denigrating the detainee's pride and ego; providing rewards or removing privileges; and up to 30 days of isolation – were legally permissible. On April 23, 2004, Goldsmith orally notified the Defense Department that they could use the techniques.

3. The CIA OIG Report and the Bullet Points Controversy

On March 2, 2004, Goldsmith received a letter from Muller, asking OLC to reaffirm the legal advice it had given the CIA regarding the interrogation program. Muller specifically asked for reaffirmation of the Yoo Letter, the Bybee Memo, the Classified Bybee Memo, and the Bullet Points.[88]

Goldsmith told us that he was unaware of the Bullet Points until he received Muller's letter, which attached a copy and which asserted that they had been "prepared with OLC's assistance and . . . concurrence . . . in June 2003."[89] Goldsmith was concerned because the Bullet Points appeared to be a CIA document, with no legal analysis and no indication that OLC had ever reviewed its content. He made inquiries, and learned that (b)(6), (b)(7)(C) and Yoo had in fact worked on the document.

In late May 2004, the CIA OGC gave OLC a copy of the final May 7, 2004 CIA OIG Report, which included descriptions of the legal advice provided to the CIA by OLC, and which included copies of the Classified Bybee Memo and the

---

88 Muller's letter also advised Goldsmith that the CIA wanted OLC approval for three new EITs: the finger press (jabbing the detainee's chest with a finger); water PFT (pouring, flicking, or tossing); and water dousing (dousing detainees with a bucket of water or a garden hose).

89 According to a CIA MFR prepared by Muller on October 16, 2003, the CIA gave Goldsmith a copy of the Bullet Points when he was briefed into the CIA interrogation program on October 7, 2003.

Goldsmith told us that he did not know what motivated Muller to ask for reaffirmation of the OLC advice at this time. We note, however, that CIA OGC had submitted its comments on the draft CIA OIG report the previous week, on February 24, 2004.

Bullet Points as appendices.[90] On May 25, 2004, Goldsmith wrote to CIA IG Helgerson, asking for an opportunity to provide comments on the report's discussion of OLC's legal advice before the report was sent to Congress.

After reviewing the CIA OIG Report, on May 27, 2004, Goldsmith wrote to Muller and advised him that the report "raised concerns about certain aspects of interrogations in practice." Goldsmith pointed out that the advice in the Classified Bybee Memo depended upon factual assumptions and limitations, and that the report suggested that the actual interrogation practices may have been inconsistent with those assumptions and limitations. The waterboard, in particular, was of concern, in that the CIA OIG Report stated that "the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant."

Goldsmith concluded the letter by recommending that use of the waterboard be suspended until the Department had an opportunity to review the CIA OIG Report more thoroughly. With respect to the other nine EITs, Goldsmith asked Muller to ensure that they were used in accordance with the assumptions and limitations set forth in the Classified Bybee Memo.

Muller responded on June 3, 2004, stating that Director Tenet had suspended the use of all EITs on May 24, 2004, and that only non-coercive debriefings would take place during the suspension period. Apparently in response to Goldsmith's concern about waterboarding, Muller pointed out that the CIA medical officer who attended the KSM waterboard sessions had confirmed that KSM's physical condition was good both before and after the sessions.

During this period, OLC began preparing comments on the CIA OIG Report. OLC and CIA OGC initially contemplated submitting a joint letter to CIA IG Helgerson, and early drafts of the letter included signature blocks for both Muller and Goldsmith.

[90] OLC's files also include a copy of a January 2004 draft of the CIA OIG Report, with CIA OGC's comments. There is no indication of how or when OLC received this document.

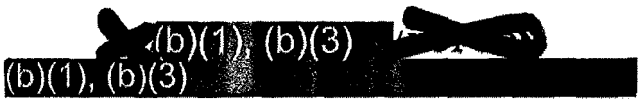
On June 9, 2004, Goldsmith talked to Yoo by telephone about the Bullet Points.[91] With respect to the Bullet Points, Yoo told Goldsmith that, to the extent they may have been used to apply the law to a set of facts, they did not constitute the official views of OLC. Yoo stated that "OLC did not generate the Bullet Points, and that, at most, OLC provided summaries of the legal views that were already in other OLC opinions." Yoo reportedly added that "almost all of the OLC work on the Bullet Points was done by an Attorney (b)(6), (b)(7)(C), who could never have signed off on such broad conclusions applying law to fact, especially in such a cursory and conclusory fashion."

On June 10, 2004, Goldsmith wrote to Muller that OLC would not reaffirm the Bullet Points, which "did not and do not represent an opinion or a statement of the views of this Office." Muller responded on June 14, 2004, arguing that the Bullet Points were jointly prepared by OLC and CIA OGC, that OLC knew that they would be provided to the CIA OIG for use in its report, and that they "served as a basis for the 'Legal Authorities' briefing slide used at a 29 July 2003 meeting attended by the Vice President, the National Security Advisor, the Attorney General, who was accompanied by Patrick Philbin, the Director of Central Intelligence, and others."

On June 15, 2004, CIA OGC informed OLC that, because the two offices had different views about the significance of the Bullet Points, OGC would not be a joint signatory to the letter to IG Helgerson.

Goldsmith submitted his comments to Helgerson on June 18, 2004. He asked that two "areas of ambiguity or mistaken characterizations" in the report be corrected. The first related to a description of Attorney General Ashcroft's comments on the "expanded use" of EITs at the July 29, 2003 NSC Principals meeting. Goldsmith explained that the statement was intended to refer to the use

[91] Goldsmith also asked Yoo about some oral advice he had provided to Haynes in connection with DOD's December 2, 2002 decision to use EITs on a detainee at the Guantanamo Bay facility. Yoo reportedly told Goldsmith that he did not know the identity of the detainee (who was probably Mohammed Al-Khatani), but that he dimly recalled discussing specific techniques with Haynes in November and December 2002. Yoo stated that any advice he gave Haynes was "extremely informal," and was clearly "extremely tentative." According to Yoo, he "never gave Mr. Haynes any advice that went beyond what was contained" in the August 2002 opinions.



of approved techniques on other detainees in addition to Abu Zubaydah, not the use of new techniques, and that with respect to the number of times the waterboard had been used on detainees, the "Attorney General expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ's August 2002 [classified] opinion." The second area of disagreement related to the conflicting views of OLC and CIA OGC over the significance of the Bullet Points. Goldsmith asserted that the Bullet Points "were not and are not an opinion from OLC or formal statement of views."

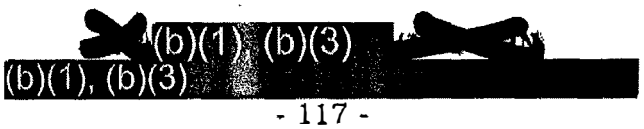
On June 23, 2004, Helgerson transmitted copies of the CIA OIG Report to the Chairs and Ranking Members of the House and Senate Select Committees on Intelligence. In his cover letter, he explained that the report had been prepared without input from DOJ, but that he had attached, with Goldsmith's permission, a copy of DOJ's June 18, 2004 comments and requested changes.

4. Goldsmith's Draft Revisions to the Yoo Memo

The first draft of the replacement memorandum was produced in mid-May 2004, and at least 14 additional drafts followed, with the last one dated July 17, 2004. Beginning with the sixth draft, dated June 15, 2004, specific criticisms of the Yoo Memo were discussed in footnotes. Although the criticism was removed from later drafts, Goldsmith told OPR that it was not removed because of any doubts about its accuracy. Rather, Goldsmith ultimately concluded that it was unnecessary to specifically address the errors. The footnotes in question, which were drafted by Bradbury pursuant to Goldsmith's request, criticized the Yoo Memo as follows:

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

2. The Yoo Memo "contains numerous overbroad and unnecessary assertions of the Commander in Chief power vis-à-vis statutes, treaties and constitutional constraints, and fails adequately to consider the precise nature of any potential interference with that power, the countervailing congressional authority to regulate the matters in question, and the case law concerning the



balance of authority between Congress and the President, *see, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38, 641-46 (1952) (Jackson, J., concurring)." *Id.*[92]

3. Yoo's "sweeping use of the canon against application of statutes to the sovereign outlined in *Nardone v. United States*, 302 U.S. 379 (1937), is too simplistic and potentially erroneous, particularly as applied to the federal torture statute . . . and possibly other criminal statutes." *Id.* at 1-2, n.1.

4. "The memorandum incorrectly concludes, contrary to an earlier opinion of this Office, that the torture statute does not apply to the conduct of the military during wartime." *Id.* at 2, n.1.

"This conclusion contradicted an earlier opinion of this Office, which had concluded that the torture statute 'applies to official conduct engaged in by United States military personnel.' Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* at 25-26 (Mar. 13, 2002). We agree with the March 2002 opinion that Congress's explicit extension of the prohibition of the torture statute to individuals acting 'under color of law' naturally includes military personnel acting during wartime. We therefore disavow the contrary conclusion on this question in [the Yoo Memo]." June 24, 2004 draft at 29-30, n.28.

5. "[T]he memorandum makes overly broad and unnecessary claims about possible defenses to various federal crimes, including torture, without considering, as we must, the specific circumstances of particular cases." June 15, 2004 draft at 2, n.1.

[92] In a June 30, 2004 email to DOJ attorneys working on a draft reply to a June 15, 2004 letter from the Senate Judiciary Committee, Goldsmith wrote:

> It is my view that the blanket construction of the [Yoo Memo's Commander-in-Chief] section is misleading and under-analyzed to the point of being wrong. I have no view as to whether we say that in this letter, as long as we do not say anything inconsistent with this position.

The Yoo Memo "makes overly broad, unnecessary, and in some respects erroneous claims about possible defenses to various federal crimes that we need not consider here." July 1, 2004 draft at 25, n.27.

6. The Yoo Memo "described the 'severe pain or suffering' contemplated by the torture statute by referring to the level of physical pain 'that would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of body functions.' [Yoo Memo] at 38-39. . . . [T]he effort to tie the severity of physical pain to particular physical or medical conditions is misleading and unhelpful, because it is possible that some forms of maltreatment may inflict severe physical pain or suffering on a victim without also threatening to cause death, organ failure or serious impairment of bodily functions. We have no need to define that line or indeed to say anything more about the meaning of the torture statute, in reviewing the particular interrogation techniques at issue here." June 24, 2004 draft at 28, n.26.

7. The Yoo Memo "asserts that Congress lacks authority to regulate wartime interrogation and, relatedly, that the [Executive Branch] could not enforce any statute that purported to do so. [Yoo Memo] at 4-6, 11-13, 18-19. These assertions, in addition to being unnecessary to support the legality of the techniques swept much too broadly, to the point of being wrong. Congress clearly has some authority to enact legislation related to the interrogation of enemy combatants during wartime, *see, e.g.*, U.S. Const. art. I, § 8, cl. 9 (power to 'define and punish Offenses against the Laws of Nations'), and clearly the Executive Branch can enforce those laws when they are violated. It is true that the Commander-in-Chief has extraordinarily broad authority in conducting operations against hostile forces during wartime . . . and that the Executive Branch has long taken the view that congressional statutes in some contexts unconstitutionally impinge on the Commander-in-Chief Power . . . . To assess the precise allocation of authority between the President and Congress to regulate wartime interrogation of enemy combatants, we would need to analyze closely a variety of factors, including the nature and scope of any potential statutory interference with the Commander in Chief power, the countervailing congressional authority to regulate the matters in question, the case law concerning the balance of authority between Congress and the President, *see, e.g., Public Citizen v. U.S. Department of Justice*,

491 U.S. 440, 482-89, (1989) (Kennedy, J., concurring in the judgement); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38, 641-46 (1952) (Jackson, J., concurring), and the historical practices of the political branches, *cf. Dames & Moore v. Regan*, 453 U.S. 654, 675-83 (1981) – factors that [the Yoo Memo] did not consider and that we view as unnecessary to consider here." *Id.* at 36-37, n.38.

8. "With respect to treaties, [the Yoo Memo] maintains that a presidential order of an interrogation method in violation of the CAT would amount to a suspension or termination of the treaty and thus would not violate the treaty. [Yoo Memo] at 47. It is true that the President has authority, under both domestic constitutional law, *see* Memorandum for Alan J. Kreczko, Special Assistant to the President, and Legal Adviser to the National Security Council, from Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty* at 8 n. 14 (Nov. 25, 1996), and international law, Vienna Convention on the Law of Treaties . . . to suspend treaties in some circumstances. But it is error to say that every presidential action pursuant to the Commander-in-Chief authority that is inconsistent with a treaty operates to suspend or terminate that treaty and therefore does not violate it. It is also unnecessary to consider this issue, because [the techniques] are fully consistent with all treaty obligations of the United States, including the Geneva Conventions and the CAT." *Id.* at 37, n.38.

9. "[The Yoo Memo] states that the Fifth Amendment to the United States Constitution is 'inapplicab[le]' during wartime, particularly with respect to the conduct of interrogations or the detention of enemy aliens. [Yoo Memo] at 9. The memorandum's citations of authority for the proposition that the Fifth Amendment Due Process Clause does not prohibit certain wartime actions by the political branches do not, however, support the broader proposition – a proposition once again not necessary to uphold the techniques in question here – either that the Fifth Amendment is inapplicable in wartime or that it 'does not apply to the President's conduct of a war.' *Cf. Hamdi, supra*, slip op. at 21-32 (plurality opinion of O'Connor, J.)." July 1, 2004 draft at 27, n.30.

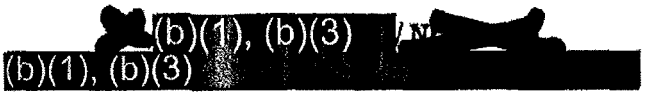
Goldsmith left the Justice Department on July 17, 2004, before he was able to finalize a replacement for the Yoo Memo. On July 14, 2004, then Associate Deputy AG Patrick Philbin testified before the House Permanent Select Committee on Intelligence as to the legality of the 24 interrogation methods that had been approved for use by the Defense Department. Sometime thereafter, the Defense Department reportedly informed OLC that it no longer needed a replacement for the Yoo Memo.

5. The Withdrawal of the Bybee Memo

On June 8, 2004, the Washington Post reported that "[i]n August 2002, the Justice Department advised the White House that torturing al Qaeda terrorists in captivity abroad 'may be justified,' and that international laws against torture 'may be unconstitutional if applied to interrogations' conducted in President Bush's war on terrorism, according to a newly obtained memo." On June 13, the *Washington Post* made a copy of the Bybee Memo available on its web site.

Up until this time, Goldsmith's focus had been on the Yoo Memo, rather than the Bybee Memo. Shortly after the Bybee Memo was leaked, Goldsmith was asked by the White House if he could reaffirm the legal advice contained in the Bybee Memo. Because the analysis in that document was essentially the same as the Yoo Memo, which he had already withdrawn, Goldsmith concluded that he could not affirm the Bybee Memo. He consulted with Comey and Philbin, who agreed with his decision, and on June 15, 2004, Goldsmith informed Attorney General Ashcroft that he had concluded that the Department should withdraw the Bybee Memo. Although Ashcroft was "not happy about it," according to Goldsmith, he supported the decision. The following day, June 16, 2004, Goldsmith submitted a letter of resignation to become effective August 6, 2004.

Later that week, Goldsmith notified the White House Counsel's Office that he was planning to withdraw the Bybee Memo. According to Goldsmith, this caused "enormous consternation in the Executive Branch because basically they thought the whole program was in jeopardy," but the White House did not resist his decision.



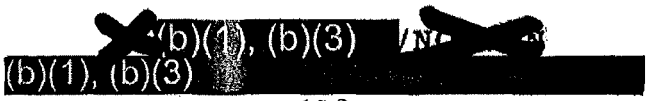
Goldsmith said he found it "deeply strange" that both the Classified Bybee Memo and the unclassified memoranda were issued on the same day. He told OPR:

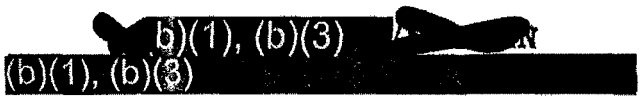
> One [the classified memo] is hyper narrow and cautious and splitting hairs and not going one millimeter more than you needed to answer the question. And the other [the unclassified memo] issued the same day is the opposite. It wasn't addressing particular problems. It was extremely broad. It went into all sorts of issues that weren't directly implicated, and issued the same day by the same office.

Bradbury told OPR that he believed it was appropriate to withdraw the unclassified Bybee Memo. He stated that Yoo's view of the Commander-in-Chief powers was "not a mainstream view" and that the memorandum did not adequately consider counter arguments. He commented that "somebody should have exercised some adult leadership in that respect."

Bradbury said part of the problem with Yoo's work on the Commander-in-Chief section was his entrenched scholarly view of the issue. He commented:

> He had a deeply ingrained view of the operative principles. And to the extent there were sources that reflect that view, he may bring them in and cite them and use them. But it's almost as if he could have written that opinion without citation to any sources. And if a court here or a court there or a commentator here or a commentator there takes a different view, that's almost of secondary importance because he had such a firmly held view of what the principles are.
>
> * * *
>
> In my view, there's something to be said for not being a scholar or professor in this job [in the OLC]. . . . And taking a more practical approach, and one where you don't think you know the answers already, because you haven't got a body of scholarly work, you know, you've already developed on these questions. And I just think that for practical reasons that's healthy.





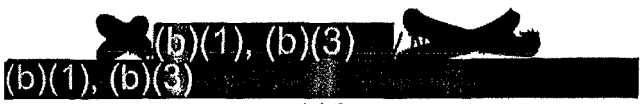
In the days that followed, there was a great deal of discussion between Department officials, the CIA and the White House about how to proceed. On June 22, 2004, Comey, Goldsmith, and Philbin met with reporters in a not-for-attribution briefing session to explain that the Bybee Memo had been withdrawn. On the same day, White House Counsel Gonzales announced at a press conference that the Bybee Memo had been meant to "explore the limits of the legal landscape," and to his knowledge had "never made it to the hands of soldiers in the field, nor to the president." He acknowledged that some of the conclusions were "controversial" and "subject to misinterpretation."

Goldsmith was determined to complete his replacement for the Yoo Memo before he left the Department, and he also assigned an OLC line attorney to prepare a replacement for the Bybee Memo.[93] At some point during the summer, however, it became apparent that the Yoo Memo could not be replaced by August, and Goldsmith decided to advance his departure date to July 17, 2004.

On July 2, 2004, AG Ashcroft and DAG Comey attended a meeting of the NSC Principals that had been requested by the CIA to discuss the interrogation of Janat Gul, a recently captured detainee the CIA believed was withholding actionable intelligence.[94] Goldsmith did not attend the meeting, but consulted with Ashcroft and Comey afterwards. On July 7, 2004, Goldsmith notified CIA GC Muller by letter that the Department approved the use of the nine techniques (all but the waterboard) described in the Classified Bybee Memo, and the twenty-four methods then approved for use by the Defense Department in the Secretary of Defense's April 15, 2003 memorandum. Goldsmith noted in his letter that the approval was subject to the specific assumptions, limitations, and safeguards described in those documents.

[93] Several replacement drafts for the Bybee Memo were prepared under Goldsmith's direction, the last of which was dated July 16, 2004.

[94] The CIA did not provide an MFR relating to this meeting and we were unable to determine from other sources who, apart from the DAG, the AG, and Muller attended.



G. Case-by-Case Approvals and the Levin Memo (December 30, 2004)

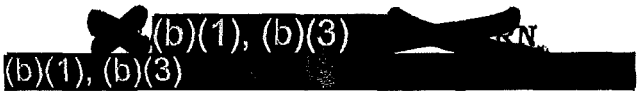
When Goldsmith left the Department in August 2006, Dan Levin, who was Counselor to Attorney General Ashcroft at the time, was asked to serve as Acting AAG of OLC. Among other duties, Levin inherited the task of drafting replacements for the Bybee Memo and the Classified Bybee Memo. In addition, he assumed responsibility for evaluating the CIA's pending and future requests for authorization to use EITs at the black sites.[95]

Levin stated that when he first read the Bybee Memo, he remembered "having the same reaction I think everybody who reads it has – 'this is insane, who wrote this?'" He thought the tone was generally inappropriate and the Commander-in-Chief and defenses sections were completely unnecessary. Levin thought an OLC opinion should be a carefully crafted analysis that did not engage in hypothetical and unnecessary analysis, but the Bybee Memo fell far short of that ideal.

Although Goldsmith had already given the CIA written approval for the use of EITs (with the exception of the waterboard) on Janat Gul, the subject was raised again at a July 20, 2004 NSC Principals meeting. According to Muller's July 30, 2004 letter to Levin, Muller asked Ashcroft at that meeting to provide a written opinion confirming that the use of EITs would not violate the United States Constitution or any statute or treaty obligation of the United States, including Article 16 of the CAT. Ashcroft responded with a one-paragraph letter dated July 22, 2004, to the Acting Director of the CIA, John McLaughlin, in which he confirmed his oral advice that the EITs described in the Classified Bybee Memo, other than the waterboard, complied with United States law and Article 16 of the CAT.

However, Muller also appears to have asked Ashcroft for authorization to use the waterboard on Janat Gul. In response, in a letter to Muller dated July 22,

[95] Prior to the Bullet Points controversy, the CIA did not seek OLC approval to use EITs on new prisoners brought into the CIA interrogation program, but simply relied on the analysis provided in the Classified Bybee Memo. After Goldsmith disavowed the Bullet Points, however, the agency appears to have sought written approval when it intended to use EITs.



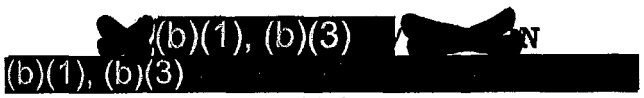
2004, Levin referred to the request and asked Muller for a precise definition of the technique, noting that the CIA OIG Report had raised questions about whether previous descriptions accurately reflected how waterboarding was being applied in practice. In particular, Levin asked the CIA to describe any differences between the technique as proposed to be used and the technique described in the Classified Bybee Memo.

On August 2, 2004, Rizzo faxed Levin a seven-page document titled "Description of the Waterboard" and a two-page "Medical and Psychological Assessment of Janat Gul." In response to Levin's question about whether the technique differed in any way from the one considered in the Classified Bybee Memo, Rizzo wrote that "[t]he differences are as follows":

> When a detainee is utilizing countermeasures to defeat the occlusion effect of the waterboard, the interrogator may create a water seal around the detainee's mouth in order to create a pool of water during the 5 to 40-second application. When the detainee attempts to counter that pooling by swallowing the water, the interrogator must use a saline solution in order to preserve the detainee's electrolyte balance. The other change is that CIA interrogators have used multiple applications of the waterboard for two of the three detainees with whom the waterboard has been used. Please note that all three of the detainees who were interrogated using the waterboard technique are in good physiological and psychological health.

In his July 30, 2004 letter to Levin, Muller also asked for "a formal written opinion addressing whether, in all the circumstances, the use of [EITs] would violate substantive Constitutional standards, including those of the Fifth, Eighth, and Fourteenth Amendments were they applicable to aliens detained abroad."

At that time, the Department had advised the CIA that the CAT Article 16 standard of cruel, inhuman, and degrading treatment did not apply to the CIA interrogation program because the activity took place outside territory subject to United States jurisdiction. Levin told us that he and Ashcroft tried to convince the CIA that they were better off relying on the jurisdictional exclusion, rather than asking OLC to hypothetically consider whether the program would meet the



standards of Article 16. The CIA insisted, however, and although Levin left OLC before that question was addressed, he "thought it would be very, very hard to conclude that it didn't violate the cruel, inhuman and degrading [standard], at least unless you came up with an argument for how it meant something different than [what it would mean if applied] to a United States citizen in New York."[96]

Levin and other OLC attorneys met with CTC officers on August 4, 2004, and requested additional information about the waterboarding procedure. CTC Associate General Counsel (b)(3) responded by fax the next day, noting some of the time limitations that the CIA had placed on the use of the waterboard.

At some point in the process, Levin had himself subjected to the waterboard technique (and the other EITs, with the exception of sleep deprivation) by CIA interrogators. He explained his reason for doing so as follows:

(b) (5)

Levin also asked the CIA for information about how the sleep deprivation technique was administered. He told us that he was surprised to learn that no one at OLC had previously asked the CIA about the methods used to keep prisoners awake for such extended periods, which was an aspect of the technique that he considered highly relevant to analyzing its effect.[97] He learned that detainees were typically shackled in a standing position, naked except for a diaper, with their hands handcuffed at head level to a chain bolted to the ceiling.

[96] That question was eventually addressed by Bradbury in the Article 16 Memo, which concluded that thirteen CIA EITs, including the waterboard, sleep deprivation and forced nudity, did not "violate the substantive standards applicable to the United States under Article 16 . . . ." Article 16 Memo at 39-40.

[97] Similarly, none of the OLC lawyers who worked on the Classified Bybee Memo appears to have asked the CIA how prisoners were induced to maintain stress positions such as "wall standing."

In some cases, a prisoner's hands would be shackled above the head for more than two hours at a time. CIA personnel were expected to monitor the subjects to ensure that they carried all their weight on their feet, rather than hanging from the chains, which could result in injuries. In some cases, a prisoner would be shackled in a seated position to a small stool so that he had to stay awake to keep his balance.

Levin approved the CIA's request to use the waterboard in a letter to Rizzo dated August 6, 2004. Levin wrote to "confirm our advice that, although it is a close and difficult question, the use of the waterboard technique in the contemplated interrogation of Janat Gul . . . would not violate any United States statute, including [the torture statute], nor would it violate the United States Constitution or any treaty obligation of the United States."[98] Levin noted that OLC would subsequently provide a legal opinion that explained the basis for his conclusion, and listed certain conditions and assumptions to the approval, which he noted were "consistent with the [Classified Bybee Memo] and with the previous uses of the technique, as they have been described to us."[99]

---

[98] Although Levin concluded that use of the waterboard was lawful, the waterboard was reportedly never used on Janat Gul.

[99] The conditions of Levin's approval were: (1) the use of the technique would conform to the description in Rizzo's August 2, 2004 letter; (2) a physician and psychologist would approve the use of the technique before each session, would be present for the session, and would have the authority to stop the session at any time; (3) there would be no material change in the subject's medical and psychological condition as described in the attachment to Rizzo's letter, with no new medical or psychological contraindications; and (4) consistent with the description in the Classified Bybee Memo, the technique would be administered during a thirty-day period, would be used on no more than fifteen days during that period, would be applied no more than twice on any given day, and the subject would be waterboarded no more than a total of twenty minutes each day.

At the time, Levin planned to issue a replacement for the Classified Bybee Memo, and OLC's files show that he prepared several drafts in August and September 2004, which were circulated to four other OLC attorneys, including Bradbury, who was read into the interrogation program around that time.[100]

On August 25, 2004, the CIA asked for authorization to use four additional EITs on Janat Gul. Levin responded on August 26, 2004, granting DOJ authorization subject to the standard conditions and assumptions.

On August 11, 2004, CTC Attorney (b)(3) sent Levin brief biographies of "four al-Qaida high-value individuals whom we expect to capture or who are already in the custody of (b)(1) and noted that they would be requesting authorization to use EITs (other than the waterboard) on those individuals.[101] On September 5, 2004 (b)(3) submitted requests for one of the detainees, and Levin provided written authorization to use EITs other than the waterboard the next day. On September 19, 2004, (b)(3) asked for authorization to use EITs other than the waterboard on another detainee, Sharif al-Masri. Levin's letter granting authorization was dated September 20, 2004.

Levin continued to work on a replacement for the Classified Bybee Memo, and in late September 2004, he asked CIA attorney (b)(3) for more information about the administration of the following EITs: nudity, water dousing, sleep deprivation, and the waterboard. (b)(3) responded on October 12, 2004.

On October 18, 2004, (b)(3) sent Levin a 28-page document, entitled "OMS [CIA Office of Medical Services] Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention," dated May 17, 2004

[100] The six EITs under consideration in the Levin drafts were dietary manipulation, nudity, abdominal slap, water dousing, sleep deprivation, and the waterboard. The Levin drafts we reviewed concluded that the use of those techniques, subject to limitations and protections described by the CIA, would not constitute torture within the meaning of the torture statute.

[101] The four detainees were Abu Faraj, Hamza Rabi'a, Abu Talha, and Ahmed Ghailani.

(OMS Guidelines). That document included the following observations about the waterboard:

> This is by far the most traumatic of the enhanced interrogation techniques . . . . SERE trainees usually have only a single exposure to this technique, and never more than two . . . .
>
> While SERE trainers believe that trainees are unable to maintain psychological resistance to the waterboard, our experience was otherwise. Some subjects unquestionably can withstand a large number of applications, with no immediately discernable cumulative impact beyond their strong aversion to the experience. Whether the waterboard offers a more effective alternative to sleep deprivation and/or stress positions, or is an effective supplement to these techniques is not yet known.

OMS Guidelines at 15.

On October 22, 2004, (b)(3) responded by letter to two questions Levin had raised in an October 18, 2004 meeting. In his letter, (b)(3) told Levin that he could share drafts of his replacement for the Classified Bybee Memo with Legal Adviser Will H. Taft, IV, at the State Department and with General Counsel William J. Haynes, II, and Assistant General Counsel Eleana Davidson at the Defense Department.[102] (b)(3) also provided additional information about the sleep deprivation and water flicking EITs.

At some point that fall, Comey directed Levin to focus on a replacement for the unclassified Bybee Memo, which he wanted completed by the end of the year. In late November or early December 2004, Levin started working on the unclassified replacement memorandum. Principal Deputy AAG Bradbury prepared an initial draft, using the last draft created under Goldsmith's supervision as a starting point. As the drafting progressed, Goldsmith's draft was

[102] Levin told us that he got "two rounds of very detailed excellent comments" from the State Department on his classified draft.

changed significantly. Virtually all of OLC's attorneys and deputies were included in the review process, and Levin also sought comments from the Criminal Division, Solicitor General Paul Clement, Philbin, Comey, the White House Counsel's Office, the State Department, the CIA, and the Defense Department.

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

Levin modified the discussion of specific intent, which he also believed to be wrong. As presented in the Bybee Memo, Levin thought the section "suggested that if I hit you on the head with a . . . hammer, even though I know it's going to cause specific pain, if the reason I'm doing it is to get you to talk rather than to cause pain, I'm not violating the statute. I think that's just ridiculous."

Levin also changed the discussion of "severe mental or physical pain or suffering" by withdrawing and criticizing the Bybee Memo's conclusion that "severe pain" under the torture statute must be the equivalent of pain resulting from organ failure or death. As he recalled, only Patrick Philbin defended the previous analysis, and he told us that the two of them had "spirited discussions" on the subject. Levin disagreed with Philbin in the end, and criticized that argument in the final draft.[103]

The Levin Memo was signed on December 30, 2004, and was posted on the OLC website; Levin continued working on a replacement for the Classified Bybee Memo.

[103] Levin told us that he was unaware that Philbin was the "second deputy" on the Bybee Memo. In a December 21, 2004 email to Levin, Philbin argued that the criticism was not "entirely fair to the authors" of the Bybee Memo because the health benefit statutes could shed light on a "lay person's understanding of what kind of pain would be associated with" death, organ failure, or loss of bodily function.

On December 30, 2004, (b)(3) provided Levin a copy of a 20-page document entitled "Background Paper on CIA's Combined Use of Interrogation Techniques." On January 4, 2005, (b)(3) sent Levin a four-page summary of twenty-eight detainees who had experienced sleep deprivation in the CIA interrogation program. On January 15, 2005, (b)(3) sent Levin an updated copy (December 2004) of the OMS Guidelines and provided comments on portions of Levin's January 8, 2005 replacement draft of the Classified Bybee Memo.[104]

Levin told us that after Gonzales became Attorney General, he asked Levin to take over Bellinger's job as legal adviser to the NSC. Levin was not interested in the job, but Gonzales, the new National Security Advisor, Stephen Hadley, and White House Counsel Harriet Miers all urged him to take the position. Levin accepted the job, but once he got there, found he had "nothing to do." After about a month, he asked for permission to leave, and returned to private practice.

In describing his work on the issue of EITs, Levin said the CIA never pressured him. Rather, he said it only "made clear that they thought it was important," but that "their view was you guys tell us what's legal or not." He stated, however, that the "White House pressed" him on these issues. He commented: "I mean, a part of their job is to push, you know, and push as far as you can. Hopefully, not push in a ridiculous way, but they want to make sure you're not leaving any executive power on the table."

---

[104] All of Levin's drafts that we saw in OLC's files concluded that the use of EITs as described by the CIA was lawful.

H. The Bradbury Memos

When Levin left the Department in early February 2005, Bradbury became OLC's Acting AAG.[105] Bradbury continued to work on a replacement for the Classified Bybee Memo, as well as a second classified memorandum that considered the legality of the combined use of EITs.[106]

Bradbury's point of contact at the CIA for these memoranda was CTC attorney (b)(3), with occasional input from CTC attorney (b)(3). Correspondence from (b)(3) to Bradbury indicates that the CIA provided its comments on the Combined Techniques Memo to OLC on March 1, 2005.

In a CIA memorandum dated March 2, 2005, (b)(3) responded to a previous request from Bradbury for a summary of the information the CIA had obtained through the use of EITs. The memorandum, captioned "Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from (b)(3) Legal Group, DCI Counterterrorist Center, *Re: Effectiveness of the CIA Counterintelligence Interrogation Techniques* (March 2, 2005)" (the CIA Effectiveness Memo), was cited by Bradbury in the Article 16 Memo and the 2007 Bradbury Memo, discussed below.

Bradbury told us that he had several communications with the CIA medical staff, psychologists, and interrogators about the effects of EITs. At the time, only three prisoners had been subjected to waterboarding, but approximately thirty individuals had undergone some form of sleep deprivation, and three had been subjected to lengthy sleep deprivation.

105 Bradbury was Acting AAG from February 5 to February 14, 2005. He then reverted to Principal Deputy AAG, but no acting AAG was appointed. He again became Acting AAG in June 2005,when his nomination to the position of AAG was submitted to the Senate, until April 27, 2007, when his time as AAG expired without Senate action on his nomination. He again reverted to the position of Principal Deputy AAG, but, again, no acting AAG was appointed.

106 Levin started working on the combined techniques memorandum before he left the Department, but was unable to complete it before his departure.

On April 22, 2005, Bradbury received a four-page fax from (b)(3) providing additional information about how sleep deprivation and the waterboard would be administered to CIA prisoners.

Bradbury circulated drafts of his memoranda widely within the Department. Both the Office of the Attorney General (OAG) and the Office of the Deputy Attorney General (ODAG) reviewed drafts, as did lawyers from the Department's National Security Division and the Criminal Division. John Bellinger at the State Department and Dan Levin, then at the NSC, were also included in the process. As discussed below, DAG Comey voiced no objections to the 2005 Bradbury Memo, but requested changes in the Combined Techniques Memo, which were not made. Former AAG Levin told us that he passed along comments on the Article 16 Memo to Bradbury, but that he does not remember seeing a final draft of the document.[107]

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

The 2005 Bradbury Memo was one of two May 10, 2005 memoranda written to replace the Classified Bybee Memo.[108] The 2005 Bradbury Memo considered whether the use of thirteen specific EITs by the CIA would be "consistent with the federal statutory prohibition on torture" and concluded that, "although extended sleep deprivation and use of the waterboard present more substantial questions . . . none of these [EITs], considered individually, would violate" the torture statute.

The 2005 Bradbury Memo concluded that the use of the following EITs, as proposed by the CIA, would be lawful: (1) dietary manipulation; (2) nudity; (3) attention grasp; (4) walling; (5) facial hold; (6) facial slap or insult slap; (7) abdominal slap; (8) cramped confinement; (9) wall standing; (10) stress positions; (11) water dousing; (12) sleep deprivation (more than 48 hours); and (13) the

[107] Bradbury told us, however, that he remembers personally delivering a copy of the signed Article 16 Memo to Levin in his office at the NSC.

[108] The 2005 Bradbury Memo noted that it superseded the Classified Bybee Memo, but added that it "confirms the conclusion of [the Classified Bybee Memo] that the use of these techniques on a particular high value al Qaeda detainee, subject to the limitations imposed herein, would not violate [the torture statute]." 2005 Bradbury Memo at 6, n.9.

waterboard. Each technique was described in the memorandum, along with the restrictions and safeguards the CIA had represented would be implemented with their use.

The memorandum noted at the outset that the CIA had represented that EITs would only be used on "High Value Detainees." Those individuals were defined by the CIA as (1) senior members of al Qaeda or an associated group; (2) who have knowledge of imminent terrorist threats against the United States or who have had direct involvement in planning such terrorist actions; and (3) who would constitute a clear and continuing threat to the United States or its allies if released. 2005 Bradbury Memo at 6.

Following a general discussion of the torture statute, the 2005 Bradbury Memo considered whether each individual technique would cause "severe physical or mental pain or suffering." As a preliminary matter, the memorandum noted that the EITs were developed from SERE training, and recited some of the same statistics regarding the effect of EITs on trainees that had appeared in the Classified Bybee Memo to support the conclusion that SERE EITs did not result in prolonged mental harm. 2005 Bradbury Memo at 29, n.33; Classified Bybee Memo at 5. Although the 2005 Bradbury Memo prefaced its discussion with the qualifying statement, "fully recognizing the limitations of reliance on this experience," it did not directly address the following concern, previously noted by CIA's Office of Technical Service (b)(3)

> [W]hile the [EITs] 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 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.

OTS Memorandum (July 24, 2002).

In evaluating the legality of the first eleven techniques, the memorandum concluded that those EITs clearly did not rise to the level of "severe mental pain or suffering." The memorandum then turned to the two remaining techniques – sleep deprivation and waterboarding.

The discussion of sleep deprivation noted that the Classified Bybee Memo had failed to "consider the potential for physical pain or suffering resulting from the shackling used to keep detainees awake or any impact from the diapering of the detainee" or the possibility of severe physical suffering unaccompanied by severe physical pain. The 2005 Bradbury Memo pointed to information provided by CIA OMS that "shackling of detainees is not designed to and does not result in significant physical pain," reviewed the OMS monitoring procedures, and concluded that "shackling cannot be expected to result in severe physical pain" and that "its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so." 2005 Bradbury Memo at 37. The memorandum also cited OMS data and three books on the physiology of sleep and concluded that sleep deprivation did not result in any physical pain. *Id.* at 36.

On the question of whether sleep deprivation caused severe physical suffering, the 2005 Bradbury Memo noted that, "[a]lthough it is a more substantial question," it "would not be expected to cause 'severe physical suffering.'" *Id.* at 37. The memorandum acknowledged that, for some individuals, the technique could result in "prolonged fatigue, . . . impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision," and concluded that this could constitute "substantial physical distress." *Id.* at 37-38. However, because CIA OMS "will intervene to alter or stop" the technique if it "concludes in its medical judgment that the detainee is or may be experiencing extreme physical distress," the 2005 Bradbury Memo found that sleep deprivation "would not be expected to and could not reasonably be considered specifically intended to cause severe physical suffering in violation of" the torture statute. *Id.* at 39-39. Relying on similar assurances from CIA OMS, and on one medical text, the 2005 Bradbury Memo also concluded that sleep deprivation would not cause "severe mental pain or suffering" within the meaning of the torture statute. *Id.* at 39-40.

With respect to the waterboard, the 2005 Bradbury Memo noted that the "panic associated with the feeling of drowning could undoubtedly be significant" and that "[t]here may be few more frightening experiences than feeling that one is unable to breathe." *Id.* at 42. However, the memorandum noted that, according to OMS, the technique was not physically painful, and that it had been

administered to thousands of trainees in the SERE program.[109] *Id.* Furthermore, "the CIA has previously used the waterboard repeatedly on two detainees, and, as far as can be determined, these detainees did not experience physical pain . . . ." *Id.* Accordingly, "the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause 'severe physical pain.'" *Id.* at 42-43.

The 2005 Bradbury Memo also concluded that the waterboard did not cause "severe physical suffering" because any unpleasant sensations caused by the technique would cease once it was discontinued. Because each application would be limited to forty seconds, the memorandum reasoned, any resulting physical distress "would not be expected to have the duration required to amount to severe physical suffering." *Id.*[110]

The 2005 Bradbury Memo commented that the "most substantial question" raised by the waterboard related to the statutory definition of "severe mental pain or suffering." Noting that an act must produce "prolonged mental harm" to violate the statute, the memorandum again cited the experience of the SERE program and the CIA's experience in waterboarding three detainees to conclude that "the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause 'prolonged mental harm.'" *Id.* at 44.

The 2005 Bradbury Memo referred, in a footnote, to the CIA OIG Report's findings regarding the CIA's previous use of the waterboard, where the OIG had highlighted the lack of training, improper administration, misrepresentation of

[109] The 2005 Bradbury Memo acknowledged that most SERE trainees experienced the technique only once, or twice at most, whereas the CIA program involved multiple applications, and that "SERE trainees know it is part of a training program," that it will last "only a short time," and that "they will not be significantly harmed by the training." 2005 Bradbury Memo at 6.

[110] The 2005 Bradbury Memo stated in its initial paragraph that it had incorporated the Levin Memo's general analysis of the torture statute by reference. The Levin Memo, citing dictionary definitions of suffering as a "state" or "condition," concluded that "severe physical suffering" was "physical distress that is 'severe' considering its intensity and duration or persistence [and not] merely mild or transitory." Levin Memo at 12.

expertise, and divergence from the SERE model in the CIA interrogation program. The 2005 Bradbury Memo stated that

> we have carefully considered the [CIA OIG Report] and have discussed it with OMS personnel. As noted, OMS input has resulted in a number of changes in the application of the waterboard, including limits on the frequency and cumulative use of the technique.

Id. at 41, n.51.

Thus, "assuming adherence to the strict limitations" and "careful medical monitoring," the 2005 Bradbury Memo concluded that "the authorized use of the waterboard by adequately trained interrogators and other team members could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering and thus would not violate" the torture statute. *Id.* at 45.

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

The Combined Techniques Memo began by briefly recapping the 2005 Bradbury Memo's conclusions, and stated that it would analyze whether the combined effects of the authorized EITs could render a prisoner unusually susceptible to physical or mental pain or suffering, and whether the combined, cumulative effect of the EITs could result in an increased level of pain or suffering. The memorandum outlined the phases, conditions, and progression of a "prototypical" CIA interrogation, based upon the "Background Paper on CIA's Combined Use of Interrogation Techniques" that the CIA had sent to Levin on December 30, 2004 (CIA Background Paper). The Combined Techniques Memo noted that the waterboard would be used only in certain limited circumstances, and that it may be used in combination with only two EITs: dietary manipulation and sleep deprivation.[111]

[111] The Combined Techniques Memo noted that the waterboard must be used in combination with dietary manipulation, "because a fluid diet reduces the risks of the technique." Combined Techniques Memo at 16. According to the CIA OMS Guidelines, a liquid diet is imposed because

The memorandum classified EITs into three categories based on their purpose. The first category, referred to as "conditioning techniques" was designed "to bring the detainee to 'a baseline, dependent state' . . . demonstrat[ing] . . . 'that he has no control over basic human needs . . . .'" Combined Techniques Memo at 5 (quoting CIA Background Paper at 5). The EITs included in this category were forced nudity, sleep deprivation, and dietary manipulation. *Id.*

Techniques in the second category, classified as "corrective techniques," are those that require physical action by the interrogator, and which "are used principally to correct, startle, or . . . achieve another enabling objective with the detainee." *Id.* (quoting CIA Background Paper at 5). This category includes the insult slap, the abdominal slap, the facial hold, and the attention grasp.

The third category, "coercive techniques," includes walling, water dousing, stress positions, wall standing, and cramped confinement. Their use "places the detainee in more physical and psychological stress." *Id.* at 5-6 (quoting CIA Background Paper at 7).[112]

The memorandum then examined whether the combined use of EITs would result in severe physical pain, severe physical suffering, or severe mental pain or suffering. With respect to severe physical pain, the memorandum noted that some of the EITs did not cause any physical pain, and that none of them used individually caused "pain that even approaches the 'severe' level required to violate the [torture] statute . . . ." The memorandum concluded that the combined use of the EITs therefore "could not reasonably be considered specifically intended to . . . reach that level." Combined Techniques Memo at 11-12. Acknowledging that some individuals might be more susceptible to pain, or that sleep deprivation might make some detainees more susceptible to pain, the memorandum described the medical and psychological monitoring procedures that CIA OMS had

---

"vomiting may be associated with [waterboard] sessions." December 2004 OMS Guidelines at 18.

[112] The waterboard, which was not discussed in the CIA Background Paper or in this section of the Combined Techniques Memo, is another coercive technique, and "is generally considered to be 'the most traumatic of the enhanced interrogation techniques . . . .'" Article 16 Memo at 15 (quoting CIA OMS Guidelines at 17).

represented would be in place for each interrogation session, and observed that interrogation team members were required to stop an interrogation if "their observations indicate a detainee is at risk of experiencing severe physical pain . . . ." *Id.* at 14. The memorandum noted that such procedures were "essential to our advice." *Id.* Thus, the memorandum concluded that the combined use of EITs, as described by the CIA, "would not reasonably be expected by the interrogators to result in severe physical pain." *Id.*

Turning to "severe physical suffering," the Combined Techniques Memo noted that extended sleep deprivation used alone could cause "physical distress in some cases" and that the CIA's limitations and safeguards were therefore important to ensure that it did not cause severe physical suffering. However, it noted that its combined use with other EITs did not cause "severe physical pain," but only increased, "over a short time, the discomfort that a detainee subjected to sleep deprivation experiences." After citing two TVPA cases that described extremely brutal conduct (such as beatings) as torture, the memorandum opined that "we believe that the combination of techniques in question here would not be 'extreme and outrageous' and thus would not reach the high bar established by Congress" in the torture statute. *Id.* at 15.

Noting that sleep deprivation could reduce a subject's tolerance for pain, and that it might therefore increase physical suffering, the memorandum observed:

> [Y]ou have informed us that the interrogation techniques at issue would not be used during a course of extended sleep deprivation with such frequency and intensity as to induce in the detainee a persistent condition of extreme physical distress such as may constitute 'severe physical suffering' within the meaning of [the torture statute.]

Id. at 16. In light of the CIA's monitoring procedure, the memorandum asserted that the use of sleep deprivation would be discontinued if OMS personnel saw indications that it was inducing severe physical suffering.

With respect to the waterboard, the memorandum pointed to the 2005 Bradbury Memo, which concluded that the technique resulted in relatively short periods of physical distress. Because "nothing in the literature or experience"

suggested that sleep deprivation would "exacerbate any harmful effects of the waterboard," or that it would prolong the distress of being waterboarded, or that the waterboard would prolong the effects of sleep deprivation, the Combined Techniques Memo concluded that the combined use of the waterboard, sleep deprivation, and dietary manipulation "could not reasonably be considered specifically intended to cause severe physical suffering within the meaning of" the torture statute. *Id.* at 16-17.

The memorandum then considered whether the combined use of EITs would result in severe mental pain or suffering. Citing past experience from the CIA detention program, the memorandum concluded that there was no medical evidence that sleep deprivation or waterboarding would cause "prolonged mental harm," or that the combined use of any of the other techniques would do so. Again stressing the importance of CIA monitoring and assuming that OMS personnel would intervene if necessary, the memorandum concluded that the combined use of EITs would not result in "severe mental pain or suffering." *Id.* at 19.

In its concluding paragraph, the Combined Techniques Memo cited "the experience from past interrogations, the judgment of medical and psychological personnel, and the interrogation team's diligent monitoring of the effects" of EITs, and opined that the authorized combined use of these [thirteen] specific techniques by adequately trained interrogators would not violate the torture statute. *Id.*

Philbin told us that he had two major concerns with the Combined Effects Memo and that he told the ODAG that he could not agree with its analysis or conclusion. Philbin said that, as a result of the CIA OIG investigation, significant new information had become available. Philbin noted in his written response:

> For example, it had not been known in 2002 that detainees were kept in diapers, potentially for days at a time. It had also not been known that detainees were kept awake by shackling their hands to the ceiling. . . . Similarly, dietary manipulation and water dousing had not been described to OLC in 2002 and were not even considered in

> the Classified Bybee Memo. All of these factors combined to create a picture of the interrogation process that was quite different from the one presented in 2002.

Philbin Response at 14.

Philbin was also concerned that, under the new reading of the law under the Levin Memo (OLC's determination that, in referring to "severe physical . . . pain or suffering," the torture statute was referring to distinct concepts of "pain" or "suffering," and that if either were inflicted with the necessary intent, a violation could be established), he could not agree with the Combined Techniques Memo that the use of all of the specified practices, taken together, would not violate the statute. *Id.* at 15. Philbin believed that the Combined Effects Memo did not adequately deal with the category of "severe physical suffering." Philbin told OPR:

> [I] did not think the memo provided a sufficient analysis to conclude that depriving a person of sleep for days on end while keeping him shackled to the ceiling in a diaper and at the same time using other techniques on him would not cross the line into producing "severe physical suffering."

Id. at 15. Philbin said he recommended to former DAG Comey that Comey should not concur in the Bradbury Combined Effects Memo.

Former DAG Comey told us that he reviewed and approved the 2005 Bradbury Memo, which found the CIA's proposed use of thirteen EITs, including forced nudity, extended sleep deprivation, and the waterboard to be lawful, but that, after he reviewed the Combined Techniques Memo, he argued that the Combined Techniques Memo should not be issued as written. His main concern was that the memorandum was theoretical and not tied to a request for the use of specific techniques on a specific detainee. Comey believed it was irresponsible to give legal advice about the combined effects of techniques in the abstract.

In an email to ODAG Chief of Staff Chuck Rosenberg dated April 27, 2005, Comey recounted a meeting on April 27, 2005 with Philbin, Bradbury, and AG Gonzales in which Comey expressed his concerns about the memorandum.

Comey wrote:

> The AG explained that he was under great pressure from the Vice President to complete both memos, and that the President had even raised it last week, apparently at the VP's request and the AG had promised they would be ready early this week. He added that the VP kept telling him "we are getting killed on the Hill." (Patrick [Philbin] had previously expressed that Steve [Bradbury] was getting constant similar pressure from Harriet Miers and David Addington to produce the opinions. Parenthetically, I have previously expressed my worry that having Steve as "Acting" – and wanting the job – would make him susceptible to just this kind of pressure.)[113]

After receiving a new draft of the Combined Techniques Memorandum, Comey met with Gonzales on April 26, 2005, and urged him to delay issuance of the memorandum. Comey believed that the AG had agreed with him, and Comey instructed Philbin to stop OLC from issuing it. In the April 27 email to Rosenberg,

[113] Bradbury told us that Comey's concern that he was susceptible to pressure because he was seeking the President's nomination to be AAG of OLC was incorrect. Bradbury asserted that the President's formal approval of his nomination occurred in early to mid-April 2005, prior to Comey's email. We were unable to confirm this date. In addition, we were unable to ascertain if any pressure was applied to Bradbury prior to the date of his formal nomination.

In the email, Comey also shared concerns expressed by Philbin about whether the memorandum's analysis of combined techniques and "severe physical suffering" was adequate. He wrote that Philbin had told him that Philbin had repeatedly marked up drafts to highlight the inadequacy of the analysis, only to have his comments ignored. However, Bradbury told us that Philbin's concerns centered on the Combined Technique Memo's conclusion, identical to that of the Levin Memo, that "severe physical suffering" was a separate concept from "severe physical pain." Philbin reportedly urged Bradbury to adopt the more permissive view of the Classified Bybee Memo, which had concluded that there was no difference between severe physical pain and severe physical suffering. Bradbury told us that he responded to Philbin's comments by expanding the discussion of severe physical suffering and by further refining the memorandum's analysis, although he did not change his ultimate conclusion that "pain" and "suffering" were distinct concepts.

Comey stated that Philbin reported back that he had spoken to Bradbury, who "seemed 'relieved' that [DOJ] would not be sending out" the memorandum.[114]

Comey also wrote in the April 27 email that the AG had visited the White House that day and "the AG's instructions were that the second opinion was to be finalized by Friday, with whatever changes we thought appropriate."

Philbin told OPR that his advice to Comey that he not concur in the Combined Effects Memo was "certainly not welcome to the White House or the OAG." According to Philbin, in November 2004, he had a private conversation with Addington, who told him that, based on his participation in the withdrawal of Yoo's NSA opinion and the withdrawal of the Bybee Memo, Addington believed that Philbin had violated his oath to uphold, protect, and defend the Constitution of the United States. Addington told Philbin that he would prevent Philbin from receiving any advancement to another job in the government and that he believed that it would be better for Philbin to resign immediately and return to private practice.[115]

In an email dated April 28, 2005 to Rosenberg, Comey recounted a telephone call he had with Ted Ullyot, Gonzales' Chief of Staff, about the imminent issuance of the Combined Techniques Memo. Ullyot had informed Comey that the memorandum was likely to be issued the next day and that he was aware of

[114] Bradbury told us that he mistakenly understood the instruction to mean that a joint decision had been reached by Gonzales and Comey in consultation with the White House and possibly the CIA, which would involve only a short delay in the issuance of the opinion. According to Bradbury, when he learned that the instruction came from Comey alone and that Comey believed the Combined Techniques Memo should not be issued, he did not consider that to be an acceptable option.

[115] Philbin told OPR that, in the Summer of 2005, then Solicitor General Paul Clement chose Philbin to be the Principal Deputy Solicitor General, AG Gonzales had agreed, and the proposal was sent to the White House personnel office for approval. According to Philbin, Addington strenuously objected to Philbin's appointment and Vice President Cheney personally called AG Gonzales to ask him to reconsider. AG Gonzales agreed and told Philbin that he had decided that Philbin would not receive the job in order to maintain good relations with the White House. Philbin told OPR that he told AG Gonzales that he should have defended him, and AG Gonzales responded that Philbin should resign if he felt that way. Philbin then resigned and returned to private practice.

Comey's concerns about the prospective nature of the opinion. Comey wrote in the email to Rosenberg:

> I responded by telling him that was a small slice of my concerns, which I then laid out in detail, just as I had for the AG. I told him that this opinion would come back to haunt the AG and DOJ and urged him not to allow it. . . . I told him that the people who were applying pressure now would not be here when the shit hit the fan. Rather, they would simply say they had only asked for an opinion. It would be Alberto Gonzales in the bullseye. I told him that my job was to protect the Department and the AG and that I could not agree to this because it was wrong.[116]

Comey further commented in the email:

> Anyhow, that's where we are. It leaves me feeling sad for the Department and the AG. I don't know what more is to be done, given that I have already submitted my resignation. I just hope that when all of this comes out, this institution doesn't take the hit, but rather the hit is taken by those individuals who occupied positions at OLC and OAG and were too weak to stand up for the principles that undergird the rest of this great institution.[117]

Comey told us that there was significant pressure on OLC and the Department from the White House, particularly Vice President Cheney and his staff. Comey said that no one was ever specific about what end result was wanted, but that one would have to "be an idiot not to know what was wanted." Comey said that, in his opinion, Bradbury knew that "if he rendered an opinion

[116] In an April 27, 2005, email to Rosenberg, Comey stated that the AG had instructed that whatever changes were appropriate should be made, but that the memorandum had to be issued by Friday (two days later). Asked if this was an indication that the AG was flexible on the results of the memorandum, Comey answered that it was not. He stated: "This was a way of giving process but in a way that foreclosed real input" because time was too short.

[117] Comey told us that he wrote the emails to Rosenberg to memorialize what he considered to be a very important and serious situation. Rosenberg recommended to Comey that he write the emails in order to have a written record of the matter in the Department computer system.

that shut down or hobbled the [interrogation] program," the Vice President and Addington would be "furious."[118] Comey added that people in the Department leadership believed that Levin had not "delivered" on the interrogation program and the result was that Levin was not made OLC AAG.[119]

We asked Bradbury about Comey's objections. He told us that he felt OLC would have been giving incomplete legal advice if it addressed the use of individual techniques without also considering their combined use. He understood Comey's concerns to be over the "optics" of the memorandum, and recalled that Comey asked rhetorically how it would look if the memorandum were made public. Bradbury concluded that Comey's disagreement was a "policy" one and argued that the memorandum should be issued to avoid an incomplete analysis of the issues. Bradbury said he believed that Gonzales considered both arguments and made a decision to go forward.

Bradbury also told us that he neither felt nor received any pressure from the White House Counsel's Office, the Office of the Vice President, the NSC, the CIA, or the AG's Office as to the outcome of his opinions concerning the legality of the CIA interrogation program. He acknowledged that there was time pressure to complete the memoranda, and stated that he believed Comey's comments reflect a confusion between time pressure, which was not at all unusual at OLC, and pressure to reach a certain result, which he vehemently denied was present. Bradbury also strongly denied that his nomination as AAG in any way depended on his finding that the CIA interrogation program was lawful. Bradbury added that, although his nomination was not forwarded to the Senate until June 23, 2005, as noted above, the President had approved his nomination by early to mid-April 2005.

3. The Article 16 Memo by Bradbury (May 30, 2005)

As noted above, OLC's initial advice to the CIA about the CAT Article 16 prohibition of "cruel, inhuman or degrading treatment or punishment," was that Article 16 did not, by its terms, apply to conduct outside United States territory.

118 Comey Interview, February 24, 2009.

119 *Id.*

However, the CIA (and, according to Bradbury, the NSC Principals) insisted that OLC also examine whether the use of EITs would violate Article 16 if the geographic limitations did not apply.

Article 16 of the CAT required each party to the treaty to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" as defined under the treaty "when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official. . . ."

The memorandum began with an overview of the CIA interrogation program and the guidelines, safeguards, and limitations attached to the use of EITs by the agency. The interrogations of Abu Zubaydah, KSM, Hassan Ghul, and Al-Nashiri were briefly described and were cited as examples of the type of prisoner that would be subjected to EITs.

A brief discussion of the effectiveness of the interrogation program followed, based upon: the CIA Effectiveness Memo; the CIA OIG Report; and a faxed memorandum from (b)(3), Chief, Legal Group, DCI Counterterrorist Center, titled *Briefing Notes on the Value of Detainee Reporting* (April 15, 2005). The Article 16 Memo concluded, based primarily on the Effectiveness Memo, that the use of EITs had produced critical information, including "specific, actionable intelligence." Article 16 Memo at 10.

Next, the Article 16 Memo described the three categories of EITs and the thirteen specific EITs under consideration: (1) conditioning techniques (nudity, dietary manipulation, and sleep deprivation); (2) corrective techniques (insult slap, abdominal slap, facial hold, and attention grasp); and (3) coercive techniques (walling, water dousing, stress positions, wall standing, cramped confinement, and the waterboard).

The Article 16 Memo revisited and reaffirmed OLC's conclusion that Article 16 does not apply outside United States territory. In addition, it went on to note that a United States reservation to CAT stated that the United States obligation to prevent "cruel, inhuman or degrading treatment or punishment" was limited to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments" to the United States Constitution.

The Memo concluded that the Eighth and Fourteenth Amendments did not apply in this context. Thus, the only restraint imposed on CIA interrogators by Article 16, according to the memorandum, was the "Fifth Amendment's prohibition of executive conduct that 'shocks the conscience.'" Article 16 Memo at 2.

The memorandum acknowledged that there was no "precise test" for conduct that shocks the conscience, but concluded that, under United States case law, the conduct cannot be constitutionally arbitrary, but must have a "reasonable justification in the service of a legitimate governmental objective." *Id.* at 2-3 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). Another relevant factor was whether

> in light of "traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them," use of the techniques in the CIA interrogation program "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

Article 16 Memo at 3 (quoting *Lewis*, 523 U.S. at 847 n.8).

The Article 16 Memo noted that the CIA EITs would only be used on senior al Qaeda members with knowledge of imminent threats and that the waterboard would be used only when (1) the CIA has "credible intelligence that a terrorist attack is imminent"; (2) there are "substantial and credible indicators that the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and (3) other interrogation methods have failed or the CIA "has clear indications that other . . . methods are unlikely to elicit this information" in time to prevent the attack. *Id.* at 5 (quoting from "Description of the Waterboard," attached to Letter from John Rizzo, Acting General Counsel, Central Intelligence Agency, to Daniel Levin, Acting AAG, OLC at 5 (August 2, 2004)).

As to whether the use of EITs was constitutionally arbitrary, the memorandum cited the government's legitimate objective of preventing future terrorist attacks by al Qaeda and concluded, based on the Effectiveness Memo, that the use of EITs furthered that governmental interest. Article 16 Memo at 29. Again summarizing the limitations and safeguards attached to the use of EITs, the memorandum concluded that the program was "clearly not intended 'to injure [the

detainees] in some way unjustifiable by any government interest.'" *Id.* at 31 (quoting *Lewis*, 523 U.S. at 849).

Finally, the Article 16 Memo considered whether, in light of "traditional executive behavior," the use of EITs constituted conduct that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* (quoting *Lewis*, 523 U.S. at 847 n.8). Conceding that "this aspect of the analysis poses a more difficult question," the memorandum looked at jurisprudence relating to traditional United States criminal investigations, the military's tradition of not using coercive techniques, and "the fact that the United States regularly condemns conduct undertaken by other countries that bears at least some resemblance to the techniques at issue." *Id.*

The memorandum looked briefly at several cases in which the U.S. Supreme Court found that the conduct of police in domestic criminal investigations "shocked the conscience." *See Rochin v. California*, 342 U.S. 165 (1952) (police pumped defendant's stomach to recover narcotics); *Williams v. United States*, 341 U.S. 97 (1951) (suspects were beaten with a rubber hose, a pistol, and other implements for several hours until they confessed); *Chavez v. Martinez*, 538 U.S. 760 (2003) (police questioned a gunshot victim who was in severe pain and believed he was dying). Article 16 Memo at 34.

Although acknowledging that some of the Justices in *Chavez v. Martinez* "expressed the view that the Constitution categorically prohibits such coercive interrogations," the memorandum asserted that the CIA's use of EITs "is considerably less invasive or extreme than much of the conduct at issue in these cases." Article 16 Memo at 33. Moreover, the memorandum drew a distinction between the government's "interest in ordinary law enforcement" and its interest in protecting national security. Because of that distinction, the memorandum stated that "we do not believe that the tradition that emerges from the police interrogation context provides controlling evidence of a relevant executive tradition prohibiting use of these techniques in the quite different context of interrogations undertaken solely to prevent foreign terrorist attacks against the United States and its interests." *Id.* at 35.

The military's long tradition of forbidding abusive interrogation tactics, including specific prohibitions against the use of food or sleep deprivation, was not

relevant, the Article 16 Memo concluded, because the military's regulations and policies were limited to armed conflicts governed by the Geneva Conventions. A policy premised on the applicability of those conventions "and not purporting to bind the CIA," the memorandum stated, "does not constitute controlling evidence of executive tradition and contemporary practice . . . ." *Id.* at 36.

Similarly, the State Department's practice of publicly condemning the use of coercive interrogation tactics by other countries was found to be of little, if any importance. The reports in question, in which the United States strongly criticized countries such as Indonesia, Egypt, and Algeria for using EITs such as "food and sleep deprivation," "stripping and blindfolding victims," "dousing victims with water," and "beating victims," were found by the Article 16 Memo to be "part of a course of conduct that involves techniques and is undertaken in ways that bear no resemblance to the CIA interrogation program." *Id.* at 36. The memorandum also noted that the State Department Reports do not "provide precise descriptions" of the techniques being criticized, and that the countries in question use EITs to punish, to obtain confessions, or to control political dissent, not to "protect against terrorist threats or for any similarly vital government interests . . . ." Nor is there any "indication that [the criticized] countries apply careful screening procedures, medical monitoring, or any of the other safeguards required by the CIA interrogation program." *Id.* at 36-37.

As evidence that the use of EITs was "consistent with executive tradition and practice," the Article 16 Memo cited their use during SERE training. The memorandum acknowledged the significant differences between SERE training and the CIA interrogation program, but balanced those differences against the fact that the CIA program furthered the "paramount interest of the United States in the security of the Nation," whereas the SERE program furthered a less important government interest, that of preparing United States military personnel to resist interrogation. Thus, the memorandum concluded that, when considered in light of traditional executive practice, the CIA interrogation program did not "shock the contemporary conscience." *Id.* at 37-38.

In its final pages, the Article 16 Memo cautioned that, because of "the relative paucity of Supreme Court precedent" and the "context-specific, fact-dependent, and somewhat subjective nature of the inquiry," it was possible that

a court might not agree with its analysis. The memorandum's concluding paragraph reads as follows:

> Based on CIA assurances, we understand that the CIA interrogation program is not conducted in the United States or "territory under [United States] jurisdiction," and that it is not authorized for use against United States persons. Accordingly, we conclude that the program does not implicate Article 16. We also conclude that the CIA interrogation program, subject to its careful screening, limits, and medical monitoring, would not violate the substantive standards applicable to the United States under Article 16 even if those standards extended to the CIA interrogation program. Given the paucity of relevant precedent and the subjective nature of the inquiry, however, we cannot predict with confidence whether a court would agree with this conclusion, though, for the reasons explained, the question is unlikely to be subject to judicial inquiry.

Id. at 39-40.

According to Bradbury, the Article 16 Memo was reviewed by the offices of the Attorney General and the Deputy Attorney General, the State Department, the NSC, CIA, and the White House Counsel's Office. Comey told us that, although he reviewed the 2005 Bradbury Memo and the Combined Techniques Memo, he was not aware of the Article 16 Memo. Levin told us that he reviewed a draft of the Article 16 Memo when he was at the NSC, "and I remember telling [Bradbury] I thought he was just wrong." Levin stated that he gave Bradbury specific comments on the draft, but that he did not remember seeing a final version. However, Bradbury remembered providing a final copy of the opinion to Levin, and told us that, although Levin commented that the CIA interrogation program raised a difficult issue under the substantive Fifth Amendment standard if the same standard were to apply to United States citizens within the United States, he did not tell Bradbury that he thought the opinion was wrong. According to Bradbury, John Bellinger, then at the State Department, reviewed a draft, but "largely deferred to us because it involved analysis of domestic constitutional law." Bellinger told us that, although he did in fact defer to OLC's legal analysis, the Article 16 Memo was a turning point for him. The memo's conclusion that the use of the thirteen EITs – including forced nudity, sleep deprivation and waterboarding

– did not violate CAT Article 16 was so contrary to the commonly held understanding of the treaty that he concluded that the memorandum had been "written backwards" to accommodate a desired result.

4. The 2007 Bradbury Memo

a. Background

In late Fall 2005, congressional efforts to legislate against the abuses that had taken place at Iraq's Abu Ghraib prison intensified. By that time, NSC Advisor Stephen Hadley and NSC attorney Brad Wiegman were negotiating with the Senate over the terms of what would eventually become the Detainee Treatment Act of 2005 (DTA).[120] Bradbury did not participate directly in those negotiations, but advised Wiegman on proposed statutory language.

According to Bradbury, the NSC was worried that the legislation would prevent the CIA from continuing its interrogation program. The CIA was also concerned that the legislation would subject its interrogators to civil or criminal liability.

Bradbury told us that he believed the CIA was also involved in the negotiations with Congress, and that agency representatives may have talked directly to one of the sponsors, Senator John McCain. Although Bradbury was not involved in any of the talks with Senator McCain, he told us that it was his understanding that the CIA removed waterboarding from the list of EITs sometime after those discussions.[121]

[120] Detainee Treatment Act of 2005, Pub.L. No. 109-148, 119 Stat. 2739 (2005) (codified at 42 U.S.C. § 2000dd). According to Bradbury and to later press accounts, Vice President Cheney and his counsel, David Addington, were involved in earlier discussions with the Senate. After they were unable to block the legislation, the NSC attorneys reportedly took over the negotiations.

[121] Bradbury acknowledged that he was not entirely certain when contacts between McCain and the CIA took place, and stated that they may have occurred in 2006. According to news accounts, McCain met with NSC Advisor Stephen Hadley in late 2006, during negotiations over the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in part at 28 U.S.C. § 2241 & note).

Bradbury told us that, during the negotiations, the NSC unsuccessfully asked the Senate to include an exception for national security emergencies. Despite the threat of a presidential veto, the legislation's sponsors would not agree to that request, and when the law was finally passed on December 30, 2005, few of the concessions sought by the Bush administration had been granted. The administration did gain a provision acknowledging that the advice of counsel defense was available to interrogators, but according to Bradbury, that was simply a restatement of existing case law.

Bradbury also told us that, as a result of the policy review the CIA had commenced in December 2005, and pursuant to the agency's subsequent understanding with Senator McCain, the Director made the decision, on policy grounds, to drop the use of the waterboard from the program.

As enacted, the DTA stated that it applied to all detainees in the custody of the United States government anywhere in the world, whether held by military or civilian authorities. Among other things, the DTA barred the imposition of "cruel, unusual, [or] inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution." 42 U.S.C. § 2000dd.

On the eve of the DTA's enactment, the CIA suspended the use of all EITs, the legality of which it believed to be subject to question under the DTA. The agency also began a lengthy internal policy review of the program, eventually asking Bradbury to draft an opinion on the legality of a reduced number of EITs. Those seven EITs were forced nudity, dietary manipulation, extended sleep deprivation, the facial hold, the attention grasp, the abdominal slap, and the insult slap.

On June 29, 2006, while Bradbury was drafting an opinion on the use of the EITs, the U.S. Supreme Court handed down its decision in *Hamdan v. Rumsfeld*, holding, among other things, that Common Article 3 of the Geneva Conventions applied to "unlawful enemy combatants" held by the United States government. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (overturning the opinion of the United States Court of Appeals for the D.C. Circuit by a 5-4 vote). *Hamdan* directly contradicted OLC's January 22, 2002 opinion to the White House and the Department of Defense, which had concluded that Common Article 3 did not apply

to captured members of al Qaeda.[122] After *Hamdan*, it was clear that the prohibitions of Common Article 3, including certain specific acts of mistreatment and "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment," applied to the CIA interrogation program. It was also apparent that interrogation techniques that violated Common Article 3 would also constitute war crimes under the War Crimes Act, 18 U.S.C. § 2441.

According to Bradbury, officials from the Departments of State, Defense, and Justice met with the President and officials from the CIA and NSC to consider the impact of the Court's decision and to explore possible options. It was clear from the outset that legislation would have to be enacted to address the application of Common Article 3 and the War Crimes Act to the CIA interrogation program.

An interagency effort was immediately launched to draft what would eventually become the Military Commissions Act (MCA) of 2006. The process went quickly, and by early August a draft bill had been completed. According to Bradbury, OLC had a central role in analyzing the legal issues and drafting legislative options, with the assistance of the State Department and the Department of Defense.

John Rizzo told us that the CIA had input into the drafting of the MCA as well. As noted above, the DTA had raised significant questions about the legality of the CIA interrogation program, and *Hamdan* raised additional concerns about "the shifting legal ground" for the program. The CIA reviewed OLC's drafts of the proposed legislation and provided extensive comments during the drafting process.

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

The MCA amended the War Crimes Act by limiting the type of abusive treatment that could be punished as a war crime under federal law. Prior to the MCA, "grave breaches" of Common Article 3 and "[o]utrages upon personal dignity,

[122] In addition, the Court held that the military commissions established by the President to try captured al Qaeda terrorists were unlawful.