in particular, humiliating and degrading treatment" constituted war crimes. The MCA limited the applicability of the War Crimes Act to "grave breaches" of Common Article 3 and defined "grave breaches" as a limited number of specific acts: torture; cruel or inhuman treatment (defined as "an act intended to inflict severe or serious physical or mental pain or suffering . . . including serious physical abuse"); performing biological experiments; murder; mutilation or maiming; intentionally causing serious bodily injury; rape; sexual assault or abuse; and taking hostages.[123] In addition, the MCA specified that the President had the authority to interpret the applicability of the Geneva Conventions to the CIA interrogation program by executive order. The MCA also granted retroactive immunity to CIA interrogators by providing that it would be effective as of November 26, 1997, the date the War Crimes Act was enacted.

The MCA included one additional prohibition, against "cruel, inhuman or degrading treatment or punishment," defined as "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States . . . ." This provision, which is identical to the DTA's prohibition against cruel, inhumane, or degrading treatment, had the effect of defining violations of Common Article 3 in terms of violations of the DTA. Thus, the language of the DTA and the MCA was identical to the United States reservation to Article 16 of the CAT, which OLC had already determined, in the Article 16 Memo, did not prohibit the use of EITs in the CIA interrogation program.

b. The 2007 Memo

After the MCA was enacted, Bradbury continued working on his memorandum on the legality of the revised interrogation program, consisting of six EITs, that the CIA had proposed following enactment of the DTA. According to Bradbury, the AG's Office, the DAG's Office, the Criminal Division, and the National Security Division were included in the drafting process, as were the State Department, the NSC, and the CIA.

[123] Thus, "outrages upon personal dignity, in particular humiliating and degrading treatment" no longer constituted war crimes as a separate category. Moreover, the MCA forbade federal courts from consulting any "foreign or international source of law" in interpreting the prohibitions of Common Article 3 and the WCA.

Sometime prior to February 27, 2007, OLC received a copy of a February 14, 2007 report by the International Committee of the Red Cross (ICRC), which described the treatment and conditions of confinement of 14 detainees in the CIA program. The report concluded:

> [T]he ICRC clearly considers that the allegations of the fourteen include descriptions of treatment and interrogation techniques – singly or in combination – that amounted to torture and/or cruel, inhuman, or degrading treatment.

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

Bradbury told us that he concluded that the ICRC report did not merit discussion in, or modification of, the 2007 Bradbury opinion because:

- (b) (5)
- (b) (5)
- (b) (5)
- (b) (5)

Bradbury email to OPR dated April 22, 2009.

On February 9, 2007, John Bellinger, then Legal Adviser to Secretary of State Condoleezza Rice, sent Bradbury an 11-page letter (the Bellinger Letter) that outlined the State Department's objections to Bradbury's draft opinion. The letter focused on the draft's analysis of Common Article 3, and offered the following comments:

- The draft relied too heavily on U.S. law to interpret the terms of Common Article 3, ignoring "well-accepted norms of treaty interpretation" and substituting "novel theories concerning the relevance of domestic law to support controversial conclusions"; Bellinger Letter at 1-2.

- The draft's conclusion that two EITs – forced nudity and extended sleep deprivation – did not violate Common Article 3 was inconsistent with traditional treaty interpretation rules and was inappropriately based on the "shock-the-conscience" standard; *Id.* at 2-3.

- The legislative history of the MCA included statements that suggested a bipartisan consensus that nudity and sleep deprivation constituted grave breaches of Common Article 3; *Id.* at 5.

- The remaining EITs may not be consistent with the requirements of Common Article 3, depending upon what restrictions and safeguards have been instituted by the CIA; *Id.* at 6.

- The practice of treaty partners and decisions of international tribunals indicate that "the world would disagree with the [draft's] interpretations of Common Article 3"; *Id.* at 7.

- The opinion should "assess risks of civil or criminal liability in foreign tribunals" because "foreign courts likely would view some of these EITs as violating Common Article 3 and as war crimes"; *Id.* at 10.

The Bellinger Letter concluded with the following observation:

> While [the draft OLC opinion] does a careful job analyzing the precise meanings of relevant words and phrases, I am concerned that the opinion will appear to many readers to have missed the forest for the trees. Will the average American agree with the conclusion that a detainee, naked and shackled, is not being subject [sic] to humiliating and degrading treatment? At the broadest level, I believe that the opinion's careful parsing of statutory and treaty terms will not be considered the better interpretation of Common Article 3 but rather a work of advocacy to achieve a desired outcome.

Id. at 11.

Bradbury responded on February 16, 2007, with a 16-page letter challenging Bellinger's criticism (the Bradbury Letter). He reproached Bellinger for taking positions that were inconsistent with his previous support of the CIA program when he was NSC Legal Adviser, and observed that the NSC Principals had previously approved the same EITs that Bellinger now described as humiliating and degrading within the meaning of Common Article 3. Bradbury addressed Bellinger's comments in detail, and rejected almost all of them, including his criticism of forced nudity and extended sleep deprivation.

According to Bradbury, the disagreement over those two EITs was referred to high-level officials at the CIA and the State Department, and the CIA Director ultimately made what Bradbury described as "a very, very difficult policy decision" to withdraw forced nudity from the list of proposed EITs. Sleep deprivation remained on the list, but according to Bradbury, the CIA made a policy decision to reduce substantially the authorized length of its use.

Bradbury's memorandum was issued on July 20, 2007, contemporaneously with President Bush's executive order holding that the CIA's detention and interrogation program was in compliance with Common Article 3 of the Geneva Convention. The memorandum was divided into four parts: (I) a brief history of the CIA program, including the six proposed EITs and the safeguards and restrictions attached to their use by the CIA; (II) the legality of the use of EITs under the War Crimes Act; (III) the legality of the use of EITs under the DTA; and

(IV) the status of EITs under Common Article 3 of the Geneva Convention. After 79 pages of analysis, relying in part on the reasoning and conclusions of the 2005 Bradbury Memo, the Combined Techniques Memo, and the Article 16 Memo, the 2007 Bradbury Memo concluded that the use of the six EITs in question did not violate the DTA, the War Crimes Act, or Common Article 3.

In concluding that the six EITs did not violate the DTA, the memorandum incorporated much of the Article 16 Memo's "shock the conscience" analysis, including the balancing of government interests, examination of "traditional executive behavior," and consideration of whether the conduct was "arbitrary in the constitutional sense."[124] 2007 Bradbury Memo at 30-31.

On April 12, 2007, and again on August 2, 2007, Bradbury testified before the Senate Select Committee on Intelligence (SSCI) in classified and unclassified hearings on the CIA's interrogation program. He presented the OLC's interpretation of the three new legal requirements discussed above: the DTA; the War Crimes Act; and Common Article 3. He explained that the DTA prohibited only methods of interrogation that "shock the conscience" under the "totality of the circumstances." He stated that a key part of this inquiry was whether the conduct is "arbitrary in the constitutional sense," meaning whether it is justifiable by the government interest involved. Bradbury emphasized that, with regard to the CIA interrogation program, the government interest was of the "highest order." Bradbury April 12, 2007 SSCI Testimony at 2-3.

Bradbury testified that the War Crimes Act differed from the torture statute because, although the torture statute prohibited "prolonged mental harm," the War Crimes Act prohibits only "serious and non-transitory mental harm (which need not be prolonged.)" *Id.* at 4. He commented that, therefore, under the new standard "we're looking for some combination of duration and intensity" rather than for "duration under the "prolonged" mental harm standard of the torture statute. *Id.*

---

[124] The 2007 Bradbury Memo again cited the CIA Effectiveness Memo to support its conclusion that the use of EITs was not arbitrary. 2007 Bradbury Memo at 31.

Finally, Bradbury explained that, consistent with the views of international tribunals, Common Article 3's prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment," does not contain a "freestanding prohibition on degrading or humiliating treatment." *Id.* Instead, to violate Common Article 3, humiliating and degrading treatment must rise to the level of an "outrage upon personal dignity." *Id.*

Bradbury prepared a four-page set of "Points Regarding Specific Enhanced Interrogation Techniques" for his testimony, summarizing OLC's analysis and findings regarding specific interrogation techniques under the new legal standards. The talking points outlined OLC's reasons for concluding that nudity, sleep deprivation, and dietary manipulation were permissible techniques under the torture statute, the War Crimes Act, and Common Article 3.

III. ANALYSIS

A. The Bybee Memo's Flaws Consistently Favored a Permissive View of the Torture Statute[125]

Because the withdrawal of two OLC opinions – the Bybee and Yoo Memos – by the same administration within such a short time was highly unusual, and because of the criticisms leveled at them by the OLC attorneys who withdrew and amended them, we initially focused on those two memoranda and on the sections of those memoranda that were set aside or modified by the Department in 2004. We found the withdrawal of certain arguments and conclusions of law by the Department to be significant, but we did not limit our review to those areas. Rather, we examined the memoranda in their entirety in light of the drafters' professional obligations set out above.

As discussed in the following sections, we found errors, omissions, misstatements, and illogical conclusions in the Bybee Memo. Although some of those flaws were more serious than others, they tended to support a view of the

---

[125] As noted earlier in this report, Yoo's March 14, 2003 memorandum to Haynes incorporated the Bybee Memo in its entirety, with very few changes. Thus, our conclusions with respect to the Bybee Memo, as set forth below, apply equally to the Yoo Memo. Moreover, former AAG Goldsmith and other OLC attorneys identified significant errors in the Yoo Memo's legal analysis, which we have described earlier in this report.

torture statute that allowed the CIA interrogation program to go forward, and their cumulative effect compromised the thoroughness, objectivity, and candor of OLC's legal advice. We discuss below several areas of the Bybee Memo that, when viewed together, support our conclusion that the Yoo and Bybee Memos did not represent thorough, objective, and candid legal advice.

We did not attempt to determine and did not base our findings on whether the Bybee and Yoo Memos arrived at a correct result. Thus, the fact that other OLC attorneys subsequently concluded that the CIA's use of EITs was lawful was not relevant to our analysis. Rather, we limited our review to whether the legal analysis and advice set forth in the Bybee and Yoo Memos were consistent with applicable professional standards.

Our view that the memoranda were seriously deficient was consistent with comments made by some of the former Department officials we interviewed, even though those individuals would not necessarily agree with some of our findings in this matter. Levin stated that when he first read the Bybee Memo, "[I had] the same reaction I think everybody who reads it has – 'this is insane, who wrote this?'" Jack Goldsmith found that the memoranda were "riddled with error," concluded that key portions were "plainly wrong," and characterized them as a "one-sided effort to eliminate any hurdles posed by the torture law." Bradbury told us that Yoo did not adequately consider counter arguments in writing the memoranda and that "somebody should have exercised some adult leadership" with respect to Yoo's section on the Commander-in-Chief powers. Mukasey acknowledged that the Bybee Memo was "a slovenly mistake," even though he urged us not to find misconduct.

1. Specific Intent

We found that OLC's advice concerning the specific intent element of the torture statute was incomplete in that it failed to note the ambiguity and complexity of this area of the law. We also found that, notwithstanding certain qualifications included in the Bybee Memo and the Yoo Memo, OLC's advice erroneously suggested that an interrogator who inflicted severe physical or mental

pain or suffering on an individual would not violate the torture statute if he acted with the goal or purpose of obtaining information.

We based our conclusions on the totality of OLC's legal advice to the CIA on this subject, including the legal analysis of the Bybee Memo, the Classified Bybee Memo, Yoo's July 13, 2002 letter to John Rizzo on the elements of the torture statute, and the June 2003 CIA bullet points that were drafted in part and reviewed in their entirety by Yoo and (b)(6), (b)(7)(C) We also based our conclusion on the contemporaneous interpretation of the advice by the CIA, and by Department of Justice lawyers who later reviewed it in 2004.

The first record of OLC's advice to the CIA on the question of specific intent appears in the CIA's written account of Yoo's April 16, 2002 meeting with attorneys from the CIA and NSC Legal Adviser John Bellinger. The CIA MFR stated that Yoo discussed several legal issues and that:

> Yoo concluded with a discussion applicable to all of the legal standards: that is, for an action to constitute torture requires the specific intent at the time the action is engaged in to cause severe physical or mental pain or suffering. That is clearly not our intent.

(b)(3) and (b)(3) April 16, 2002 MFR at 3.

As discussed earlier in this report, at the July 13, 2002 meeting attended by Yoo, Rizzo, and others, Rizzo asked Yoo for written advice on the elements of the torture statute, as they related to severe mental pain or suffering. Yoo responded in a letter dated July 13, 2002, in which he listed the elements of the torture statute and provided the following advice concerning specific intent to inflict severe mental pain or suffering:

> Specific intent can be negated by a showing of good faith. Thus, if an individual undertook any of the predicate acts for severe mental pain or suffering, but did so in the good faith belief that those acts would not cause the prisoner prolonged mental harm, he would not have acted with the specific intent necessary to establish torture. If, for example, efforts were made to determine what long-term impact, if any, specific conduct would have and it was learned that the conduct

> would not result in prolonged mental harm, any actions undertaken relying on that advice would have be [sic] undertaken in good faith. Due diligence to meet this standard might include such actions as surveying professional literature, consulting with experts, or evidence gained from past experience.[126]

When the Bybee Memo was issued a few weeks later, it included a more extensive discussion of the specific intent element. The memorandum's conclusions were based primarily upon *United States v. Carter*, 530 U.S. 255 (2000), in which the Court explained the difference between general and specific intent through the example of a person who robs a bank not intending to keep the money, but in order to be arrested and returned to prison, where he could be treated for alcoholism. In that example, the Court explained, the defendant would have only had general intent because he did not intend to permanently deprive the bank of its money. Based on *Carter*, the Bybee Memo concluded that, in theory, "knowledge alone that a particular result is certain to occur does not constitute specific intent." Bybee Memo at 4.

The Bybee Memo also cited *United States v. Bailey*, 444 U.S. 394 (1980), in which the Court noted that the law of homicide distinguishes between a person who knows that someone will be killed as a result of his conduct and a person who acts with the specific purpose of taking another's life. Turning to another Supreme Court case, *Vacco v. Quill*, 521 U.S. 793 (1997), where the Court considered whether a law barring assisted suicide was constitutional, the Bybee Memo quoted the following excerpt from the Court's discussion of the difference between assisted suicide and the withdrawal of life-sustaining treatment: "the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of' their unintended but foreseen consequences." Bybee Memo at 4 (quoting *Vacco* at 802-03). Based on those sources, the Bybee Memo concluded:

> Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good

---

[126] The letter closed with: "[a]s you know, our office is in the course of finalizing a more detailed memorandum opinion analyzing section 2340. We look forward to working with you as we finish that project. Please contact me or (b)(6), (b)(7)(C) if you have any further questions."

> faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control.

Bybee Memo at 4. The memo noted that, notwithstanding the above, a jury could infer from factual circumstances that a defendant had specific intent to do an act.

The Bybee Memo then stated that "a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent. . . . Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct. . . . A good faith belief need not be a reasonable one." *Id.* at 4-5 (citations omitted). Again, the memo noted that, as a practical matter, a jury would be unlikely to acquit where a defendant held an unreasonable belief, and that "a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief." *Id.* at 5.

The Classified Bybee Memo summarized the specific intent element of the torture statute as follows:

> As we previously opined, to have the required specific intent, an individual must expressly intend to cause such severe pain or suffering. We have further found that if a defendant acts with the good faith belief that his actions will not cause such suffering, he has not acted with specific intent. A defendant acts in good faith when he has an honest belief that his actions will not result in severe pain or suffering. Although an honest belief need not be reasonable, such a belief is easier to establish where there is a reasonable basis for it. Good faith may be established by, among other things, the reliance on the advice of experts.

Classified Bybee Memo at 16 (citation to Bybee Memo and citations to cases omitted).

The memorandum continued: "Based on the information you have provided us, we believe that those carrying out these procedures would not have the specific intent to inflict severe physical pain or suffering. The objective of these techniques is not to cause severe physical pain." *Id.*

The Classified Bybee Memo also summarized some of the information provided to OLC by the CIA concerning the medical supervision and monitoring of interrogation, the views of experts about the effects of EITs, the experience of SERE training, and the CIA's review of relevant professional literature. In the context of severe mental pain or suffering, it offered the following legal advice:

> As we indicated above, a good faith belief can negate [specific intent]. Accordingly, if an individual conducting the interrogation has a good faith belief that the procedures he will apply, separately or together, would not result in prolonged mental harm, that individual lacks the requisite specific intent. This conclusion concerning specific intent is further bolstered by the due diligence that has been conducted concerning the effects of these interrogation procedures.

Classified Bybee Memo at 17.

In conclusion, the Classified Bybee Memo restated its findings on specific intent as follows:

> Reliance on this information about Zubaydah and about the effect of the use of these techniques more generally demonstrates the presence of a good faith belief that no prolonged mental harm will result from using these methods in the interrogation of Zubaydah. Moreover, we think that this represents not only an honest belief but also a reasonable belief based on the information that you have supplied to us. Thus, we believe that the specific intent to inflict prolonged mental [sic] is not present, and consequently, there is no

> specific intent to inflict severe mental pain or suffering. Accordingly, we conclude that on the facts in this case the use of these methods separately or [sic] a course of conduct would not violate [the torture statute].

Classified Bybee Memo at 18.

The CIA's August 2, 2002 cable to the black site where Abu Zubaydah was being held quoted extensively from Yoo's statement, in his July 13, 2002 letter to Rizzo, that a good faith belief can negate the specific intent element of the torture statute. The Bybee Memo's brief qualification to that statement of the law ("a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief") was not mentioned in the cable.

The June 2003 CIA Bullet Points, which were drafted in part and reviewed in their entirety by (b)(6), (b)(7)(C) and Yoo, included the following regarding the negation of specific intent by good faith:

> 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.

The CIA Bullet Points do not mention the one qualification to the good faith defense cited in the Bybee Memo – that although a good faith belief need not be reasonable, the defense is "more compelling" when it is reasonable.

In his OPR interview, Yoo stated that he relied on (b)(6), (b)(7)(C) for the specific intent section of the Bybee Memo, and that he only "looked at the cases quickly." His sense at the time was "that the Supreme Court's doctrine in the area [was] messed up," and that the *Carter* case was "confusing." He asked (b)(6), (b)(7)(C) "to try to take those cases and try to figure out what, you know, from reading that, those cases which seemed not very clear, what the law really is on specific intent at that time."

Yoo also discussed the issue with Chertoff and with persons outside of government who had expertise in criminal law. According to Yoo, they told him "that they thought the specific intent standard, this idea of specific intent was awfully confused, and it was kind of a we-know-it-when-we-see-it kind of thing." This was the first time Yoo had ever dealt with the question of specific intent, and he "was very surprised to see that the Supreme Court cases were so confused about it." He also remembered reading a law review article or treatise, possibly LaFave & Scott, that discussed "how they're not sure what the exact definition of specific intent is."

We asked Yoo about criticism that the Bybee Memo could be interpreted as saying that if an interrogator's motive was to obtain information, rather than to

inflict pain, he would not have the necessary specific intent to violate the torture statute.[127] We pointed to the following sentence from the Bybee Memo:

> Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.

Bybee Memo at 4.

Yoo told us that he remembered discussing this point with (b)(6), (b)(7)(C) and that he thought the sentence was included to answer the question, "what if someone causes severe pain, but wasn't trying to cause severe pain when they were doing the interrogation." He conceded that "the sentence is just not clear" and that it did not address that issue, but explained that the next sentence in the Bybee Memo ("Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control") clarified what they intended to say because "it says, a defendant is guilty only if he acts with the express purpose of inflicting severe pain or suffering on the person."[128] Yoo also included qualifying language that made it clear that notwithstanding legal theory, as a practical matter a jury could infer specific intent from a defendant's actions.

[127] *See, e.g.*, Andrew C. McCarthy, *A Manufactured Scandal*, National Review Online, June 25, 2004, http://www.nationalreview.com/mccarthy/mccarthy200406250856.asp ("the 'specific objective' qualification [in the Bybee Memo] seems especially unworthy, conflating the separate legal (and common sense) issues of intent and motive").

[128] In light of the sentence that preceded it, it was not apparent to us how this sentence clarified what Yoo told us he intended to say – that there is a difference between acting "with the express purpose of inflicting severe pain or suffering on the person" and "accidentally causing the pain."

We asked current and former Department attorneys about this section of the Bybee Memo. Levin told us that he thought the Bybee Memo's analysis on this point was wrong because:

> it sort of suggested that if I hit you on the head with a, you know, steel 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. . . . It's just not the law. I mean, as far as I can tell, it's just not the law.

Accordingly, the Levin Memo stated explicitly that "there is no exception under the statute permitting torture to be used for a 'good reason'" and "a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute." Levin Memo at 17 (citing *Cheek v. United States*, 498 U.S. 192, 200-01 (1991)).

Philbin told us that he:

> did not agree with part of the specific intent analysis to the extent it could be read to suggest that, if an interrogator caused someone severe pain, but did so with the intent of eliciting information, that would somehow eliminate the intent to cause severe pain. Mr. Philbin thought that such reasoning was incorrect. . . . Mr. Philbin believes he informed Jay Bybee that he did not agree with this aspect of the specific intent analysis, but he explained that he considered it unnecessary *dicta* because none of the conclusions in the Classified Bybee Memo turned on it.

Philbin Response at 8-9.

The OLC Attorney (b)(6), (b)(7)(C) assigned to review and redraft the Bybee Memo in June 2004 also concluded that the specific intent discussion could be read as

conflating intent and motive, as evidenced by the following email comment to Philbin on June 20, 2004:

> The way the section reads now, you're left wondering whether someone could ever be charged under the statute if the purpose of the acts was to gather information.

The same OLC attorney commented a few days later to Goldsmith:

> One particular area that I wanted to [draw] your attention to is the requirement of specific intent. I have added a paragraph cautioning that you can be liable under the statute if you specifically intend to cause severe harm even if the intent to cause harm is not your only intention or ultimate motivation. The way it reads now makes you wonder whether this is just an anti-sadism statute.

Based on the above comments, and based on our reading of the Bybee Memo, we concluded that the memorandum erroneously suggested that an interrogator who inflicted severe physical or mental pain or suffering on an individual would not violate the torture statute if he acted with the goal or purpose of obtaining information.

We also concluded, based on our review of the Bybee Memo, that its erroneous view was supported by an over-simplification of this difficult area of the law. As the Levin Memo observed, "[i]t is well recognized that the term 'specific intent' is ambiguous and that the courts do not use it consistently." Levin Memo at 16 (citing 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003)). The Levin Memo concluded that it would not be "useful to try to define the precise meaning of 'specific intent'" in the torture statute, and disavowed the Bybee Memo's conclusions, adding that "it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture." Levin Memo at 16-17.

The Supreme Court has commented more than once on the imprecision of the terms "specific intent" and "general intent." In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court noted that "[f]ew areas of criminal law

pose more difficulty than the proper definition of the *mens rea* required for any particular crime" and that the distinction between specific and general intent "has been the source of a good deal of confusion" *Id.* at 403.[129]

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), the Court commented on "'the variety, disparity and confusion' of judicial definitions of the 'requisite but elusive mental element' of criminal offenses." *Id.* at 444 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). In another case, the Court noted that jury instructions on the meaning of specific intent have "been criticized as too general and potentially misleading" and that a "more useful instruction might relate specifically to the mental state required under [the statute in question] and eschew use of difficult legal concepts like 'specific intent' and 'general intent.'" *Liparota v. United States*, 471 U.S. 419, 433 n.16 (1985).

The *Bailey* Court noted, "the ambiguous and elastic term 'intent' [has tended to be replaced] with a hierarchy of culpable states of mind . . . , commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence." *Bailey*, 444 U.S. at 403-04 (citing W. LaFave & A. Scott, Handbook on Criminal Law 194 (1972) and American Law Institute, Model Penal Code § 2.02 (Prop. Off. Draft 1962)).

The meaning of specific intent may vary from statute to statute. For example, in evaluating the mental state required to prove a violation of 18 U.S.C. § 664 (theft or embezzlement from employee benefit plan), one appellate court

---

[129] The Court quoted the following passage from LaFave & Scott's treatise on criminal law:

> Sometimes "general intent" is used in the same way as "criminal intent" to mean the general notion of *mens rea*, while "specific intent" is taken to mean the mental state required for a particular crime. Or, "general intent" may be used to encompass all forms of the mental state requirement, while "specific intent" is limited to the one mental state of intent. Another possibility is that "general intent" will be used to characterize an intent to do something on an undetermined occasion, and "specific intent" to denote an intent to do that thing at a particular time and place.

Bailey, 444 U.S. at 403 (quoting W. LaFave & A. Scott, Handbook on Criminal Law § 28, 201-02 (1972)).

found that "[t]he specific intent required . . . includes *reckless disregard* for the interests of the plan." *United States v. Krimsky*, 230 F.3d 855 860-61 (6th Cir. 2000) (emphasis added). *See United States v. Woods*, 877 F.2d 477, 480 (6th Cir.1989) (specific intent in cases involving willful misapplication of bank funds in violation of 18 U.S.C. § 656 "exists whenever the officer acts knowingly or with reckless disregard of the bank's interests and the result of his conduct injures or defrauds the bank"); *United States v. Hoffman*, 918 F.2d 44, 46 (6th Cir.1991) (district court correctly instructed the jury that reckless disregard is equivalent to intent to injure or defraud).

As noted above, Yoo acknowledged in his OPR interview that the law in this area was "confusing" and "messed up," but that he "looked at the cases quickly" and was willing to rely upon a relatively inexperienced, junior OLC attorney to "try to figure out . . . what the law really is on specific intent . . . ."

Some of the Bybee Memo's analysis was oversimplified to the point of being misleading. The first paragraph of the Bybee Memo's discussion of specific intent cited *Ratzlaf v. United States*, 510 U.S. 135 (1994), as an example of what was required to show specific intent:

> For example, in *Ratzlaf* . . . , the statute at issue was construed to require that the defendant act with the "specific intent to commit the crime." (Internal quotation marks and citation omitted.) As a result, the defendant had to act with the express "purpose to disobey the law" in order for the *mens rea* element to be satisfied. . . .

Bybee Memo at 3 (citing and quoting *Ratzlaf*, 510 U.S. at 141). The Bybee Memo clearly implied that the Court had considered the meaning of specific intent and had concluded that it required an express purpose to disobey the law on the part of the defendant.

However, the *Ratzlaf* decision did not address the meaning of "specific intent" in a general sense. The statute under review in that case penalized "willful violations" of the Treasury Department's cash transaction reporting regulations, and the only question before the Court was the meaning of the term "willful." *Ratzlaf*, 510 U.S. at 136-37 and 141-49. In that context, the Court ruled that the term "consistently has been read by the Courts of Appeals to require both

'knowledge of the reporting requirement' *and* a 'specific intent to commit the crime,' *i.e.*, 'a purpose to disobey the law.'" *Id.* at 141 (italics in original).

Yoo has argued that *Ratzlaf* was used properly "as an *example* of a statute that was construed to require specific intent [because] the willfulness requirement at issue in *Ratzlaf is*, in fact, a specific intent requirement." Yoo Response at 29 n.15 (emphasis in original). However, although "willfulness" can be characterized as a form of specific intent, specific intent to inflict severe pain or suffering has nothing to do with "willfulness." Rather, "willfulness" "'carv[es] out an exception to the traditional rule' that ignorance of the law is no excuse." *Bryan v. United States*, 524 U.S. 184, 195 (1998). Thus, a statute that specifies a defendant must act "willfully" "require[s] that the defendant have knowledge of the law" he is charged with violating. *Id.* As used in *Ratzlaf* and other cases involving highly technical tax or currency regulations, "willfulness" is considered a "heightened *mens rea*" standard, even compared to the way "willfulness" is applied in other, less complex statutes. *Id.* at 194-195, 195 n.17.

In his response to OPR, Bybee similarly characterized the "willfulness" requirement of *Ratzlaf* as "a specific intent to violate the currency structuring law." Thus, he argued, the Bybee Memo's statement that the defendant in *Ratzlaf* "had to act with the express 'purpose to disobey the law' in order for the *mens rea* element to be satisfied" was accurate in a literal sense because "the law" in that sentence referred to the currency structuring law. Bybee claimed that, because the Bybee Memo did not "seek to extend *Ratzlaf* to other statutory regimes," and because the memorandum did not say elsewhere that the torture statute requires a defendant to act with a specific intent to violate the law, the citation to *Ratzlaf* was proper.

However, *Ratzlaf* was cited in a section of the Bybee Memo devoted to the elements of the torture statute, in a paragraph that began by noting that "[the torture] statute requires that severe pain and suffering must be inflicted with specific intent," and which proposed a general definition of "specific intent," relying on *Carter* and Black's Law Dictionary. *Ratzlaf* was cited in that same paragraph as an example of how the Supreme Court had construed specific intent, and the Bybee Memo did not identify or describe the "statute at issue" in that

case. Based on that context, we concluded that the Bybee Memo misleadingly suggested that, in order to violate the torture statute, a defendant would have to act with a "purpose to disobey the law."[130]

This was stated more explicitly in the July 28, 2002 draft of the Bybee Memo, which concluded the discussion of *Ratzlaf* quoted above with the following comment:

> In other words, the intent to achieve the *actus reus* of a crime is not sufficient to satisfy a specific intent standard, but rather a defendant must have knowledge of the legal prohibition established by the criminal statute *and* the purpose to violate that prohibition.

July 28, 2002 draft at 3 (citation to *Ratzlaf* omitted) (emphasis in original). As a general statement of the law, this was clearly wrong, and was deleted from the final draft. However, as the introductory phrase "in other words" signifies, it represented a restatement of the memorandum's preceding analysis, which remained unchanged in the final draft.

We also found that the Bybee Memo's discussion of a potential good faith defense to violations of the torture statute was incomplete. The memorandum characterized the good faith defense as: "a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent." Bybee Memo at 4. The memorandum added that even an unreasonable belief could constitute good faith, but cautioned that a jury would be unlikely to acquit a defendant on the basis of an unreasonable, but allegedly good faith belief. *Id.* at 5. Thus, the memorandum concluded, "a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief." *Id.*

---

[130] If the Bybee Memo had disclosed that *Ratzlaf* construed a currency structuring statute that required a showing of "willfulness," a form of specific intent that requires proof of the defendant's knowledge of the law he is accused of violating, the citation would not have been misleading, but the case's relevance to the torture statute, which does not include an element of willfulness, would have been hard to discern.

The Bybee Memo cited three cases in support of its conclusion that the good faith defense would apply to prosecutions under the torture statute, but did not point out that the good faith defense is generally limited to fraud or tax prosecutions. *See* Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, *Federal Jury Practice and Instructions* § 19.06 (5th ed. 2000 & 2007 Supp.) (*Federal Jury Instructions*)("The defense of good faith is discussed in the context of mail, wire, and bank fraud, and in tax prosecutions, infra.").[131] The Bybee Memo did not address the possibility that a court might refuse to extend the good faith defense to a crime of violence such as torture.

The availability of good faith as a defense to torture is not a foregone conclusion. For example, in *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983), the defendant argued that he was entitled to a good faith instruction relating to the charge that he willfully and specifically intended to export firearms. *Id.* at 974. The court of appeals disagreed, noting that the defendant had failed to demonstrate that he was entitled to the defense and that "[s]uch an unwarranted extension of the good faith defense would grant any criminal *carte blanche* to violate the law should he subjectively decide that he serves the government's interests thereby." *Id.* at 975.

The Bybee Memo also failed to advise the client that under some circumstances, a prosecutor can challenge a good faith defense by alleging willful blindness, or conscious or deliberate ignorance or avoidance of knowledge that would negate a claim of good faith. *See, e.g., United States v. Goings*, 313 F.3d 423, 427 (8th Cir. 2002) (court properly gave willful blindness instruction where defendants claimed they acted in good faith but evidence supported inference that they "consciously chose to remain ignorant about the extent of their criminal behavior"); *United States v. Duncan*, 850 F.2d 1104, 1118 (6th Cir. 1988) (reversing for failure to give requested instruction but observing that the trial court could have instructed the jury "on the adverse effect 'willful blindness' must have on a good faith defense to criminal intent"). Thus, a CIA interrogator who argued that

[131] Bybee Memo at 4-5. The cases cited in the Bybee Memo included two mail fraud cases and one prosecution for failure to file tax returns. In his response to OPR, Bybee stated that the Bybee Memo "openly disclosed that most of its cited cases were 'in the context of mail fraud.'" In fact, the Bybee Memo only disclosed that one of the three cases was decided "in the context of mail fraud."

his good faith belief in the benign effect of EITs negated the specific intent to torture could have faced a challenge to his defense on willful blindness grounds.

In his comments on a draft of this report, Yoo argued that our criticism was unfounded because the Third Circuit, in *Pierre v. Attorney General*, 528 F.3d 180, 190 (3d Cir. 2008) (*en banc*) ruled, in interpreting the CAT specific intent requirement in the context of an immigration matter, that willful blindness can be used to establish knowledge but not specific intent. However, we did not assert that the government could establish a defendant's specific intent through a willful blindness theory. We stated that a willful blindness instruction might be granted under some circumstances to counter a defendant's claim that he held a good faith belief – based on knowledge obtained from the CIA – that the use of EITs would not result in the infliction of severe mental or physical pain or suffering. Moreover, *Pierre* was decided long after the Bybee Memo was issued, and has no bearing on whether its authors presented a thorough view of the law at that time.[132]

Bybee stated that it was reasonable for him to assume that at least one of the memorandum's recipients, Alberto Gonzales, a former judge on the Texas Supreme Court, was aware of the willful blindness instruction, "since it is a standard doctrine in the law." Nevertheless, a thorough, objective, and candid discussion of a possible good faith defense to torture would have analyzed possible problems with the defense.

The cursory qualifications contained in the Bybee Memo – that, as a practical matter, a jury could infer specific intent from factual circumstances or would be unlikely to acquit a defendant who held an unreasonable belief that he acted in good faith – were insufficient to counteract the incomplete analysis and erroneous implications of the Bybee Memo's analysis. Moreover, OLC's advice to the CIA on specific intent and good faith was not limited to the Bybee Memo. In the Yoo Letter, the Classified Bybee Memo, and the CIA Bullet Points, OLC

[132] Similarly, although *Pierre* and other appellate cases decided after issuance of the Bybee and Yoo Memos have narrowly interpreted specific intent as it applies to CAT Article 3 immigration matters, those cases are not relevant to whether the OLC attorneys presented a thorough, objective, and candid analysis of the law in 2002 and 2003.

presented an unqualified, oversimplified view of the law without acknowledging potential problems.

2. Severe Pain

The Bybee Memo's definition of "severe pain" as necessarily "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" was widely criticized, both within and outside the Department. Goldsmith and Levin explicitly rejected that formulation and characterized the reasoning behind it as illogical or irrelevant.[133]

The Bybee Memo began its discussion of "severe pain" by noting that the torture statute only applied to the infliction of pain or suffering that was "severe." It quoted several dictionary definitions of "severe" and concluded that "the adjective 'severe' conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure." Bybee Memo at 5.

The Bybee Memo went on to state that "Congress's use of the phrase 'severe pain' elsewhere in the United States Code can shed more light on its meaning. . . . Significantly, the phrase 'severe pain' appears in statutes defining an emergency medical condition for the purpose of providing health benefits." *Id.* (citation omitted). The memorandum then cited several nearly identical statutes that defined the term "emergency medical condition" and quoted from one of them as follows:

> [An emergency medical condition is one] manifesting itself by acute symptoms of sufficient severity (including *severe pain*) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate

[133] Various commentators described the definition as: "absurd," David Luban, *Liberalism, Torture, and the Ticking Bomb*, in The Torture Debate in America 58, (Karen J. Greenberg ed., 2006); based on "strained logic," George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. Nat'l Security L. & Pol'y 409, 434 (2005); or "bizarre," Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memo*, 1 J. Nat'l Security L. & Pol'y 455, 459 (2005) ("This claimed standard is bizarre for a number of reasons. In the first place, organ failure is not necessarily associated with pain at all. In addition, this legal standard is lifted from a statute wholly unrelated to torture.").

> medical attention to result in — (i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part . . . .

Bybee Memo at 5-6 (citing and quoting 42 U.S.C. § 1395w-22(d)(3)(B)) (emphasis added in Bybee Memo).

The discussion concluded with the statement that "'severe pain,' as used in [the torture statute] must rise to a similarly high level – the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions – in order to constitute torture." Bybee Memo at 6. The Bybee Memo restated that conclusion several times, with slight variations:

- In the introduction at page 1 ("Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death");
- In the summary of Part I at page 13 ("The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result");
- In the introduction to Part IV at page 27 (torture is "extreme conduct, resulting in pain that is of an intensity often accompanying serious physical injury"); and
- In the conclusion at page 46 ("Severe pain . . . must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure").

We found several problems with the Bybee Memo's analysis. In the first place, the medical benefits statutes in question do not associate severe pain with "death," "organ failure," or "permanent damage." The language used by Congress

was "serious jeopardy," "serious impairment of bodily functions," and "serious dysfunction of any bodily organ or part." We asked Yoo why OLC changed the words of the statute. He offered the following explanation:

> I don't think that was an effort to try to change it. I think that was just an effort to, you know, sort of paraphrase what the statutory language was. . . . I don't think there was anything, any effort to make it a different or higher standard.

We noted, however, that the words chosen to paraphrase the statute tended to heighten the severity of the listed consequences. In the Bybee Memo, "serious jeopardy" became "death," "serious dysfunction of any bodily organ" became "organ failure," and "serious impairment of bodily functions" became "permanent damage." Thus, we concluded that, contrary to Yoo's denial, the reason the authors of the Bybee Memo rephrased the language of the statutes was to add further support to their "aggressive" interpretation of the torture statute.

Second, the benefits statutes do not define or even describe "severe pain." They simply cite severe pain as one of an unspecified number of symptoms that would lead a prudent layperson to believe that serious health consequences are likely to result from a failure to provide immediate medical attention.

Finally, the Bybee Memo's use of the medical benefits statutes was illogical. When we asked Yoo to describe the pain of death, he replied, "Well, I think I assume that's very painful, but I don't know." We concluded that the intensity of pain that accompanies organ failure or death has no commonly understood meaning and had no practical value in explaining the meaning of "severe pain."

Levin told us that, although he thought it was reasonable for the authors of the Bybee Memo to look to other statutes for the meaning of "severe pain," their use of the health benefits statutes "just didn't make sense." The Levin Memo specifically rejected the Bybee Memo's analysis, stating, "We do not believe that [the medical benefits statutes] provide a proper guide for interpreting 'severe pain' in the very different context of the prohibition against torture in sections 2340-2340A." Levin Memo at n.17.

Philbin defended the legal reasoning behind the use of the medical benefits statutes, but told us that he advised Yoo against including the argument in the Bybee Memo. In his OPR interview, Philbin stated that his "practical lawyer's instinct" told him that "optically," it was better not to use the "kind of gruesome language" of the Bybee Memo to describe the consequences of severe pain. He also stated that the memorandum's characterization of severe pain was "not very accurate, not very helpful." In written comments on a draft of this report, Philbin stated that he "did not think the terms of the medical benefit statutes actually provided useful, concrete guidance concerning what amounts to 'severe pain' [because] there is no readily identifiable level of pain that precedes medical events such as 'organ failure.'" Philbin Response at 8.

Similarly, Bradbury told us that the Bybee Memo's analogy of pain equivalent to organ failure or death "is fairly meaningless" because there are many forms of death and organ failure that are not associated with pain.

Goldsmith commented as follows on the Bybee Memo's analysis of "severe pain":

> It is appropriate, when trying to figure out the meaning of words in a statute, to see how the same words are defined or used in similar contexts. But the health benefit statute's use of "severe pain" had no relationship whatsoever to the torture statute. And even if it did, the health benefit statute did not define "severe pain." . . . It is very hard to say in the abstract what the phrase "severe pain" means, but OLC's clumsy definitional arbitrage didn't seem even in the ballpark.

Goldsmith, *The Terror Presidency* at 145.

In Goldsmith's and Bradbury's draft revisions to the Yoo Memo, they described the use of the medical benefits statutes as:

> 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.

The Bybee Memo's definition could be interpreted as advising interrogators that they may legally inflict pain up to the point of organ failure, death, or serious physical injury.[134] Indeed, as discussed above, drafts of the Bybee Memo explicitly stated that the torture statute only outlaws the intentional infliction of pain that "is likely to be accompanied by serious physical injury, such as damage to one's organs or broken bones." Although, in the final drafts, the authors modified the language by stating that severe pain must be "equivalent to" pain "so severe that death, organ failure, or permanent damage" is likely to result, the difference between the two formulations is minor. Whether severe pain is described as pain that is likely to result in injury, or as "equivalent" or "akin" to pain that is likely to result in injury, an interrogator could still draw the erroneous conclusion that pain could be inflicted as long as no injury resulted.

Bybee has asserted that "no rational interrogator" could interpret the Bybee Memo as advising that he could "legally inflict pain up to the point of organ failure, death, or serious physical injury." Yoo argued that the advice was "written to guide a very small and quite sophisticated legal audience, not for any 'interrogators' in the field . . . ." In light of those comments, it is worth noting that the CIA's August 2, 2002 cable to the black site where Abu Zubaydah was being held informed field personnel that the use of EITs:

> should not repeat not produce severe mental or physical pain or suffering: for example, no severe physical injury (such as the loss of a limb or organ) or death should result from the procedures . . . .

According to Rizzo, the cable was sent to "the people in the field who were responsible for interrogating Zubaydah." The cable's author, (b)(3) a senior CTC attorney, was deeply involved in discussions with OLC about the interrogation program, and was presumably part of the "sophisticated legal audience" for whom the Bybee Memo was intended. The fact that (b)(3) summarized and quoted from OLC's advice in a cable to the field belies the notion that it was restricted or limited in any way.

---

[134] *See, e.g.*, Andrew C. McCarthy, *A Manufactured Scandal*, National Review Online, June 25, 2004, (to "equate 'severe physical pain' with pain 'like that accompanying death . . .' would suggest that any pain which is not life-threatening cannot be torture").

The only legal authority cited by the Bybee Memo to justify its use of the medical benefits statute was *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), cited after the statement, "Congress's use of the phrase 'severe pain' elsewhere in the United States Code can shed more light on its meaning [in the torture statute]." *Casey* appears to have been inserted in response to Yoo's comment, on the June 26, 2002 draft, that they should "cite and quote S.Ct. for this proposition." The following language from *Casey* was quoted in a parenthetical:

> [W]e construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.[135]

Casey, 499 U.S. at 100 (citing 2 J. Sutherland, Statutory Construction § 5201 (3d ed. 1943) (discussing the *in pari materia* doctrine of statutory construction).[136]

[135] The quoted excerpt omitted a qualifying introductory phrase, "*Where a statutory term presented to us for the first time is ambiguous*, we construe . . . ." *Casey*, 499 U.S. at 100. (emphasis added). Thus, the Bybee Memo should have demonstrated that the term "severe pain" was ambiguous before turning to other statutory sources. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1999) (first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning, and the inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent).

One way of establishing that "severe pain" was ambiguous would have been to cite inconsistent definitions. *See MCI v. ATT*, 512 U.S. 218, 227 (1994) ("Most cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries."). In *Casey*, the Court assessed the meaning of a statute's attorney's fees provision by turning to similar provisions in other statutes and by reviewing some of the prior judicial decisions that had interpreted those provisions. The Court found that the language in question had a clearly accepted meaning in judicial and legislative practice and that it was plain and unambiguous. *Casey*, 499 U.S. at 98-101.

As the Levin Memo noted, however, any difficulty in interpreting the term "severe pain" is more properly attributable to the subjective nature of physical pain, rather than ambiguous language. *See* Levin Memo at 8 n.18 (citing and quoting Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993).

[136] The *in pari materia* doctrine is described as follows: "The intent of the legislature when a statute is found to be ambiguous may be gathered from statutes relating to the same subject matter – statutes *in pari materia*." 2 J. Sutherland, Statutory Construction at § 5202. However,

In his OPR interview, Bybee defended the use of the medical statutes as follows:

> I think that we ought to look to any tools we can to try to understand by analogy what the term "severe pain" means, and by looking to the medical emergency provisions, these are not statutes, we haven't made an *in pari materia* argument here, we aren't arguing that Congress knew what it said in 42 U.S.C., and that it incorporated that deliberately here, it's taken that phrase out of . . . the CAT statute, but both the Levin memorandum and our memorandum reflect, there was a great deal of concern on the part of the United States at the drafting of CAT that these terms were not specific, that they didn't have any meaning in American law, and there was even some concern that the statute might be void for vagueness. We're struggling here to try and give some meaning that we can work with because we had an application that we were also required to make at this time, and we couldn't discuss this just simply as a philosophical nicety; we had real questions before us.

Interpreting ambiguous statutory language by analogy to unrelated but similar legislation is a recognized technique of statutory construction. *See, e.g., Dep't of Energy v. Ohio*, 503 U.S. 607 (1992); *Firstar Bank v. Faul*, 253 F.3d 982, 991 (7th Cir. 2001); *Doe v. DiGenova*, 779 F.2d 74, 83 (D.C. Cir. 1985). *See also* Sutherland at § 53:03.[137] However, where courts look to unrelated statutes for

as noted in a later edition of Sutherland's treatise, N. Singer, Sutherland on Statutes and Statutory Construction (6th ed. 2000) (Sutherland), "The adventitious occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will normally not justify applying the rule." Sutherland at § 51.03 (quoting *Sylvestre v. United States*, 771 F. Supp. 515 (D. Conn. 1990)).

[137] Sutherland describes the interpretive relevance of unrelated statutes as follows:

> On the basis of analogy the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to *similar persons, things, or relationships.* By referring to other *similar* legislation, a court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or several statutes to a *similar* statute

guidance in interpreting ambiguous language, there is generally a logical basis for doing so. In some cases, the unrelated statute is helpful because it defines or gives context to the term, or because the term in the unrelated statute has been interpreted by the courts. *See, e.g., Carcieri v. Salazar*, __ U.S. __, 129 S. Ct. 1058, 1064 (2009) (definition of term is consistent with interpretations given to the word by Court with respect to its use in other statutes); *Dep't of Energy v. Ohio*, 503 U.S. at 607, 621-22 (reviewing examples of usage of term in other contexts); *Casey*, 499 U.S. at 99-100. In other cases, the unrelated statutes are similar in purpose or subject matter. *See, e.g., Doe v. DiGenova*, 779 F.2d 74, 83 (D.C. Cir. 1985) (incorporation of identical or similar language from an act with a related purpose evidences some intention to use it in a similar vein); *Stribling v. United States*, 419 F.2d 1350, 1352-53 (8th Cir. 1969) (where interpretation of particular statute at issue is in doubt, express language and legislative construction of another statute not strictly *in pari materia* but employing similar language and applying to similar persons, things or cognate relationships may control by force of analogy).

However, "borrowing from an unrelated statute . . . is a relatively weak aid given that Congress may well have intended the same word to have a different meaning in different statutes." *Firstar*, 253 F.3d at 991. *See*, Sutherland at § 53:05 ("The interpretation of one statute by reference to an analogous but unrelated statute is considered an unreliable means of discerning legislative intent.") (footnote and citations omitted).

Even in those instances where courts refer to language in completely dissimilar statutes to interpret an ambiguous term, there is some logical basis for doing so. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) (the Court concluded that the word "contract" in the Federal Arbitration Act, 9 U.S.C. § 2, included contracts that later prove to be void, in part because

> of doubtful meaning, the court not only is able to give effect to the probable intent of the legislature, but also to establish a more uniform and harmonious system of law. *It is useful to look to the function of statutes having similar language to determine if there is a possibility of reference. It also follows that the usefulness of the rule is greatly enhanced where analogy is made to several statutes or a statute representing general legislation.*

Sutherland at § 53.03 (footnotes and citations omitted) (emphasis added).

"contract" is used "elsewhere in the United States Code to refer to putative agreements, regardless of whether they are legal").[138]

The fact that the medical benefits statutes were neither related, similar, nor analogous to the torture statute, coupled with the fact that they did not in fact define, explain or interpret the meaning of "severe pain," undermined their utility in interpreting the torture statute and led us to conclude that the Bybee Memo's reliance on those statutes was unreasonable. The occurrence of the phrase "severe pain" in the medical benefits statute provided little or no support for the conclusion that "severe pain" in the torture statute must rise to the level of pain associated with "death, organ failure, or serious impairment of body functions."

3. Ratification History of the United Nations Convention Against Torture

The Bybee Memo cited the ratification history of the CAT in support of its conclusion that the torture statute prohibited "only the most extreme forms of physical or mental harm." Bybee Memo at 16. Drawing primarily on conditions that were submitted to the Senate Foreign Relations Committee by the Reagan administration during the CAT ratification process, the Bybee Memo concluded that "severe pain" under the CAT is "in substance not different from" pain that is "excruciating and agonizing."[139]

The memorandum did not disclose that those conditions were never ratified by the Senate, in part because, "[t]hose conditions, in number and substance, created the impression that the United States was not serious in its commitment to end torture worldwide." S. Exec. Rep. No. 101-30 at 4. In reaction to criticism

---

[138] In *Buckeye*, however, the Court did not rely solely upon similar language in dissimilar statutes. That opinion relied primarily on the way the word "contract" was used in the same section of the same statute. *Id.* at 448. The Court's reference to unrelated statutes appeared in a footnote that reinforced its conclusion, as stated in the text of the opinion, that "[b]ecause the sentence's final use of 'contract' so obviously includes putative contracts, we will not read the same word earlier in the same sentence to have a more narrow meaning." *Id.*

[139] *Id.* at 19. The Levin Memo rejected that conclusion, noting that the Reagan administration proposal was "'criticized for setting too high a threshold of pain,' and was not adopted." Levin Memo at 8 (citation and footnote omitted).

from human rights groups, the American Bar Association, and members of the Senate Foreign Relations Committee, the first Bush administration acknowledged that the Reagan administration understanding regarding the definition of torture, which included the phrase "excruciating and agonizing physical or mental pain or suffering," could be seen as establishing "too high a threshold of pain for an act to constitute torture," and deleted that language from the proposed conditions. *Id.* at 9; *Convention Against Torture: Hearing Before the Senate Comm. On Foreign Relations*, 101st Cong. 8-10 (1990) (CAT Senate Hearing) (testimony of Hon. Abraham D. Sofaer, legal adviser, U.S. Department of State).

The Bybee Memo mentioned the revision but minimized its importance, stating that "it might be thought significant that the Bush administration's language differs from the Reagan administration understanding" because it was changed "in response to criticism" that the language "raised the bar for the level of pain . . . ." Bybee Memo at 18. However, the Bybee Memo dismissed the differences as "rhetorical," and asserted that the revisions "merely sought to remove the vagueness created by [the] concept of 'agonizing and excruciating' mental pain." *Id.* at 18-19. The Bybee Memo concluded that:

> [t]he Reagan administration's understanding that the pain be "excruciating and agonizing" is in substance not different from the Bush Administration's proposal that the pain must be severe. . . . The Bush understanding simply took a rather abstract concept – excruciating and agonizing mental pain – and gave it a more concrete form.

Bybee Memo at 19.

It is inaccurate to suggest that the Reagan administration language was changed simply to clarify the definition of mental pain. Although that was one reason for the revisions, that aspect was addressed by adding a detailed definition of mental pain or suffering to the understanding. It is clear from the ratification history that the first Bush administration's proposed definition of severe physical pain or suffering, which deleted the phrase "excruciating and agonizing," was included in response to criticism that the United States had adopted "a higher, more difficult evidentiary standard than the Convention required" and to ensure that the United States proposal did "not raise the high threshold of pain already

required under international law . . . ." CAT Senate Hearing at 9-10 (Sofaer testimony). Thus, the understanding that was ratified by the Senate only referred to the infliction of "severe" physical pain.

Finally, we concluded that the Bybee Memo's emphasis on the Reagan administration's proposed conditions was misplaced because those conditions were never ratified by the Senate, and, unlike the Bush administration's conditions, therefore, have no effect on the United States' obligations under the CAT. *See* Restatement (Third) of Foreign Relations Law of the United States § 314, cmt. a and b. (1987) (reservations and understandings are effective only if ratified or acceded to by the United States with the advice and consent of the Senate).

4. United States Judicial Interpretation

Part III of the Bybee Memo stated accurately that "[t]here are no reported prosecutions under [the torture statute,]" and went on to discuss federal court decisions under the Torture Victim Protection Act (TVPA). Bybee Memo at 22. However, the memorandum ignored a relevant body of federal case law that has applied the CAT definition of torture in the context of removal proceedings against aliens. Moreover, the Bybee Memo's discussion of TVPA cases focused on the more brutal examples of conduct courts have found to be torture, and downplayed less severe examples in the reported decisions.

a. Implementation of Article 3 of the Convention Against Torture

When Congress implemented Article 3 of the CAT, which prohibits the expulsion of persons "to another State where . . . [they] would be in danger of being subjected to torture," it directed the responsible agencies to prescribe regulations incorporating the CAT definition of torture. 8 U.S.C. § 1231 note (2000). Those regulations are at 8 C.F.R. § 208.18(a) (Department of Homeland Security), and 22 C.F.R. § 95.1(b) (State Department) (the CAT regulations). Like the CAT, the CAT regulations distinguish between torture and cruel, inhuman, and degrading treatment. 8 C.F.R. § 208.18(a)(2) ("Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.").

At the time the Bybee Memo was being drafted, some courts had already interpreted the CAT regulations' definition, providing additional examples of how courts have distinguished between torture and less severe conduct. *See, e.g., Al-Saher v. I.N.S.*, 268 F.3d 1143 (9th Cir. 2001);[140] *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016 (9th Cir. 2000) (also stating that the prohibition on torture is a *jus cogens* norm that can "never be abrogated or derogated" and that acts of Congress must be construed consistently with that prohibition); *Khanuja v. I.N.S.*, 11 Fed. Appx. 824 (9th Cir. 2001) (unpublished).[141]

The Bybee Memo's failure to discuss the CAT regulations was a relatively minor omission, and we note that the case law and CAT regulations are generally consistent with the Bybee Memo's uncontroversial conclusion that torture is an aggravated form of cruel, inhuman, and degrading treatment. We note the omission here because of our determination that OLC's interpretation of the torture statute in the context of the CIA interrogation program demanded the highest level of thoroughness, objectivity, and candor.

b. The Torture Victim Protection Act

In its discussion of cases decided under the TVPA, the Bybee Memo pointed out that the TVPA's definition of torture, which closely follows the CAT definition, required the intentional infliction of "severe pain or suffering . . . whether physical or mental," and concluded that TVPA cases would therefore be useful in determining what acts constituted torture. Bybee Memo at 23 n.13. The memorandum also asserted that courts in TVPA cases have not engaged in lengthy analyses of what constitutes torture because "[a]lmost all of the cases involve physical torture, some of which is of an especially cruel and even sadistic

[140] Although *Al-Saher* and another immigration case were listed and briefly described in the appendix to the Bybee Memo, the CAT regulations were not cited or discussed.

[141] At our December 31, 2008 meeting with AG Mukasey and DAG Filip, Filip, a former federal district court judge, stated that he thought OPR attorneys faced possible sanctions under Ninth Circuit Rule 36-3 for citing the *Khanuja* decision. That rule states that unpublished Ninth Circuit decisions are not precedent and that they "may not be cited to the courts of this circuit" except under certain specified conditions. We do not agree that the rule forbids Department attorneys from discussing unpublished Ninth Circuit decisions in executive branch legal memoranda or reports. Moreover, the case is cited here not as precedent, but as an example of a judicial decision that applied the CAT regulations and which was available to the drafters of the Bybee Memo.

nature." *Id.* at 24. As support, the memorandum cited one district court case, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), and described the brutal physical treatment that the court found to constitute torture in that case.[142] Bybee Memo at 24-27. Seven additional TVPA cases and seven other cases discussing torture in the context of the Alien Tort Claims Act, the Foreign Sovereign Immunities Act, or CAT Article 3, were summarized in an appendix to the memorandum.[143]

Acknowledging that the courts have not engaged "in a careful parsing of the statute," but have simply recited the definition of torture and concluded that the described acts met that definition, the Bybee Memo proposed that the reason for the lack of detailed analysis was because only "acts of an extreme nature" that were "well over the line of what constitutes torture" have been alleged in TVPA cases. *Id.* at 27. Thus, the memorandum asserted, *Mehinovic* "and the other TVPA cases generally do not approach [the lowest] boundary [of what constitutes torture]." *Id.*

That statement was inaccurate. In fact, conduct far less extreme than that described in *Mehinovic* was held to constitute torture in two of the TVPA cases cited in the appendix to the Bybee Memo. In *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001), the district court held that imprisonment for five days under extremely bad conditions, while being threatened with bodily harm, interrogated, and held at gunpoint, constituted torture with respect to one claimant. Other plaintiffs in that case, imprisoned for much longer periods under similar or worse conditions, were also found to have stated claims for torture under the TVPA. *Id.* at 25. The court made no findings regarding severe pain and only general findings of psychological harm in concluding that the claimants were

[142] The Bybee Memo noted that the plaintiffs in *Mehinovic* were severely and repeatedly beaten with bats and other weapons, were forced to endure games of Russian roulette, had their teeth pulled, and were subjected to several other forms of brutal treatment. Bybee Memo at 24-26.

[143] *Mehinovic* appears to have been added in response to the following comment from Yoo on the May 23, 2002 draft of the Bybee Memo: "discuss in the text a few of what we consider the leading cases from the appendix, to demonstrate how high the bar is to meet the definition of torture." *Mehinovic* was not one of the cases listed in the appendix and none of those cases was discussed in the text of the Bybee Memo.

entitled "to compensation for their mental and physical suffering during their incarceration, since their release, and in the future." *Id.*

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78 (D.D.C. 2001), *aff'd in part, rev'd in part, vacated in part* 326 F.3d 230 (D.C. Cir. 2003), the district court held, without detailed analysis, that the plaintiff had stated a claim for torture under the TVPA by alleging:

> that she was "interrogated and then held incommunicado," "threatened with death by representatives of the defendant if [she] moved from the quarters where [she was] held," and "forcibly separated from her husband . . . [and unable] to learn of his welfare or his whereabouts . . . ." [144]

Those district court cases contradict the Bybee Memo's assertion that the reason the courts had not carefully parsed the meaning of torture under the TVPA was because the acts under consideration were "so shocking and obviously incredibly painful."

In his response to OPR, Bybee maintained that the Bybee Memo's discussion of *Mehinovic* was not misleading because it disclosed "that a single beating [in *Mehinovic*] sufficed to constitute torture" and because it acknowledged "that a single incident can constitute torture." In fact, the Bybee Memo stated

---

[144] *Id.* at 88 (quoting from plaintiff's complaint). Although *Simpson* was subsequently reversed because the acts alleged were not "unusually cruel or sufficiently extreme and outrageous as to constitute torture" within the meaning of the TVPA, the Court of Appeals' decision was issued on April 22, 2003, after the Bybee and Yoo Memos had been issued. *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d at 234.

that the district court "would have been in error" if it found a single blow, in isolation, constituted torture, and that:

> to the extent the [*Mehinovic*] opinion can be read to endorse the view that this single act and the attendant pain, considered in isolation, rose to the level of "severe pain or suffering," we would disagree with such a view based on our interpretation of the criminal statute.

Bybee Memo at 27.

5. International Decisions

Part IV of the Bybee Memo discussed the decisions of two foreign tribunals: the European Court of Human Rights (European Court), in *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (*Ireland v. U.K.*); and the Supreme Court of Israel, in *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999) (*PCATI v. Israel*). That discussion began with the reminder that, "[a]lthough decisions by foreign or international bodies are in no way binding authority upon the United States, they provide guidance about how other nations will likely react to our interpretation of the CAT and [the torture statute]." Bybee Memo at 27. After referring in the next paragraph to the European Court and the European Convention on Human Rights and Fundamental Freedoms (European Convention), the memorandum stated that European Convention decisions concerning torture "provide a useful barometer of the international view of what actions amount to torture." *Id.* at 28.

Despite those statements, the memorandum made no further reference to international opinion. The Bybee Memo did claim, however, that the international cases discussed in Part IV "make clear that while many of these [enhanced interrogation] techniques may amount to cruel, inhuman or degrading treatment, they do not produce pain or suffering of the necessary intensity to meet the

definition of torture" and that the cases "permit, *under international law*, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist." *Id.* at 2, 31 (emphasis added).[145]

a. *Ireland v. the United Kingdom*

The Bybee Memo's discussion of *Ireland v. U.K.* consisted of a detailed description of five interrogation techniques that the European Court found did not rise to the level of torture: wall standing (a stress position); hooding; subjection to noise; sleep deprivation; and deprivation of food and drink. Bybee Memo at 27-29. The memorandum also noted that the court found other abusive techniques, such as beating prisoners, not to constitute torture. *Id.* at 29.

The opinion reviewed and reversed portions of the report and findings of the European Commission of Human Rights (the Commission), which initially investigated the Irish government's complaint, held evidentiary hearings and interviewed witnesses. In its report, the Commission unanimously found that the combined use of the five interrogation techniques in question violated the European Convention's ban on torture. *Ireland v. U.K.* at ¶ 147(iv).

We found that the Bybee Memo ignored several important facts surrounding the decision. First, the respondent government, the United Kingdom, did not contest the Commission's findings that the interrogation techniques constituted torture. *Id.* at ¶ 8(b). Second, prior to the Commission's investigation, the government of the United Kingdom formed a committee to review the interrogation techniques in question. The committee's majority report concluded that the techniques "need not be ruled out on moral grounds." A minority report took the opposite view. However, both the majority and minority reports concluded that

[145] The suggestion that the two cases support an aggressive interpretation of what constituted torture "under international law" was inaccurate. A thorough examination of what is permissible under international law would have required, at a minimum, a discussion of: (1) all relevant international treaties, agreements, and declarations (including, in addition to the European Convention and the CAT, the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Political and Civil Rights, and related reports and studies); (2) the doctrine of *jus cogens*; and (3) the laws, practices, and judicial decisions of other nations. *See* Restatement (Third) of Foreign Relations Law of the United States at § 102 (summarizing the sources of international law).

the methods were illegal under domestic law. *Id.* at ¶ 100. Third, following publication of the committee's report and prior to the European Commission's investigation, the United Kingdom renounced further use of the techniques in question. *Id.* at ¶¶ 101, 102, 135. Fourth, the case was decided by a 17-judge panel of the European Court. Four of those judges dissented from the court's opinion, writing separately that they believed the techniques in question constituted torture. *Id.*, Separate Opinions of Judges Zekia, O'Donoghue, Evrigenis and Matscher. Finally, although the majority of the European Court found that the techniques did not constitute torture, it nevertheless found that their use violated the European Convention. *Id.* at ¶ 168.

A thorough, objective, and candid examination of *Ireland v. U.K.* would have mentioned some or all of the above facts.[146] It would also have considered a body of post-*Ireland* case law from the European Court, in which the meaning of cruel, inhuman, and degrading treatment and torture has been discussed further.[147] *E.g., Selmouni v. France,* (25803/94) [1999] ECHR 66 (28 July 1999); *Aydin v. Turkey,* (23178/94) [1997] ECHR 75 (25 September 1997); *Aksoy v. Turkey,* (21987/93) [1996] ECHR 68 (18 December 1996). The failure to discuss *Selmouni* is significant, as that case cited the CAT's definitions of torture and cruel, inhuman, and degrading treatment. *Selmouni* at ¶ 100. *Selmouni* also included the following statement:

> [C]ertain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in [the] future. . . . [T]he increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

---

[146] The Bybee Memo's use of *Ireland v. U.K.* is discussed in Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House,* 105 Colum. L. Rev. 1681, 1705-06 (2005).

[147] Much of that case law in fact supports the uncontroversial conclusion that the term "torture" should be applied to more severe forms of cruel, inhuman and degrading treatment. *See, e.g., Aksoy v. Turkey,* (21987/93) [1996] ECHR 68 (18 December 1996) at ¶ 63.

Selmouni at ¶ 101. Thus, *Selmouni* raised questions about the continuing validity of the European Court's findings in *Ireland v. U.K.* A thorough, objective, and candid assessment of the law would have included a discussion of that case.

b. *Public Committee Against Torture in Israel v. Israel*

The Bybee Memo cited *PCATI v. Israel* as further support for the proposition that there is "a wide array of acts that constitute cruel, inhuman, or degrading treatment or punishment, but do not amount to torture." Bybee Memo at 31. In that case, the Israeli court examined five physical interrogation techniques, similar to the techniques examined in *Ireland v. U.K.*, and concluded that all of the techniques were illegal and could not be used by the Israeli security forces to interrogate prisoners. *PCATI v. Israel* at ¶¶ 24-31.[148]

The Bybee Memo acknowledged that the court did not address whether the techniques amounted to torture, but claimed that the opinion "is still best read as indicating that the acts at issue did not constitute torture." Bybee Memo at 30. The following reasons were given for this conclusion:

- "[T]he court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture."
- The court "even relied on [*Ireland v. U.K.*] for support and it did not evince disagreement with that decision's conclusion that the acts considered therein did not constitute torture."
- "The court's descriptions of and conclusions about each method indicate that the court viewed them as merely cruel, inhuman or degrading but not of the sufficient severity to reach the threshold of torture."

[148] The techniques were: (1) shaking; (2) "the Shabach" (a combination of hooding, exposure to loud music, and stress positions); (3) the "Frog Crouch" (a stress position); (4) excessive tightening of handcuffs; and (5) sleep deprivation. Bybee Memo at 30.