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

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

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

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

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

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

2. Drafting the Yoo Memo

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

Yoo assigned (b)(6), (b)(7)(C) to serve as OLC's liaison to the Working Group, and both of them subsequently attended meetings to explain OLC's view of the applicable laws to the Working Group. According to Yoo, they did not discuss or provide copies of the Bybee Memo or the Classified Bybee Memo, but the legal

[68] Evidence suggests that the CIA and the DOD General Counsel's Office had in fact discussed the agency's use of EITs before Yoo was asked to draft the 2003 memorandum. As noted above, on July 26, 2002, the CIA provided OLC copies of two memoranda about the effects of SERE training. Those memoranda, dated July 24 and 25, 2002, were prepared by military personnel at the direction of the DOD OGC and then forwarded to the CIA. OLC cited one of the memoranda in the Classified Bybee Memo to support its finding that the EITs used in the CIA interrogation program did not violate the torture statute. As also noted above, email evidence suggests that Yoo may have provided copies of the Bybee Memo and the Classified Bybee Memo to DOD on August 2, 2002. There is additional evidence, discussed later in this report, that Haynes and Rumsfeld were briefed on the CIA program on January 16, 2003. As we have also discussed, on October 2, 2002, CTC attorney (b)(3) briefed JTF personnel at Guantanamo about the CIA's use of EITs and the legal analysis provided by OLC in the Bybee Memo.

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

advice they provided was identical to what was set forth in the Bybee Memo. At about this time, (b)(6), (b)(7)(C) started working on the draft Yoo Memo. Although the Yoo Memo was the only formal advice OLC provided on military interrogation, Yoo and (b)(6), (b)(7)(C) consulted with the Working Group as it formulated Defense Department policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On March 3, 2003, Yoo instructed (b)(6), (b)(7)(C) to send a draft of the Yoo Memo to then CIA General Counsel Scott Muller. According to Yoo, Muller wanted to make sure nothing in the new memorandum detracted from the assurances OLC had provided to the CIA in the Bybee Memo.

Muller reviewed the draft and wrote to (b)(3) on March 7, 2003:

> I have read and reread the DOJ opinion and we are fine. The bottom line is that, as long as we are not with the military, our people are not subject to the US criminal law overseas provided they stay on facilities that are not part of the special or maritime jurisdiction of the US. I also gave John Yoo some other edits to eliminate or tone down any reference to the need for necessity as a defense. When this is done, he will send us a copy for our reliance. I told Yoo that we wanted to schedule an update briefing for him and Michael Chertoff and John Bellinger.

Bybee apparently began reviewing drafts of the Yoo Memo sometime before March 4, 2003, when (b)(6), (b)(7)(C) sent Bybee and Yoo a draft "with Jay's changes."[69] Email traffic indicates that Bybee (b)(6), (b)(7)(C), and Yoo exchanged several drafts of the Yoo Memo over the next few days.

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

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

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

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

Bybee was confirmed for his judgeship on March 13, 2003, and sworn in on March 28, 2003. According to (b)(6), (b)(7)(C), Bybee was prepared to sign the Yoo Memo, but Yoo persuaded him not to because he was about to assume a judgeship. Bybee told us that he does not remember why Yoo signed the opinion, but that it was not unusual for deputies to sign OLC memoranda. On March 14, 2003, Yoo finalized and signed the Yoo Memo.

3. Key Conclusions of the Yoo Memo

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

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

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

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

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

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

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

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

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

4. The Working Group Report

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

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

D. Implementation of the CIA Interrogation Program

In November 2002, the CIA's Deputy Director of Operations (DDO) informed CIA OIG that a prisoner at one of the CIA's clandestine overseas facilities had died in custody. In January 2003, the DDO notified the CIA OIG that CIA personnel had used unauthorized interrogation techniques on a prisoner at another clandestine facility, and asked CIA OIG to investigate the two incidents. Other agency personnel separately told CIA OIG that they were concerned about human rights abuses at CIA facilities. In January 2003, CIA OIG initiated an investigation into CIA detention and interrogation practices, and on May 7, 2004, it issued its report. The facts in the following discussion are based primarily upon that document.

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

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

1. Abu Zubaydah

Upon receipt of (b)(3) August 2, 2002 cable, operational personnel at a CIA detention facility code-named (b)(1), (b)(3) began using EITs in the interrogation of Abu Zubaydah.[72] According to the CIA OIG Report, two independent contractor psychologists were assigned to lead the interrogation team, consisting of CIA security, medical, (b)(3) personnel.[73] Overall supervision of the facility was the responsibility of a CIA case officer assigned as Chief of Base (COB), who reported to CTC headquarters. CIA OIG Report at ¶¶ 73, 74.

The two psychologist/interrogators administered all of the interrogation sessions involving EITs, which were closely followed by headquarters personnel. The psychologist/interrogators also participated in post-interrogation evaluations of the effectiveness and impact of the EITs. CIA headquarters psychologists objected to that practice, which they considered a conflict of interest. *Id.*

According to the CIA OIG Report, the interrogation team decided at the outset to videotape Abu Zubaydah's sessions, primarily in order to document his medical condition. CIA OIG examined a total of 92 videotapes, twelve of which recorded the use of EITs. Those twelve tapes included a total of 83 waterboard applications, the majority of which lasted less than ten seconds. Based on the facility's interrogation logs, two additional waterboard sessions appear to have been administered, but not videotaped. *Id.* at ¶¶ 77, 79.

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

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

[73] The CIA OIG Report did not name those individuals, (b)(3) , the same psychologists who originally developed the EITs used in the CIA interrogation program.

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

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

After the on-site interrogation team determined that Abu Zubaydah had ceased resisting interrogation, they recommended that EITs be discontinued. However, CTC headquarters officials believed the subject was still withholding information, (b)(1) . Senior CIA officials reportedly made the decision to resume the use of the waterboard over the objections of the interrogators. Several senior CTC officers traveled to (b)(1) to witness the waterboarding and to assess the subject's compliance. After that session, CTC agreed with the on-site interrogators that the subject was being truthful, and no further waterboard applications were administered. (b)(1)

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

CIA OIG also reported that, when they interviewed CTC attorney (b)(3) on February 19, 2003, (b)(3) stated that the waterboard was overused on Abu Zubaydah and that the interrogators had "crossed the line" because of the excessive use.

2. Abd Al-Rahim Al-Nashiri

On November 15, 2002, a second prisoner, Abd Al-Rahim Al-Nashiri, was brought to (b)(1), (b)(3) facility. The two psychologist/interrogators immediately began using EITs, and Al-Nashiri reportedly provided lead information about other terrorists during the first day of interrogation. On the twelfth day, the psychologist/interrogators applied the waterboard on two occasions, without achieving any results. Other EITs continued to be used, and the subject eventually become compliant. On December [redacted] 2002, both Al-Nashiri and Abu Zubaydah were moved to another CIA black site, code-named (b)(1), (b)(3) CIA OIG Report at ¶ 76.

Some time in December 2002, CIA headquarters officials sent a cable to the (b)(1), (b)(3) interrogation team, requesting that enhanced techniques be resumed with Al-Nashiri. The basis for the request, as set forth in the cable, was that:

> it is inconceivable to us that Nashiri cannot provide us concrete leads to locate and detain the active terrorists in his network who are still at large . . . .
>
> From our optic, the single best measure of this cooperation will be in his reporting. Specifically, when we are able to capture other terrorists based on his leads and to thwart future plots based on his reporting, we will have much more confidence that he is, indeed, genuinely cooperative on some level.

Id. at ¶ 207.

The (b)(1), (b)(3) interrogators disagreed with this rationale, and sent the following reply:

> [We recommend] against resuming enhanced measures with [Al-Nashiri] unless there are specific pieces of information he has provided that we are certain/certain are lies or omissions; or there is equally reliable additional information from other sources which implicates [Al-Nashiri] in a heretofore unknown plot to attack U.S. or allied interests. If such is the case, [we] would eagerly support returning to all enhanced measures; indeed, we would be the first to request them. Without tangible proof of lying or intentional withholding, however, we believe employing enhanced measures will accomplish nothing except show [Al-Nashiri] that he will be punished whether he cooperates or not, thus eroding any remaining desire to continue cooperating.
>
> Bottom line is we think [Al-Nashiri] is being cooperative, and if subjected to indiscriminate and prolonged enhanced measures, there is a good chance he will either fold up and cease cooperating, or suffer the sort of permanent mental harm prohibited by the statute. Therefore, a decision to resume enhanced measures must be grounded in fact and not general feelings that [he] is not being forthcoming . . . .

Id. at ¶ 208.

Following this exchange, headquarters sent a new debriefer to (b)(1), (b)(3) After further deliberation and medical and psychological assessments, the use of EITs was resumed.

While EITs were being administered, several unauthorized techniques were also used on Al-Nashiri. Sometime around the end of December, with the knowledge and consent of the (b)(1), (b)(3) COB but not CIA headquarters, the new debriefer tried to frighten Al-Nashiri by cocking an unloaded pistol next to the prisoner's head while he was shackled in a sitting position in his cell. On what may have been the same day, Al-Nashiri was forced to stand naked and hooded

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

On another occasion in December 2002, an (b)(1) debriefer (b)(1) told Al-Nashiri that, if he did not talk, his mother and family would be brought to the facility. According to the CIA OIG report, there is a widespread perception in the Middle East that (b)(1) intelligence services torture prisoners by sexually abusing female family members in their presence. *Id.* at ¶ 94.

On other occasions, the CIA debriefer blew cigar smoke in Al-Nashiri's face, manhandled him while he was tied in stress positions, and stood on his shackles to induce pain. The CIA OIG noted in its report that the CIA officers questioned about the above acts either denied them or offered benign explanations or justifications for their conduct.

According to CIA OIG, the waterboard was not used on Al-Nashiri at (b)(1), (b)(3) although other EITs continued to be applied. At some point, the (b)(1), (b)(3) interrogators determined that he was cooperating and the use of EITs was discontinued.

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

3. Khalid Sheik Muhammed

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

The CIA OIG Report stated that KSM was taken to (b)(1), (b)(3) facility for interrogation and that he was accomplished at resisting EITs. He reportedly

underwent fifteen waterboard sessions over twelve days, involving approximately 183 applications, before interrogators concluded that the waterboard was not an effective technique in his case. KSM was reportedly adept at swallowing water as it was poured over his mouth, preventing the cloth from forming a seal. Interrogators responded to that technique by cupping their hands around his mouth so that water would pool over his mouth and nose. CIA OIG Report at ¶ 100.

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

4. Gul Rahman

Gul Rahman was a CIA prisoner who died in custody at a black site in (b)(1), (b)(3), code-named (b)(1), (b)(3) According to the CIA OIG report, (b)(1), (b)(3) was used to detain, screen, and interrogate up to 20 high-value terrorist suspects at a time. Both Al-Nashiri and KSM were held at (b)(1), (b)(3) before being transferred to (b)(1), (b)(3) CIA OIG Report at ¶¶ 107, 123.

(b)(1), (b)(3) was an (b)(1), (b)(3) building (b)(1) and equipped with twenty individual concrete cells. The building had no insulation or central heating or cooling, and although the cells were designed to include electric space heaters, none was installed. (b)(1) *Id.* at ¶ 115.

The (b)(1), (b)(3) site manager was (b)(3) CIA employee on his first operational tour.[74] (b)(3) who was reportedly ill-prepared for the assignment. According to the CIA OIG report, (b)(1), (b)(3) was loosely supervised, understaffed, and poorly equipped. Interrogations

[74] (b)(1)

were sometimes conducted by inexperienced personnel, with little or no guidance from headquarters, and medical care for prisoners was largely inadequate. *Id.* at ¶¶ 133, 136.

Rahman was captured in Pakistan and taken to (b)(1), (b)(3) on November 4, 2002.[75] During the next ten days, six more interrogation sessions were conducted by an interrogation team that included (b)(1), (b)(3) an analyst, a translator, and contract psychologist/interrogator (b)(1), (b)(3) from (b)(1), (b)(3) As noted above, (b)(1), (b)(3) was one of the psychologists who had helped develop the CIA EITs, and who had taken part in the interrogation of Abu Zubaydah. *Id.* at ¶ 159.

During the next twelve days, Rahman was subjected to at least six interrogation sessions, which included the use of both authorized and unauthorized EITs, such as sleep deprivation, forced nudity, exposure to extreme cold (including forced cold showers), stress positions, and "hard takedowns." (b)(1), (b)(3) reportedly observed or participated in these acts. Rahman remained uncooperative, and was punished with "cold conditions with minimal food and sleep." *Id.* at ¶¶ 160, 161.

The CIA OIG Report described the "hard takedown" technique used on Rahman as follows:

> His clothes were removed and he was run up and down the corridor; when he fell, he was dragged. The process took between three to five minutes and Rahman was returned to his cell. (b)(1), (b)(3) observed contusions on his face, legs and hands that "looked bad." (b)(1), (b)(3) saw a value in the exercise in order to make Rahman uncomfortable and experience a lack of control. He recognized, however, that the technique was not within the parameters of what was approved by DOJ and recommended to (b)(1), (b)(3) that he obtain written approval for employing the technique. Three other officers who were present at

[75] Rahman is described in the CIA OIG Report as "a suspected Afghan extremist associated with the Hezbi Islami Gulbuddin organization . . . ." *Id.* at ¶ 159.

the same time provided similar accounts of the incident. No approval from Headquarters was sought or obtained.

Id. at ¶ 190.

On November (b)(1) 2002, Rahman reportedly assaulted and threatened the (b)(1) guards who entered his cell by throwing food and excrement at them and telling them he would kill them. (b)(1) later told CIA investigators that they had not been assaulted or threatened by Rahman. In response, (b)(3) ordered the prisoner to be shackled to the floor of his cell by his hands and feet and left there clothed in only a sweatshirt. Temperatures that night were recorded at a low of 31 degrees Fahrenheit. The following morning, November (b)(1), 2002, Rahman was found dead in his cell. The CIA pathologist who subsequently performed an autopsy concluded that the probable cause of death was hypothermia. *Id.* at ¶¶ 161-163.

5. CIA Referrals to the Department

According to a CIA MFR drafted by John Rizzo, on January 24, 2003, Scott Muller (then CIA General Counsel), Rizzo, and (b)(3) met with Michael Chertoff, Alice Fisher, John Yoo, and (b)(6), (b)(7)(C) to discuss the incidents at (b)(1), (b)(3) According to Rizzo, he told Chertoff before the meeting that he needed to discuss "a recent incident where CIA personnel apparently employed unauthorized interrogation techniques on a detainee."

Muller had (b)(3) describe the unauthorized EITs that had been used at (b)(1), (b)(3) and mentioned that the matter had been referred to the CIA OIG as part of an overall review of the CIA's detention and interrogation policies.

According to Rizzo, Muller then told the group "about the accidental death of a detainee at (b)(1), (b)(3) in November . . . as another specific event the IG might want to investigate." Rizzo reported that Chertoff and others "asked a few questions . . . but were mostly in a listening mode."

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

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

Chertoff reportedly commented that the CIA was correct to advise them because the use of a weapon to frighten a detainee could have violated the law. He stated that the Department would let CIA OIG develop the facts and that DOJ would determine what action to take when the facts were known. According to Rizzo, "Chertoff expressed no interest or intention to pursue the matter of the accidental death at (b)(1), (b)(3)"

On January 28, 2003, CIA Inspector General John Helgerson called Yoo and told him that the CIA OIG was looking into the (b)(1), (b)(3) matter. According to Helgerson's email message to Rizzo, Yoo "specifically said they feel they do not need to be involved until after the OIG report is completed." Rizzo responded to Helgerson: "Based on what Chertoff told us when we gave him the heads up on this last week, the Criminal Division's decision on whether or not some criminal law was violated here will be predicated on the facts that you gather and present to them."

(b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C)

(b)(3), (b)(5), (b)(6), (b)(7)(C)

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

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

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

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

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

(b)(3), (b)(5), (b)(6), (b)(7)(C)

76

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

(b)(3), (b)(5), (b)(6), (b)(7)(C)

(b)(3), (b)(5), (b)(6), (b)(7)(C)

76 (b)(3), (b)(5), (b)(6), (b)(7)(C)

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

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

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

(b)(3), (b)(5), (b)(6), (b)(7)(C)

(b)(3), (b)(5), (b)(6), (b)(7)(C)

(b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C)

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

(b)(3), (b)(5), (b)(6), (b)(7)(C)

[77] (b)(5), (b)(6), (b)(7)(C)

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

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

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

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

(b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C)

78 (b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C)

(b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C)

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

6. Other Findings of the CIA OIG Report

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

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

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

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

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

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

CIA OIG Report at ¶16.

> Measuring the overall effectiveness of EITs is challenging for a number of reasons including: (1) the Agency cannot determine with any certainty the totality of the intelligence the detainee actually possesses; (2) each detainee has different fears of and tolerance for EITs; (3) the application of the same EITs by different interrogators may have different results; and (4) the lack of sufficient historical data related to certain EITs because of the rapid escalation to the use of the waterboard in the cases where it was used.

Id. at ¶ 221.

(b) (5)

Id. at ¶ 233.

(b) (5)

* * *

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

(b) (5)

Id. at ¶¶ 233-235.

E. Reaffirmation of the CIA Program

1. The Question of "Humane Treatment"

In a February 7, 2002 order, the President determined that the armed forces were required to treat detainees humanely. (b)(1), (b)(3)

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

According to Muller, Addington and Gonzales confirmed that the President's order was applicable only to the military. "Addington further stated and Yoo agreed that the term 'humane treatment' was intended to be no more restrictive than the Eight [sic] Amendment's prohibition on cruel and unusual punishment." Muller February 12, 2003 MFR at 4.

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

At a January 16, 2003 meeting attended by Muller, Tenet, Rice, Rumsfeld, Haynes, Secretary of State Colin Powell, and Vice President Richard B. Cheney, Muller reportedly told Rice:

> [T]here was an arguable inconsistency between what CIA was authorized to do and what at least some in the international community might expect in light of the Administrations's public statements about "humane treatment" of detainees on and after the February Memo. Everyone in the room evinced understanding of the issue. CIA's past and ongoing use of enhanced techniques was reaffirmed and in no way drawn into question. Questions instead were directed at DOD which, according to DOD General Counsel [Haynes], was about to commence an internal legal review to determine what interrogation techniques the military would authorize in what circumstances.

Id.

On January 22, 2003, Muller met with Haynes, (b)(3) and Yoo at the Defense Department. According to Muller, "John Yoo repeated his statements that the February Memo is not applicable to the CIA and that the word 'humane' remains consistent with the Eighth Amendment." *Id.*

On March 18, 2003, CIA attorneys Muller, Rizzo, and (b)(3) met with Chertoff, Fisher, Yoo, (b)(6), (b)(7)(C) and Bryan Cunningham from the NSC to update them on the status of six high-value detainees then in CIA custody, the use of EITs, "and policy issues re cruel, inhuman and degrading treatment." According to (b)(3) MFR, Department officials confirmed that the CIA's use of EITs did not violate United States law. Chertoff reportedly added that persons planning the

use of EITs were not engaged in a criminal conspiracy and were not aiding and abetting criminal acts. (b)(3) MFR continued:

> DOJ confirmed that transportation of subjects through US bases would render unlawful the use of EITs. DOJ OLC confirmed that they briefed the AG and DAG about EITs. Yoo reported that Gonzales told [WH spokesman] Fleischer to avoid using the term "humane treatment."

(b)(3) March 18, 2003 MFR.

The question of humane treatment was raised in an unsigned, undated document in OLC's files that appears to have been prepared by the CIA around this time, prior to issuance of the Working Group Report. The document raised a series of questions about the CIA interrogation program, and made the following observations:

> OLC has advised the CIA that it is not subject to [the President's] Order. Thus, while some of the enhanced techniques that the CIA has employed may constitute cruel, inhuman, or degrading treatment, the CIA would not be in violation of the [President's] order in using them.
>
> A number of [statements by administration officials that detainees are treated humanely] may be inaccurate. While the techniques employed [by] the CIA do not rise to the level of torture, some might fall within international standards of what constitutes inhumane treatment.

On March 24, 2003, White House Counsel Gonzales called a meeting at his office for an update on the CIA's detention program and EITs. Rizzo and Muller represented the CIA, and Chertoff, Deputy AAG Fisher, Yoo, Haynes, and Addington also attended. According to Rizzo's MFR, the group discussed the "overarching issue of the Administration's current legal and policy posture regarding the use of . . . [EITs]." Rizzo March 25, 2003 MFR at 1.

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

Chertoff reportedly stated that the Attorney General's staff had not decided whether the Attorney General should receive the same detailed, substantive briefing on the six detainees that Chertoff had received on March 18, 2003, and that "in retrospect," Chertoff was not sure why he (Chertoff) had been briefed. Chertoff and Yoo reportedly confirmed that Ashcroft had been personally briefed on the Abu Zubaydah detention and that he had signed off on the Classified Bybee Memo. *Id.*

According to Rizzo's MFR of that meeting, "Gonzales expressed strong reservations about the need or wisdom of briefing Secretary Powell at this time." Haynes was reported to have "made no comment one way or the other" about briefing Rumsfeld, and told the group that DOD was expected to decide that week "whether it should commence utilizing enhanced techniques on detainees the military is holding on Gtmo and elsewhere." Haynes added that he predicted DOD would decide not to use EITs as a matter of policy. Chertoff reportedly said he was not in favor of the use of EITs by the military "because he considers it essential that such techniques be closely regulated and monitored lest they stray into areas that violate the Torture statute . . . ." *Id.* at 2.

Rizzo's MFR of the March 24, 2003 meeting concluded with the following statement:

> All agreed that public statements coming out of the Administration should not state or leave the impression that the USG (as opposed to the US military) treats all of its detainees "humanely."

Id.

2. The "Bullet Points"

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

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

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

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

On May 12, 2003, a CIA colleague sent the following email message to Rizzo:

> Re: Applying pressure to [name withheld]
>
> We would also need to query DOJ regarding the Geneva Conventions since they contains [sic] limitations regarding the questioning of detainees. The Geneva Convention for the Protection of Civilian Persons states that "no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."

Rizzo replied as follows:

> Re: Applying pressure to [name withheld]
>
> Yes, [name of colleague]. Geneva will likely be too big an obstacle, but experience has demonstrated that this OLC has demonstrated an ingenious ability to interpret over, under and around Geneva, the torture convention, and other pesky little international obligations.[79]

[79] In a letter to OPR commenting on a draft of this report, Rizzo stated that this message "clearly appears to be an off-the-cuff, jocular remark made to a member of my staff. . . . Taking off-hand remarks made in an email to a colleague out of the context in which they were made and attributing to them a meaning that they were clearly not intended to have would be a gross

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

On May 27, 2003, (b)(3) sent (b)(6), (b)(7)(C) comments on revisions to the draft Bullet Points. According to later correspondence by Muller, OLC and CIA attorneys "formally concurred" on the Bullet Points on June 4, 2003. Muller added that the document was "fully coordinated with and drafted in substantial part by John Yoo with (b)(6), (b)(7)(C) " Email correspondence from (b)(3) to Muller on June 4, 2003 stated that he "confirmed [that] afternoon with (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) of DoJ/OLC that OLC is fully in accord with these points, and they reflect some final, minor revisions suggested by (b)(6), (b)(7)(C) during our conversation. On June 16, 2003, (b)(3) sent (b)(6), (b)(7)(C) and Philbin a copy of the Bullet Points by fax, with the message, "For your records - copy of final legal summary. Thank you."[80]

On June 16, (b)(3) also prepared a MFR referencing the Bullet Points, stating that the document "was fully coordinated with John Yoo . . . as well as with (b)(6), (b)(7)(C) Mr. Yoo at OLC. It was drafted in substantial part by Mr. Yoo and (b)(6), (b)(7)(C) and was approved verbatim. It reflects the joint conclusion of the CIA Office of General Counsel and the DoJ Office of Legal Counsel."

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

distortion of my views." In response to that comment, we quoted both emails in their entirety in this report.

80 Yoo left the Department on May 30, 2003, (b)(6), (b)(7)(C) (b)(6), (b)(7)(C)

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

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

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

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

(b)(3) provided a copy of the Bullet Points to the CIA OIG, which incorporated them into its draft report. As discussed below, OLC subsequently disavowed the Bullet Points.

3. The Leahy Letter

On June 20, 2003, Muller and (b)(3) met with Gonzales at his office to discuss how the administration should respond to a June 2, 2003 letter from Senator Patrick Leahy to National Security Advisor Condoleezza Rice, requesting confirmation that the United States was treating detainees humanely. Also attending the meeting were Deputy White House Counsel David Leitch, John Bellinger, Whit Cobb (from DOD OGC), Patrick Philbin, and (b)(6), (b)(7)(C) Prior to the meeting, Muller prepared a draft response to Leahy's letter, which was redrafted by Philbin and circulated at the meeting for comments.

According to (b)(3) MFR, the group recognized that the CIA EITs involved "certain 'stress and duress' measures and physical contact," and "[n]o one suggested that these measures were inconsistent with the statement in the draft letter that the US is complying with Constitutional standards and with Article 16 of the [CAT]." Philbin reportedly confirmed, in response to a direct question from Bellinger, that the EITs authorized by the Department "could be used consistent with CAT and the Constitution."[81] (b)(3) June 20, 2003 MFR at 1-2.

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

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

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

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

After the meeting, Muller, (b)(3) and Bellinger reportedly remained behind to discuss questions raised about the implementation of the CIA interrogation program that had been raised by the CIA OIG review. Gonzales had previously questioned whether the use of the waterboard during the interrogation of KSM "could be viewed as excessive." The group noted that the Classified Bybee Memo had stated, on page two, that the technique would not be repeated because it loses its effectiveness after several repetitions. Muller and (b)(3) told Gonzales, who reportedly agreed, that, "as per standard legal practice, the memorandum provided both a legal 'safe harbor' . . . and a touchstone by which to assess the lawfulness of any future activities that did not fall squarely within the specific facts reflected in the memorandum." They also reportedly agreed that simply because conduct went beyond the "safe harbor" did not necessarily mean that the conduct violated the statute or convention. (b)(3) June 20, 2003 MFR at 2.

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

Muller, (b)(3) and Gonzales then discussed whether, as part of the NSC's annual review of covert action, the Secretary of State and other Principals or Deputies should be briefed into the CIA interrogation program. They reportedly agreed that Rice and Tenet "should consider whether to provide those additional briefings . . . ." *Id.*

4. The CIA Request for Reaffirmation

On July 3, 2003, CIA Director Tenet sent Rice a memorandum requesting a meeting to discuss reaffirmation of "current, past and future CIA policies and practices concerning the interrogation of certain detainees . . . ." That meeting was held on July 29, 2003, and was attended by Vice President Cheney, Tenet, Muller, Ashcroft, Philbin, Gonzales, and Bellinger.

According to Muller's MFR, Tenet began the meeting by stating that the CIA wanted a reaffirmation of its policies and practices in light of the White House's statements regarding the humane treatment of detainees, "which had created the impression that certain previously authorized interrogation techniques are not used by US personnel and are no longer approved as a matter of US policy." Muller then distributed a set of briefing slides to the group, captioned "CIA Interrogation Program, 29 July 2003" (the Briefing Slides).

The Briefing Slides noted that EITs were used in the interrogation of a limited number of detainees and had produced "significant results," that they were drawn from methods used in DOD SERE training, and had been approved by the Attorney General and "fully disclosed to the SSCI [Senate Select Committee on Intelligence] and HPSCI [House Permanent Select Committee on Intelligence] leadership."

One slide summarized legal authorities for the interrogation program as follows:

LEGAL AUTHORITIES

Properly conducted and authorized interrogations:

- Do not violate the federal anti-torture statute, 18 U.S.C. 2340-2340A

- Do not violate the Constitution. They do not "shock the conscience" under the 5th and 14th Amendments. The 8th Amendment prohibition on cruel and unusual "punishment" is inapplicable.

- Do not constitute "cruel, inhumane and degrading treatment or punishment" under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment because, under U.S. law, those terms are limited to U.S. constitutional requirements.[82]

Another slide noted that the CIA had briefed White House, NSC, and Department of Justice officials on the program, along with the Chair and Ranking Minority Members of the HPSCI and SSCI. The program's "safeguards" were described, the EITs were listed, and the results of the interrogations of five detainees, including Abu Zubaydah and KSM, were summarized in bullet point form.

One slide stated that 24 detainees had been interrogated under the program, resulting in 1,500 intelligence reports, or half of the agency's reporting on al Qaeda plans. The Briefing Slides included a table that listed the dates and numbers of interrogation sessions for thirteen detainees. In a list of pros and cons, one slide noted that "[t]ermination of this program will result in loss of life, possibly extensive."

According to Muller, when the "Legal Authorities" slide was discussed, Ashcroft:

> forcefully reiterated the view of the Department of Justice that the techniques being employed by CIA were and remain lawful and do not

[82] Briefing Slides at 4. When AAG Goldsmith subsequently disavowed the CIA Bullet Points, Muller complained, among other things, that the CIA had relied on that document to create this slide for the July 29, 2003 meeting. Muller June 14, 2004 letter to Goldsmith at 1. Philbin told OPR that he made clear to Muller that this analysis was that of the CIA and not the OLC.

> violate either the anti-torture statute or US obligations under the [CAT]. He said that he had reviewed the 25 June 2003 letter to Senator Leahy . . . and had reviewed with Patrick Philbin the facts relating to actual CIA interrogations in the past year. Having done so, he said that CIA practices were entirely lawful and that he agreed with the statement that had been made with respect to those policies and practices in the [letter to Leahy].

Muller August 5, 2005 MFR at 2.

A discussion reportedly followed of why the press had recently reported that the administration had stated that detainees were being treated "humanely" by the United States. Bellinger stated that the White House press secretary had "gone off script," and Tenet observed that it was "important for the White House to cease stating that US Government practices were 'humane' as that term is easily susceptible to misinterpretation." *Id.* at 2-3. Bellinger told OPR that the spokesperson had not been cleared to received information about the CIA interrogation program and that he told the spokesperson that he should only make statements about humane treatment regarding Department of Defense detainees, not CIA detainees.

In discussing the "Safeguards" slide, Bellinger reportedly stated that the program's safeguards (psychological screening, interrogator training, written guidelines, headquarters approval, and the presence of medical and psychological officers) were intended to reflect the CIA's "intent and good faith." Philbin then explained that "under the Eighth Amendment, it was critical to look at the purpose of the acts." Muller reported that Philbin said that some United States cases finding Eighth Amendment violations for the mistreatment of prisoners "were inapplicable because . . . they involved 'wanton and malicious' punishment

whereas the [CIA interrogations] were undertaken for very different and legitimate purposes." *Id.* at 3-4.

Rice then asked whether there had been a death in connection with the program. Muller stated that there had been two deaths, both of which had been reported to the CIA OIG, DOJ, and Congress, but that neither had involved the interrogation program, which he defined in the MFR as "authorized interrogation personnel engaged in or authorized to engage in interrogations as part of the Interrogation Program or detainees who were the authorized subject of enhanced techniques." *Id.* at 4.

In discussing the slide that listed the EITs, Muller explained to the group that "the technique most likely to raise concerns was the waterboard." Rice asked for a description, which Muller provided. When Rice commented on the number of times that KSM had been waterboarded (119, according to the slide), Muller "stated his understanding that a number of the uses had been for less than the permitted 40 seconds." Philbin then reportedly stated that the OLC opinion authorized repetitions of the procedure, and Ashcroft reportedly said that he was "fully aware of the facts" and that the CIA was "well within" the scope of the OLC opinion. *Id.* at 5.

Muller also reported that Philbin and Ashcroft "gave a lengthy explanation of the law and the applicable legal principles" which "squares completely with the understanding under which CIA has been operating." *Id.* at 2.

Philbin told OPR that Muller's statements about his and Ashcroft's statements were not accurate. He said he and Ashcroft agreed before the meeting that the number of waterboard repetitions "was a cause for some concern." Philbin said they concluded that the number did not "cross a line to violate the statute," but that the CIA should have better controls in place and "show more caution in the future." According to Philbin, Ashcroft told the attendees that he indicated that, although 119 times did not violate the Department's advice, it warranted caution.

Tenet told the group that the CIA had to know that it was "executing Administration policy and not merely acting lawfully." According to Muller's MFR,

the "Vice President stated, and Dr. Rice and the Attorney General agreed, that this was the case." Bellinger reportedly stated in response to a question from Cheney, that "there was no requirement for a full meeting of the NSC Principals." Gonzales stated that he was certain that DOD General Counsel Haynes knew the substance of the CIA program, "based on, among other things, the DoD review of similar techniques and numerous discussions." According to Muller, Gonzales had stated at a previous meeting that "when the techniques were first authorized, Dr. Rice had discussed them with the Secretary of Defense." Cheney, Rice, Ashcroft, and Tenet then agreed that "it was not necessary or advisable to have a full Principals Committee meeting to review and reaffirm the Program." It was also agreed that Rice, Cheney, or Gonzales would "inform the President that the CIA was conducting interrogations . . . using techniques that could be controversial but that the Attorney General had reviewed and approved them as lawful under US law." *Id.* at 5.

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

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

1. The NSA Matter

Soon thereafter, Philbin brought to Goldsmith's attention another extremely sensitive national security issue. Philbin told OPR that he discovered the legal problems with the program in the Summer of 2003 and notified Goldsmith.

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

Philbin was one of only three DOJ attorneys, along with Ashcroft and Office of Intelligence and Policy Review Counsel James Baker, who knew about the program at that time. Philbin made a request that Goldsmith be briefed into the program.

After the clearance was granted, Goldsmith learned that OLC had issued written opinions on the legality of a program of warrantless electronic surveillance by the NSA (the NSA program).[84] The opinions, written by Yoo, covered both abstract legal issues and specific factual scenarios. Goldsmith read them all over a period of several weeks in November 2003, and concluded that there were serious problems with the underlying legal analysis and that the memoranda would have to be withdrawn and rewritten. Goldsmith informed AG Ashcroft and DAG Comey about the problem and told them that he thought the memoranda should be replaced. According to Goldsmith, both Ashcroft and Comey supported his decision.

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

Philbin told us that he had concerns about the Yoo Memo because it could be used by DOD to independently approve interrogation techniques that might violate the law. Philbin said that, soon after Yoo's departure from the Department in May 2003, he instructed (b)(6), (b)(7)(C) who had recently begun work at the DOD's Office of General Counsel, to instruct GC Haynes that DOD should not rely on the Yoo Memo for any purpose beyond the 24 specific interrogation practices that had been approved.

[84] The witnesses we spoke to referred only to a "sensitive national security matter," which they did not identify as the NSA program. We subsequently learned that the matter in question was the NSA program.

2. The Withdrawal of the Yoo Memo

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

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

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

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

[87] Philbin responded to that email as follows:

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

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

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

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

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

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

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

As an initial matter, Goldsmith analyzed the four techniques requiring approval by Rumsfeld and discussed the issue with Philbin and another OLC attorney. He determined that the four techniques – "good cop/bad cop;" verbally