However, while the interrogation techniques mentioned above (attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, waterboard, and mock burial) are administered to student volunteers in the U.S. in a harmless way, with no measurable impact on the psyche of the volunteer, **we do not believe we can assure the same**

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> **here for a man forced through these processes and who will be made to believe this is the future course of the remainder of his life.** While CIA will make every effort possible to ensure that the subject is not permanently physically or mentally harmed, some level of risk still exists. The intent of the process is to make the subject very disturbed, but with the presumption that he will recover.

OTS Memo at 10 (emphasis added).

According to Rizzo, that information was sent to OLC because the CIA did not want to "oversell" the significance of SERE training, and because they wanted to make it clear that the application of EITs under the CIA's interrogation program was not identical to what a SERE trainee would experience.

In a contemporaneous, internal email message, Rizzo told another CIA official that they were providing the OTS memorandum "in substance" to OLC and that it included a statement that, although techniques are administered to volunteers in the United States in a harmless way, the CIA could not assure the same here.

The same OTS Memo included the following explanation for why the waterboard technique was essential to the interrogation program:

> The plan hinges on the use of an absolutely convincing technique. The water board meets this need. Without the water board, the remaining pressures 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.

OTS Memo at 8.

On July 24, 2002, (b)(6)(7)(C) sent an email to another OLC attorney, asking about the protocol for working on a classified laptop computer. This suggests that work on the Classified Bybee Memo began sometime thereafter.

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Over the next few days, (b)(3) sent (b)(6)(7)(C) additional information relating to the proposed interrogation, including a psychological assessment of Abu Zubaydah and a report from CIA psychologists asserting that the use of harsh interrogation techniques in SERE training had resulted in no adverse long-term effects.

(b)(3) also provided additional information about the proposed interrogation program to (b)(6)(7)(C) On July 26, 2002, (b)(3) sent (b)(6)(7)(C) three memoranda the CIA had obtained from the Department of Defense Joint Personnel Recovery Agency (JPRA) and the United States Air Force. The memoranda, dated July 24 and July 25, 2002, were in response to requests for information from the DOD Office of General Counsel about SERE interrogation techniques. The two JPRA memoranda were in response to a request for information about interrogation techniques used against United States prisoners of war, and the techniques used on students in SERE training. The Air Force memorandum was from a psychologist who served in the Air Force's SERE training program. The memorandum discussed the psychological effects of SERE training, noting that the waterboard was 100% effective as an interrogation technique, and that the long-term psychological effects of its use were minimal.

Around this time, CTC staff members decided that they were not willing to rely on oral confirmation from OLC that the EITs were lawful. On Friday, July 26, 2002, (b)(3) sent (b)(3) the following internal email message:

> The consensus at the 4:30 CTC FO meeting is not/not to proceed on an oral report alone from OLC. We will need a written confirmation from OLC – even a letter, sent in advance of the full opinion – before we may proceed. Please let (b)(6)(7)(C) know. Thank you.

(b)(3) replied, "Done – via voice mail and asked (b)(6)(7)(C) to call me."

Later that afternoon, (b)(6)(7)(C) sent Yoo the following email message:

> I got a message from (b)(3) said the agency wants written approval rather than just oral approval. (b)(3) said that this did not need to be in the form of a written opinion, but could be some sort of short letter that tells them that they have the go ahead.

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Yoo and (b)(6), (b)(7)(C) continued working on the second, classified memorandum that evaluated the legality of the specific EIT's. That evening, Yoo sent (b)(6), (b)(7)(C) the following email message:

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

In a July 26, 2002 email, Yoo asked (b)(6), (b)(7)(C) to "stop by and pick up [Philbin's] comments and input them . . . . You also have Mike Chertoff's comments, to input." Two days later, on July 28, 2002, Yoo sent (b)(6), (b)(7)(C) a new draft that he stated included "the Philbin, Gonzales and Chertoff comments."

On July 30, 2002, Yoo asked (b)(6), (b)(7)(C) by email, "[D]o we know if Boo boo is allergic to certain insects?" (b)(6), (b)(7)(C) responded, "No idea, but I'll check with (b)(3)" Although there is no record of a reply by (b)(3) the final version of the Classified Bybee Memo included the following statement: "Further, you have informed us that you are not aware that Zubaydah has any allergies to insects."

We did not find a record of Philbin's, Gonzales's or Chertoff's comments in OLC's files. Philbin told us that he generally noted his comments in writing on the draft and then discussed them either with Yoo or (b)(6), (b)(7)(C) Philbin told OPR he told Yoo that he "did not like the use of the medical benefits statute for construing 'severe pain.'" Philbin Response at 8. He said he thought the clinical terminology of the statute was "imprudent to use in this context," and that it did not provide "useful, concrete guidance concerning what amounts to 'severe pain.'" *Id.* Philbin said this was a practical concern and turned on the fact that there is no readily identifiable level of pain that precedes medical events such as organ failure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

According to a CIA MFR captioned "NSC Weekly Meeting," on July 31, 2002, Deputy National Security Advisor Stephen Hadley, NSC Legal Adviser John Bellinger, National Security Advisor Condoleezza Rice, and Director of Central Intelligence George Tenet's Chief of Staff, John Moseman, met to discuss the proposed interrogation of Abu Zubaydah, among other things. The CIA's summary of the meeting reported that DOJ "is expected to render an opinion that the specific techniques, including the most aggressive, do not violate U.S. law implementing the international convention against torture" and that "CIA officers involved in the interrogation would not engage in conduct that violates the [CAT]." Hadley reportedly stated that two techniques – mock burial and diapering – would not be used, and briefed Rice on the specific EITs.[61] As reported in the CIA MFR, "Dr. Rice indicated that she would not object to employing the techniques if they were determined by the Attorney General to be legal." Bellinger told us that Rice wanted the Attorney General's personal opinion on the matter because of growing concerns in the NSC about the OLC's failure to consult other entities prior to finalizing its opinions. According to the CIA MFR, "Dr. Rice participated only during a portion of the discussion of interrogation techniques and Abu Zubaydah."

According to the CIA's summary, the attendees then discussed whether the President should be briefed on the use of EITs. Bellinger reportedly informed Moseman, after the meeting, that the NSC had decided not to brief the President, and that, because DOJ had determined that the EITs were legal, the CIA could

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[61] The CIA medical personnel were reportedly concerned that Abu Zubaydah's wound could become infected if the diapering technique were used.

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decide whether or not to apply EITs in a given instance. According to the CIA memorandum, Bellinger also told Moseman that Gonzales and Rice had agreed to that approach.[62]

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

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

62 On July 30, 2002, Moseman wrote to Tenet that Gonzales was confused about whether the President would be briefed before any EITs were employed. Moseman reported that Gonzales had told Rizzo earlier that day that Tenet had agreed the President would be briefed. Moseman's message to Tenet continued as follows:

> Gonzales further said that he had mentioned the techniques to the President and, based on the mistaken understanding of DoJ, had suggested to the President that there was an ICC [International Criminal Court] concern. Gonzales now knows that the techniques are not violative of the International Convention, and will correct this with the President. However, he reiterated to John Rizzo that you needed to brief the President on the reasons for employing the techniques. (When Gonzales mentioned the techniques to the President, the President simply said that he would wait to hear from you, but did not signal any concern one way or the other.)

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

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

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

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

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

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

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

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

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

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

On the morning of August 2, 2002, (b)(6), (b)(7)(C) informed Yoo by email that the original memoranda were in the DOJ Command Center. Shortly before noon, Yoo emailed (b)(6), (b)(7)(C) instructions for delivering copies of the memoranda to the White House, CIA, the AG's office, and the DAG's office.[64] According to CIA records, the agency received a copy of the Bybee Memo by fax at approximately 4:00 p.m. that day.

[64] In his email, Yoo stated that he would deliver copies of the memoranda to the White House and to "DoD." In another email, Yoo directed (b)(6), (b)(7)(C) to send "both memos" to DOD. In his OPR interview, however, Yoo stated that the Defense Department did not receive a copy of the Bybee Memo.

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The same day, August 2, 2002, (b)(3) sent a classified cable to the Abu Zubaydah interrogation team, informing them that they were now authorized to use the waterboard, in addition to the other previously authorized EITs. That cable summarized the July 13, 2002 meeting at the NSC, in part as follows:

> We emphasized clearly that it is not our intent to permit AZ to die in the course of such activities, and that we would have appropriately trained medical personnel on-site to ensure the availability of emergency response should he suffer a potentially lethal consequence. Nonetheless, we noted that the risk is ever-present that AZ may suffer a heart attack, stroke, or other adverse event regardless of the conditions of his detention and questioning; indeed, that potential is always present whenever an individual is under detention.

(b)(3) cable also advised the field personnel of the following:

> The agency's attorneys have conducted extensive discussions with the DOJ, and, with the legal adviser to the NSC, and have confirmed that the use of [the eleven specific EITs] is lawful. Additionally, the DCI discussed these proposals with the National Security Adviser on 17 July 2002, and has advised us that we may proceed. We received formal written approval from the DOJ's OLC on 1 August 2002 at 2230 that each of the techniques described in the referral and including the use of the water board are legal.
>
> * * *
>
> 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. The legal conclusion turns on the following factors: the absence of any specific intent to inflict severe physical or mental pain or suffering.

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(b)(3) cable then quoted verbatim the language from Yoo's July 13, 2002 letter to Rizzo, in which he advised the CIA 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."

Other factors cited by the cable included the following:

> We understand from OTS (b)(3), and the SERE psychologists on the interrogation team that the procedures described above should not repeat not produce severe mental or physical pain or suffering: for example, no severe physical injury (such as the loss of a limb or organ) or death should result from the procedures; nor would they be expected to produce prolonged mental harm continuing for a period of months or years (such as the creation of persistent PTSD), given the experience with these procedures and the subject's resilience to date.
> The cable continued:
>
> While OLC/DOJ found that use of the waterboard poses an imminent threat of death as used in the statute, it also found that no prolonged mental harm attaches to its use and its use does not have the specific intent to inflict severe pain or suffering; therefore the use of the waterboard does not violate the statute.

Four days later, (b)(6), (b)(7)(C) told Yoo in an email that [redacted] had spoken to (b)(3) and that "a cable was sent out last week, following the issuance of the opinions." In his OPR interview, Yoo told us that this email referred "to the CIA then issuing the interrogation instructions to the field."

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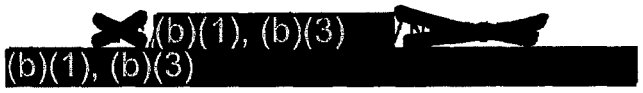


3. Key Conclusions of the Bybee Memo

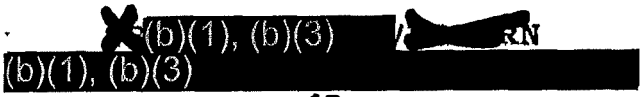
The final version of the Bybee Memo made the following key conclusions regarding the torture statute:

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

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

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

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



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

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

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

4. Key Conclusions of the Classified Bybee Memo

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

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

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

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

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

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

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

5. The Yoo Letter (August 1, 2002)

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

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

1. Guantanamo and the Military's Interrogation of Detainees

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

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

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(b)(1), (b)(3), (b)(5), (b)(6)

[redacted]

[redacted]

(b)(1), (b)(3), (b)(5), (b)(6)

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

Category I:

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

Category II:

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

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

Category III:

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

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

A contemporaneous report to FBI General Counsel by (b)(6), (b)(7)(C) listed these JTF techniques but included an additional Category I technique ("gagging with gauze"), (b)(6), (b)(7)(C) report also stated that he believed some of the Category II and III techniques might constitute violations of the torture statute, (b)(6), (b)(7)(C)

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

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

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

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

[67] One of the military detainees who was reportedly subjected to aggressive techniques over the objections of the FBI was Mohammed Al-Khatani ("Al-Qahtani" in the DOJ OIG Report). According to (b)(6), (b)(7)(C), sometime in 2003, John Yoo told [redacted] to draft a letter to the Defense Department opining on the legality of the techniques that had been used in Al-Khatani's interrogation. In a May 30, 2003 email, written to Yoo shortly before he left the Department, (b)(6), (b)(7)(C) said tha[redacted] "did not get a chance to draft a letter to DOD re: techniques. My thought is I can draft it when I get back and have Pat [Philbin] sign it." (b)(6), (b)(7)(C) told us hat [redacted] never drafted the letter because [redacted] did not receive sufficient information about the interrogation from the Defense Department.

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