

# The Legal Process of the Federal Government After September 11

*“The Generals’ War”<sup>21</sup> was the title of an excellent history of the first Gulf War, an allusion to the fact that the conflict was a set-piece of modern military strategy conducted by the nation’s top soldiers. In some significant ways, the prolonged conflicts that occurred after September 11 could be thought of as “The Lawyers’ War.”*

*From the beginning, the detention and interrogation of prisoners was less dependent on the decisions of generals, and more influenced by government attorneys. Both those in uniform and those in the CIA looked to government lawyers to guide them and set limits. Never before in the history of the nation had attorneys, and the advice they provided, played such a significant role in determining the treatment of detainees.*

*The horror of September 11 quickly threw up questions about the obligations of the United States and its agents under domestic and international law. Before then, U.S. detainee policy had arisen, almost exclusively, in connection with armed conflicts, fought on foreign soil, between nation states. Some government attorneys came to argue that the “unique nature” of the post-September 11 conflicts, allowed — if not required — some significant reinterpretations of U.S. legal obligations.*

*Events after September 11 did not occur in a legal vacuum. The U.S. Constitution at least implicated detainee treatment within our borders. The Geneva Conventions, which the United States had been instrumental in shaping decades earlier, contained international humanitarian laws of war that were adopted as U.S. law. The War Crimes Act in 1996 made it a crime under U.S. law to violate the Geneva Conventions and other international laws of war ratified by the United States. The U.S. had also been an early and enthusiastic supporter of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment during the Reagan administration, and in 1994, the United States eventually passed the Torture Statute, 18 U.S.C. §§ 2340–2340A, in order to comply with the treaty’s requirement to enact enabling legislation.*

*Yet, despite the laws in place, some attorneys for the federal government advised the nation’s political leaders that a variety of techniques used by agents of the United States were permissible. Several of those techniques were later deemed by many, including this Task Force, to amount to torture. Almost all the significant legal advice formally issued by the federal government pertaining to detainee treatment after September 11 came from the Office of Legal Counsel of the Department of Justice. The Office of Legal*

*Counsel pronounced on the legality and constitutionality of behavior for the White House, giving it a special role, a kind of internal Supreme Court. Despite playing an important part in the implementation of detainee policy, and despite significant institutional experience in the subjects of law enforcement, interrogation, national security and counterterrorism, subject-matter experts at the Department of Defense, the FBI, the Department of State, and other federal agencies, for the most part, had only a minor role — or none at all — in establishing the legal parameters for U.S. policy during this period. Individuals at agencies outside the Department of Justice would press to have their say, but it was the advice of the Office of Legal Counsel, and a few select individuals, that provided the legal foundation in the post-September 11 era.*

*John Yoo, a deputy attorney general in the Office of Legal Counsel from 2001 to 2003, was instrumental in shaping the office's early response after September 11 on matters of national security. Though Jay Bybee was the assistant attorney general in charge of the office at the time, and Yoo his deputy, Yoo was the national-security specialist. Yoo met occasionally with a group of influential lawyers: David Addington, legal counsel to the vice president; Alberto Gonzales, White House counsel; Timothy Flanigan, deputy White House counsel; and William "Jim" Haynes II, general counsel, for the Defense Department to discuss legal issues affecting national security. The informal group became known as the "War Council," despite the fact that the five attorneys themselves had little experience in law enforcement, military service or counterterrorism. The precise effect these individuals had on the advice provided by Office of Legal Counsel from 2001 to 2003 remains imprecise, but that they had an effect is amply demonstrated in documents, books, emails and interviews.*

*Even before the issuance of the 2002 memos that became notorious for appearing to authorize acts constituting torture, Office of Legal Counsel issued a number of significant legal opinions in the "War on Terror" that reinterpreted the power of the president in wartime in a greatly expanded fashion. The president, OLC determined, had authority to: unilaterally suspend the Geneva Conventions; dispense with the Fourth Amendment's warrant and probable-cause requirements in the execution of domestic military operations; detain U.S. citizens as enemy combatants; ignore specific laws that prohibited the surreptitious surveillance of Americans' communications; and deploy military force preemptively against terrorist organizations and the states that harbor them, whether or not those organizations and states were linked to September 11.*

*The Torture Memos, as they've become known, were drafted in the spring and summer of 2002. The memoranda examined behavior under the law to determine what actions constituted torture. The authors determined the proposed acts could cause pain, and could be degrading, but could still be administered without producing pain and suffering intense enough to constitute torture. Ten controversial interrogation techniques, including the use of the infamous "waterboard," were approved in August 2002.*

*As the personnel in the Office of Legal Counsel changed, so too did the office's legal advice; however, the office never determined that the tactics approved by Yoo and Bybee had violated the law. Jack Goldsmith III became the assistant attorney general in charge of Office of Legal Counsel after Jay Bybee left in 2003. When Goldsmith issued legal advice that constrained the president's policy options, he was criticized by remaining members of the War Council. When news of the controversial earlier legal*

*advice became public, Goldsmith withdrew Yoo and Bybee's work but he did not remain in his post long enough to issue new guidance to replace it. His successor, Daniel Levin, issued new legal guidance. Levin concluded, however, in a footnote, that none of the interrogation techniques used in the past was illegal under his new legal guidance. Similarly, Levin's successor, Steven Bradbury, determined that dietary manipulation, nudity, attention grasp, walling, facial hold, facial slap, abdominal slap, cramped confinement, wall standing, stress positions, water dousing, sleep deprivation, and even waterboarding did not violate the law. Though Yoo's successors at Office of Legal Counsel offered different legal advice and differing rationales, they still agreed that the methods themselves were legal.*

*Yoo has remained an aggressive, vocal defender of the advice he and others provided the administration, while most of his colleagues from the time have remained silent. Their silence, however, cannot and should not be confused with repudiation. Though relatively few attorneys now vocally support Yoo's work, the debate on the appropriateness of the legal advice he and others gave continues. As long as the debate continues, so too does the possibility that the United States could again engage in torture. In the last days of the Bush administration, Steven Bradbury offered an explanation as to why it was understandable that Yoo, Bybee and others issued legal advice that later came to be criticized so strongly. "It is important to understand the context of the [memo]. It was the product of an extraordinary — indeed, we hope, a unique — period in the history of the Nation; the immediate aftermath of the attacks of 9/11." On January 15, 2009, Bradbury subsequently retracted and cautioned against relying on nine different memoranda issued by the Office of Legal Counsel.*

*As this chapter illustrates, more than a decade after September 11, much still remains classified by the United States that could shed light on how the legal processes of the United States contributed to a situation in which torture was allowed to occur.*



# Overview of the Legal Framework in the United States on September 11

U.S. law on detainee treatment prior to September 11 was contained primarily in treaties ratified by the United States and laws enacted by Congress, based on long-standing principles of international law.

## The U.S. Constitution

Three constitutional amendments implicate detainee treatment domestically. The Fifth Amendment establishes the right against compelled self-incrimination and the right to due process prior to any deprivation of liberty by the federal government.<sup>2</sup> The 14th Amendment requires that a person deprived of liberty be afforded due process by the states, and establishes the right to equal protection under the law.<sup>3</sup> The Eighth Amendment prohibits cruel and unusual punishment.<sup>4</sup> The rights contained in these three amendments prohibit treatment that “shocks the conscience.”<sup>5</sup> As will be discussed further, U.S. statutory law on detainee treatment applies Eighth Amendment standards.

## The Geneva Conventions

The Geneva Conventions are a collection of four conventions<sup>6</sup> containing international humanitarian laws of war.<sup>7</sup> The four conventions have been ratified by every nation in the world,<sup>8</sup> and therefore constitute both international and U.S. law.<sup>9</sup> The humane treatment of all war victims, including detainees, has been described as the “fundamental theme running throughout the Conventions.”<sup>10</sup> Official commentary on the Conventions notes that “[e]very person in enemy hands must have some status under international law” as “[n]obody in enemy hands can be outside the law.”<sup>11</sup>

Upon ratification of the four current versions in 1955,<sup>12</sup> the United States reconfirmed its commitment to the humanitarian laws of war, stating that our nation “fully supports the objectives of this Convention.”<sup>13</sup> The United States was instrumental in shaping the four Conventions, actively participating in the various conferences that led to their emergence.<sup>14</sup> U.S. commitment to the Conventions continues.<sup>15</sup> The U.S. military has incorporated the Conventions into its internal regulations,<sup>16</sup> and designated its implementation as a key objective of wartime detentions.<sup>17</sup> The United States has enacted laws prohibiting breaches of the Conventions.<sup>18</sup>

The Geneva Conventions create obligations that protect detainees and other persons not actively involved in combat. The most fundamental of those obligations are set forth in what is often referred to as “Common Article 3,” a provision that is repeated in all four Conventions.<sup>19</sup>

Common Article 3 enumerates the minimum level of protections for detainees.<sup>20</sup> Acts banned by Common Article 3 are “prohibited at any time and in any place whatsoever” for individuals no longer actively involved in hostilities, specifically including detainees.<sup>21</sup> The prohibited acts include torture, outrages upon personal dignity, and cruel, humiliating and degrading treatment, among others.<sup>22</sup> Common Article 3 also creates an affirmative obligation that detainees “shall in all circumstances be treated humanely.”<sup>23</sup>

Two of the Geneva Conventions create additional protections for certain classifications of people subject to detention. The Third Geneva Convention protects persons who meet the Convention's definition of "prisoners of war" (POWs).<sup>24</sup> The Fourth Geneva Convention protects civilians.<sup>25</sup> Both Conventions establish protections above and beyond those afforded by Common Article 3.

Two related principles are critical to understanding the Conventions' protections for detainees. The first is the distinction between "international armed conflict" and "noninternational armed conflict."<sup>26</sup> An international armed conflict is an armed conflict between two nations; all other conflicts, including internal civil wars, are noninternational.<sup>27</sup> This distinction is significant because POW status, which carries the array of protections outlined in the Third Geneva Convention, applies only in international armed conflicts.<sup>28</sup> The laws of war do not contemplate POW status in noninternational armed conflicts.<sup>29</sup> Also, the full protections of the Fourth Convention only apply in international armed conflicts.<sup>30</sup>

The second principle involves the extensive reach of Common Article 3. According to its language, Common Article 3 applies to "armed conflict not of an international character."<sup>31</sup> However, it is generally recognized that Common Article 3 is customary international law<sup>32</sup> that applies in all conflicts, whether international or not.<sup>33</sup>

Common Article 3 states:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed [outside of combat] by sickness, wounds, *detention*, or any other cause, *shall in all circumstances be treated humanely ...*

To this end, the following acts are and shall remain prohibited *at any time and in any place whatsoever ...*

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ...
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment ...
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.<sup>34</sup>

Despite its explicit association with noninternational armed conflict, it is broadly accepted that Common Article 3 establishes the minimum standards applicable to all detainees in all conflicts.<sup>35</sup> The U.S. Supreme Court, in a 2006 decision, would find Common Article 3 applied to the conflict with Al Qaeda.<sup>36</sup>

Several key principles in Common Article 3 appear in other international and U.S. laws. Those principles include:

- The ban on torture<sup>37</sup>
- The ban on cruel, inhuman or degrading treatment<sup>38</sup>
- The requirement that detainees be treated humanely<sup>39</sup>
- Universal application of these obligations without exception for place or circumstance<sup>40</sup>

**“No exceptional circumstance whatsoever, whether a state of war or a threat of war, political instability or any other public emergency, may be invoked as a justification for torture.”**

According to Common Article 3(1)(d), no sentences should be passed, nor executions carried out, without a prior judgment issued “by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>41</sup>

The phrase “regularly constituted court” is not specifically defined in Common Article 3 or its accompanying commentary. The International Committee of the Red Cross (ICRC) has defined “regularly constituted court” for the purposes of Common Article 3 as a court “established and organized in accordance with the laws and procedures already in force in a country.”<sup>42</sup> The ICRC definition would later be adopted by the U.S. Supreme Court in *Hamdan v. Rumsfeld*.<sup>43</sup>

The Third Geneva Convention (GCIII) governs the treatment of POWs. Much debate in the White House after September 11 focused solely on GCIII, which can be divided into four major parts. First, GCIII restates and reapplies Common Article 3 as a minimum standard for treatment.<sup>44</sup> Second, it defines POWs who are entitled to the additional protections created by GCIII.<sup>45</sup> Third, it requires that a detaining state determine whether detainees are POWs and, where any doubt exists, to assume POW status.<sup>46</sup> Fourth, GCIII sets forth a series of protections for POWs in addition to those required by Common Article 3.<sup>47</sup>

Article 4 of GCIII defines six categories of individuals who qualify as POWs.<sup>48</sup> They include members of the armed forces as well as militias or volunteers.<sup>49</sup> They also include other belligerent forces who meet certain criteria, such as command for subordinates, wearing a distinctive insignia, carrying arms openly, and acting in accordance with the laws and customs of war.<sup>50</sup>

Article 5 of GCIII requires that (1) POW status apply from capture until release,<sup>51</sup> and (2) where any doubt as to status exists, POW treatment is assumed “until such time as their status has been determined by a competent tribunal.”<sup>52</sup>

GCIII requires that POWs be humanely treated at all times,<sup>53</sup> and protected from torture or coercion.<sup>54</sup> In addition to these protections, which resemble those provided under Common Article 3, GCIII sets forth a series of obligations toward POWs regarding living conditions, medical treatment, religious practices, transfer, and due process guarantees for those charged with crimes.<sup>55</sup>

The Fourth Geneva Convention (GCIV) governs the treatment of detained civilians, with civilians defined as persons who are neither members of the armed forces nor individuals actively involved in hostilities.<sup>56</sup> GCIV contemplates that detention of civilians, either by a party to armed conflict or an occupying power, will be atypical and provides for protective internment of civilians in rare instances.<sup>57</sup> There are only two sets of circumstances where

civilians can be detained without the full array of protections provided under GCIV. First, in occupation settings, protected civilians forfeit their “rights of communication” contained within GCIV if caught acting as a spy or saboteur “in those cases where absolute military security so requires.”<sup>58</sup> Second, where civilians are located “in the territory of a Party to the conflict,” and a civilian is “definitely suspected of or engaged in activities hostile to the security of the State,” they are not entitled to claim “such rights and privileges as would be prejudicial to the security of such State.”<sup>59</sup> In both instances such detainees are to be “treated with humanity,” “be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power,” and, in case of trial, afforded the “rights of fair and regular trial.”<sup>60</sup>

The decision to detain a civilian must be made on a case-by-case basis,<sup>61</sup> and the reasons for detention must be reviewed at least once every six months.<sup>62</sup> Civilian detention determinations shall be made according to a regular procedure to be prescribed by the “occupying power” in accordance with the provisions of GCIV.<sup>63</sup> “Unlawful confinement,” which presumably includes confinement not adhering to the above standards, constitutes a “grave breach” under the Geneva Conventions.<sup>64</sup> Civilians detained as security threats must be released “as soon as the individual ceases to pose a real threat to state security.”<sup>65</sup>

GCIV affords civilians similar protections as those afforded to POWs as to family rights, religious convictions and practices, humane treatment, and protection against all acts of violence, threats, insults and public curiosity.<sup>66</sup>

Under GCIV, detained civilians are entitled to have the reasons for their detention reconsidered as soon as possible by an appropriate court or administrative board. If internment is continued, the court or board shall periodically review the case at least twice annually with a view to favorable amendment of the initial decision to detain.<sup>67</sup>

### **The Convention Against Torture**

The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by the Senate in 1994, forms part of international and U.S. law.<sup>68</sup> Prior to drafting CAT, the prohibition on torture was recognized as a nonderogable norm of customary international law, and included in the Geneva Conventions.<sup>69</sup> However, CAT provided a legal definition of torture, added a series of affirmative substantive requirements and prohibitions, and prohibited cruel, inhuman or degrading treatment, as further described below.<sup>70</sup> A U.N.-administered Committee Against Torture was created to implement CAT. This committee is the enforcement body for CAT, and states party to CAT are obliged to submit periodic reports to the committee on their compliance with CAT.<sup>71</sup>

CAT reflects that the ban of torture is one of the bedrock principles of international law. The prohibition of torture is absolute, without exception for war or national emergency.<sup>72</sup> Detainees may not be transferred to countries where they would face a serious risk of torture, and information acquired through torture can never be used in court except as evidence against those accused of torture.<sup>73</sup> States are required to criminalize all acts of torture or complicity in torture, and to ensure that they have jurisdiction over torture committed on their territory or by their citizens. A state must “ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that

an act of torture has been committed in any territory under its jurisdiction,” and ensure the prosecution or extradition of the perpetrators. CAT also requires training of detention personnel and interrogators to ensure they understand the prohibition on torture and cruelty, and requires that torture victims have a legally “enforceable right to fair and adequate compensation” in the courts. CAT similarly bans any “acts of cruel, inhuman or degrading treatment or punishment” against detainees even if they fall short of torture.<sup>74</sup>

**“CAT provides that evidence acquired by torture is inadmissible except as evidence against an alleged torturer.”**

The United States was an early and enthusiastic supporter of CAT, and was actively involved in the negotiations that led to CAT’s adoption by the U.N. General Assembly in 1984.<sup>75</sup> The State Department described U.S. participation in the negotiation of the treaty as evidence that “[t]he United States has long been a vigorous supporter of the international fight against torture.”<sup>76</sup> President Ronald Reagan similarly noted that the United States participated “actively and effectively” in the drafting of CAT. Although he said that “it was not possible to negotiate a treaty that was acceptable to the [U.S.] in all respects,”<sup>77</sup> Reagan urged ratification of CAT based on its central principle — the categorical ban of torture. After signing the treaty, he confirmed the United States’ support for such a ban:

By giving its advice and consent to ratification of this Convention, the Senate of the United States will demonstrate unequivocally our desire to bring an end to the abhorrent practice of torture.<sup>78</sup>

The following section describes the key provisions of CAT applicable to detainee treatment and the relevant U.S. reservations, understandings, and declarations.<sup>79</sup>

Under Article 1 of CAT, torture is (1) an intentional infliction of severe pain or suffering, whether physical or mental; (2) to obtain information or a confession, to punish for an act or suspected act, to intimidate or coerce, or for discrimination of any kind; (3) when such pain or suffering is inflicted by, at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.<sup>80</sup>

Upon ratification, the United States stated that its understanding<sup>81</sup> of the definition of torture included a “specific intent” requirement: “... in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.”<sup>82</sup> The requirement of specific intent means that infliction of severe physical and mental pain would not be torture unless the violator specifically intended to cause such pain.<sup>83</sup>

Severe physical pain is defined as injury that involves (1) substantial risk of death, (2) extreme physical pain, (3) serious burn or disfigurement, or (4) significant loss or impairment of a body part, organ or mental faculty.<sup>84</sup>

“Severe mental pain or suffering” is defined as “prolonged mental harm” caused by or resulting from one of the following:

- Intentional infliction or threatened infliction of severe physical pain
- The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality

- The threat of imminent death
- The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality<sup>85</sup>

In addition to prohibiting torture, CAT also bans “cruel, inhuman or degrading treatment or punishment [CID] which do[es] not amount to torture ...”<sup>86</sup> This provision was the subject of a significant U.S. reservation, with the United States stating that CID is limited to the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or 14th Amendments to the U.S. Constitution.<sup>87</sup>

The United States explained its reservation by stating that “it was necessary to limit U.S. undertakings under this article primarily because the meaning of the term ‘degrading treatment’ is at best vague and ambiguous.”<sup>88</sup>

The language of CAT, particularly Article 16, may appear to create more recourse and penalties for torture than it does for CID.<sup>89</sup> However, the U.N. Committee Against Torture’s position is that CAT applies equally to torture and CID, stating that “the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.”<sup>90</sup>

Article 2 of CAT imposes broad-ranging affirmative obligations to prevent torture, requiring states to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction.”<sup>91</sup> In particular, states must criminalize all acts of torture, including attempted torture, complicity in acts of torture, and participation in acts of torture.<sup>92</sup>

CAT requires nations to ban torture comprehensively, categorically and without exception:

No exceptional circumstance whatsoever, whether a state of war or a threat of war, political instability or any other public emergency, may be invoked as a justification of torture. ...

An order from a superior officer or a public authority may not be invoked as a justification of torture.<sup>93</sup>

The United States issued two relevant understandings with respect to the absolute ban against torture. First, the prohibited acts must have occurred against individuals within the “offender’s custody or physical control.”<sup>94</sup> Second, “acquiescence” by a public official to torture requires both awareness of the torture prior to its execution and failure to intervene.

The CAT requires a series of protections to prevent and to ensure full investigations of acts of torture/CID. Article 10 requires that all officials involved in arrests or detentions (including law enforcement and military personnel) be trained and educated about the prohibitions against torture/CID.<sup>95</sup> Article 11 requires states to systematically review rules, instructions, methods and practices pertaining to detainee/arrestee treatment “with a view to preventing any cases of torture.”<sup>96</sup>

Article 12 requires a state to conduct a “prompt and impartial investigation” by “competent authorities” whenever there is “reasonable ground to believe that an act of torture has been committed in any territories within its jurisdiction.”<sup>97</sup> Article 13 requires that persons who allege that they were subject to torture/CID have the right to complain and have complaints promptly and impartially examined by competent authorities. Article 14 requires that victims of torture have a legally enforceable right to redress and compensation. The duties to train, to review rules and to investigate apply to CID as well as to torture.<sup>98</sup>

The CAT provides that evidence acquired by torture is inadmissible except as evidence against an alleged torturer:

Each state shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence *in any proceedings*, except against a person accused of torture as evidence the statement was made.<sup>99</sup>

The exclusion of torture-acquired evidence applies to all proceedings without exception.<sup>100</sup>

### **The Torture Statute**

The Torture Statute is the U.S. federal statute prohibiting acts of torture.<sup>101</sup> The statute was enacted in 1994 by Congress in order to comply with CAT’s requirement to enact enabling legislation. The statute defines torture as an act committed

- by a person acting under the color of law;
- specifically intended to inflict severe physical or mental pain or suffering upon another person;
- within his custody or physical control.<sup>102</sup>

Conspiracy to commit torture also violates the statute.<sup>103</sup> The coverage of nongovernmental officials is left ambiguous by the language of the Act, which requires that torture be done “under color of state law.” What is clear is that purely private abusive conduct is not covered.

The Torture Statute covers acts committed outside the United States; acts committed within the United States are prohibited by other federal and state laws.<sup>104</sup> U.S. courts have jurisdiction over all U.S. nationals and any foreign nationals who are present in the United States.<sup>105</sup> The jurisdiction over foreign nationals, often referred to as “universal jurisdiction,” complies with CAT’s requirement that states prosecute or extradite perpetrators of torture found in their territory regardless of nationality.<sup>106</sup>

The Torture Statute imposes fines and/or imprisonment of “not more than 20 years” for torture or conspiracy to torture. If torture or conspiracy to torture results in death, however, the penalty may include death, life imprisonment, or imprisonment of “any term of years.”<sup>107</sup>

### **The War Crimes Act**

The War Crimes Act (WCA), was passed by Congress in 1996 and criminalizes certain violations of the law of armed conflict.<sup>108</sup> The act makes it a crime under U.S. law to violate the

Geneva Conventions and other international laws of war ratified by the United States.<sup>109</sup> The WCA applies to all U.S. nationals and members of the U.S. Armed Forces.<sup>110</sup>

The WCA, as originally enacted, created two categories of crimes: (1) “grave breaches” of the Geneva Convention in international armed conflicts;<sup>111</sup> and (2) any violations of Common Article 3 in other conflicts.<sup>112</sup>

### **Other Statements of U.S. Legal Intent**

Two additional international law instruments reflect U.S. commitment to the bans on torture and CID: the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Though the UDHR is not legally binding, it is significant as it contains the basic principles upon which many subsequent human rights treaties are based. The United States was a leader in drafting and implementing the UDHR.

The UDHR of December 1948 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>113</sup> Additionally, the Declaration has a series of articles that collectively bar wrongful detention.<sup>114</sup>

The ICCPR, which prohibits torture, CID and arbitrary detention, was drafted to clarify and enforce the UDHR.<sup>115</sup> Though the ICCPR was ratified by the Senate with numerous reservations and understandings, it has nearly unanimous support around the world and, as such, constitutes binding international law.<sup>116</sup> The Senate observed that the ICCPR protects “basic democratic values and freedoms.”<sup>117</sup> Many of the rights contained within the ICCPR are already recognized and enforced by the federal and state constitutions.<sup>118</sup>

## **The Initial Legal Response of the Federal Government after September 11**

Three days after September 11, President George W. Bush declared a national emergency pursuant to the National Emergencies Act (50 U.S.C. §§ 1601 *et seq.*).<sup>119</sup> On September 18, 2001, the one-week anniversary of the attacks, Congress enacted the Authorization for Use of Military Force (AUMF).<sup>120</sup> The statute empowered the president to use “all necessary and appropriate force against those nations, organizations, or persons” involved in the terrorist attacks of September 11, 2001.<sup>121</sup>

President Bush signed a still-classified presidential finding the day prior, on September 17, authorizing the CIA to kill or capture suspected terrorists.<sup>122</sup> The CIA’s chief legal officer at the time, John Rizzo, who helped draft the September 17 presidential authorization, said of it: “I had never in my experience been part of or ever seen a presidential authorization as far-reaching and as aggressive in scope. It was simply extraordinary.”<sup>123</sup>

The September 17 authorization had moved much faster than a typical covert-action finding.<sup>124</sup> Generally, after the CIA’s lawyers drafted a proposed finding, it was reviewed by “the Lawyers’ Group,” which was chaired by the National Security Council’s legal counsel and included lawyers from DOS, DOD, DOJ, and the CIA.<sup>125</sup> After the legal review, the proposed findings were reviewed further by cabinet-level national-security policymakers, where, among others, the vice president would weigh in and then it would move to the president’s desk. But in this

instance, the CIA had gained incredible new powers with very little debate — none of it public. Two weeks after the attacks, DOJ's Office of Legal Counsel issued the first of its known opinions in the post-September 11 legal landscape.

## **The Early Expansion of Executive Authority**

### ***The Office of Legal Counsel***

The Office of Legal Counsel (OLC) is responsible for issuing opinions that instruct government officials by providing interpretations of existing law.<sup>126</sup> The opinions by OLC do not constitute binding U.S. law. However, OLC considers its opinions binding on the executive branch, subject to the supervision provided by the attorney general, under the ultimate authority of the president.<sup>127</sup> The office is led by an assistant attorney general.<sup>128</sup> A number of deputy assistant attorneys general and attorney advisors, numbering approximately two dozen at any one time, serve under the assistant attorney general.<sup>129</sup>

On September 11, 2001, Jay S. Bybee was awaiting confirmation as the next assistant attorney general in charge of OLC to replace Randolph D. Moss, who had been appointed by President Bill Clinton to the position.<sup>130</sup> The confirmation of Bybee by the Senate came on October 23, 2001.<sup>131</sup> At that time, a deputy assistant attorney general was already working in the office. That lawyer, John Yoo, had been hired specifically to supervise OLC's work on foreign affairs and national security.<sup>132</sup>

Prior to arriving at OLC, Yoo was a law professor at the University of California at Berkeley and had authored a number of scholarly articles on the Constitution's separation of powers.<sup>133</sup> In his scholarly work, Yoo repeatedly maintained that the president possessed a great deal of unilateral constitutional authority in the execution of war. Yoo, even in these early articles, in his own words, expressed “a more pro-Executive” view of presidential power than many of his peers in academia.<sup>134</sup>

### ***The “War Council”***

An impromptu group of influential lawyers within the Bush administration met periodically to consider legal issues that arose in the immediate wake of September 11. The group included David Addington, legal counsel to Vice President Dick Cheney; Alberto Gonzales, White House counsel; Timothy Flanigan, deputy White House counsel; William “Jim” Haynes II, DOD general counsel; and Yoo. These five self-selected lawyers called themselves the “War Council.”<sup>135</sup> None of them had significant experience in law enforcement, military service or counterterrorism.

OLC memoranda bind the executive branch, but individuals outside OLC, individuals in the War Council in particular, were influential in crafting OLC's advice. As Yoo set to work crafting controversial memoranda on the interrogation of detainees during the spring and summer of 2002, he was “under pretty significant pressure to come up with an answer that would justify [the program],” John Bellinger III, legal adviser to the National Security Council (NSC) later observed.<sup>136</sup> In an interview with *The Washington Times* on December 18, 2008, Vice President Cheney commented on the dialogue back and forth between OLC and senior White House officials:

Was it torture? I don't believe it was torture. ... We spent a great deal of time and effort getting legal advice, legal opinion out of the [Justice Department's] office of legal counsel.<sup>137</sup>

And, in a February 14, 2010, interview with ABC News, Cheney said:

The reason I've been outspoken is because there were some things being said, especially after we left office, about prosecuting CIA personnel that had carried out our counterterrorism policy or disbaring lawyers in the Justice Department who had — had helped us put those policies together, and I was deeply offended by that, and I thought it was important that some senior person in the administration stand up and defend those people who'd done what we asked them to do.<sup>138</sup>

At the time OLC was crafting controversial detainee interrogation memoranda, Yoo stated in a July 2002 email to an OLC colleague that comments from Gonzales and others would be incorporated into OLC's work product.<sup>139</sup> Gonzales speculated that Addington had a significant hand in an OLC memo that was addressed to him on August 1, 2002, as it contained significant discussion of the plenary authority of the commander in chief — about which Addington held strong views.<sup>140</sup> The precise role the War Council or others outside OLC had on OLC and its work product remains unclear. Addington denied a role in the authorship of OLC memoranda but, in his testimony before the House Judiciary Committee in 2008, said:

Now, there is one thing worth pointing out in there in defense of Mr. Yoo, who, as any good attorney would, has, I presume, not felt free to explain and defend himself on the point. I can do this in my capacity essentially as the client on this opinion [addressed to Alberto Gonzales, dated August 1, 2002]. ...

In defense of Mr. Yoo, I would simply like to point out that is what his client asked him to do. So it is the professional obligation of the attorney to render the advice on the subjects that the client wants advice on.<sup>141</sup>

### ***The OLC's Examination of Executive Authority to Take Action Post-September 11***

In a memo to Associate Attorney General David Kris, dated September 25, 2001 — two weeks after September 11 — Yoo wrote that the Foreign Intelligence Surveillance Act (FISA), the U.S. law outlining the procedures and requirements for intelligence collection by the government, could be amended unilaterally by the executive without violating the Constitution,<sup>142</sup> even though under the Constitution, only Congress could lawfully amend a statute. The memo asserted that constitutional standards had “shifted” in the aftermath of September 11. While analyzing the constitutionality of the proposed FISA change, Yoo wrote:

It is not unconstitutional to establish a standard for FISA applications that may be less demanding than the current standard, because it seems clear that the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks.<sup>143</sup>

A month later, OLC issued a memo that further demonstrated its view that September 11 had changed the application of constitutional considerations in matters of national security and foreign affairs.<sup>144</sup> This later memo, co-authored by Yoo and Special Counsel Robert J. Delahunty, advised:

- The president had ample authority to deploy military force against terrorist

threats within the United States. The AUMF had recognized that the president may deploy military force domestically to prevent and deter similar terrorist attacks.<sup>145</sup>

- The Posse Comitatus Act, 18 U.S.C. § 1385, which prohibits the use of the Armed Forces for domestic law-enforcement purposes, does not limit the ability of the president to utilize the military domestically against international and foreign terrorists operating within the United States.<sup>146</sup>
- The Fourth Amendment does not apply to domestic military operations against terrorists. “In our view, however well suited the warrant and probable cause requirements may be as applied to criminal investigations or to other law enforcement activities, they are unsuited to the demands of wartime and the military necessity to successfully prosecute a war against an enemy.”<sup>147</sup>
- The First Amendment protections of freedom of the press and freedom of speech may also be subordinated to the overriding need to wage war successfully.<sup>148</sup>

In a memo to the deputy counsel of the president dated September 25, 2001, Yoo laid out an expansive view of presidential authority to conduct military operations.<sup>149</sup> The memo argued that:

- The AUMF passed by Congress on September 14, 2001, and the War Powers Resolution (WPR) of 1973 (50 U.S.C. §§ 1541–48) did not grant power to the president but were acknowledgments of the president’s inherent executive power.<sup>150</sup>
- “The President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, *whether or not they can be linked to the specific terrorist incidents of September 11.*”<sup>151</sup>
- “[The Constitution’s] enumeration of the Treaty and Appointments Clauses only dilutes the unitary nature of the executive branch in regard to the exercise of those powers.”<sup>152</sup>
- “The Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people whether at home or overseas.”<sup>153</sup>
- “Neither [the WPR nor the AUMF] can place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response.”<sup>154</sup>

A November 5, 2001 memo, again co-authored by Yoo and Delahunty, advised the senior associate counsel to the president and NSC legal adviser that the client, the president of the United States, had the authority to unilaterally suspend articles of the Anti-Ballistic Missile Treaty, to which the United States is a party.<sup>155</sup> The memo’s authors concluded that “amending” the treaty would require Senate advice and consent, whereas wholesale suspension of articles included in the treaty did not.<sup>156</sup>

## **The First Detainee Legal Considerations**

Several weeks passed after September 11 before OLC first considered the issue of detainees. The invasion of Afghanistan by the U.S. military began on October 7, 2001. Ten days later, General Tommy Franks, the commander of U.S. forces in Afghanistan, ordered his troops to apply the requirements of the Geneva Conventions to all detainees in the theater of operations.<sup>157</sup>

### ***Establishing Military Commissions***

The first known OLC opinion pertaining to detainees is dated November 6, 2001.<sup>158</sup> The memo advised that individuals captured in connection with the September 11 attacks could be subject to a trial before a military court.<sup>159</sup> The memo found the authority for doing so in 10 U.S.C. § 821 (2000) and, moreover, within the president's inherent commander in chief powers, provided that the laws of war were in effect.<sup>160</sup> And, the memo asserted, there existed ample evidence and ample bases to find that the laws of war were in effect.<sup>161</sup> Furthermore, it stated, even if Congress had not authorized the creation of military commissions pursuant to § 821, the president nevertheless had the authority to convene them by view of his plenary constitutional authority.<sup>162</sup> One week later, the president authorized the secretary of defense to establish military commissions.<sup>163</sup> On perhaps a related note, Yoo is believed to have issued a still-classified memo to the DOD general counsel on possible criminal charges against John Walker Lindh, the so-called "American Taliban," on or about December 21, 2001.<sup>164</sup>

### ***Detainee Rights to Habeas Review***

Proposals were under consideration in late 2001 to detain alleged Al Qaeda and Taliban members at Guantánamo Bay, Cuba. OLC was asked to consider whether federal courts would entertain a writ of *habeas corpus* filed on behalf of alien detainees at Guantánamo.<sup>165</sup> The memo's authors acknowledged that, were a federal court to take jurisdiction, it could review the constitutionality, the detention, and use of military commissions.<sup>166</sup> The late-December 2001 memo concluded:

[T]he great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo]. Nonetheless, we cannot say with absolute certainty that any such petition would be dismissed for lack of jurisdiction. A detainee could make a non-frivolous argument that jurisdiction does exist. . . . While we believe that the correct answer is that federal courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States, there remains some litigation risk that a district court might reach the opposite result.<sup>167</sup>

On this point the Supreme Court would later explicitly reject OLC's position.<sup>168</sup>

### **Application of the Geneva Conventions to Al Qaeda and Taliban**

When evaluating the legal analysis that led to OLC's advice on the application of the Geneva Conventions to Al Qaeda and Taliban detainees, it is important to note that the first memo, and several subsequent memos produced by OLC on this matter, are believed to still be classified.<sup>169</sup> Currently pending Freedom of Information Act (FOIA) litigation indicates that an OLC memo

may exist, dated November 21, 2001, written by John Yoo to White House Counsel Alberto Gonzales.<sup>170</sup> The substance of the memo is believed to address the War Crimes Act, Hague Convention, Geneva Conventions, the federal criminal code and detainee treatment.<sup>171</sup>

The question of the application of the Geneva Conventions to detainees is noteworthy as it produced disagreement within the federal government on the topic of detainee treatment for the first time post-September 11.<sup>172</sup> The disagreement extended both to the adequacy of OLC's legal advice and the policy it suggested. The first known OLC opinion on the topic was a draft memo dated January 9, 2002, from Yoo and Delahunty to DOD's Jim Haynes.<sup>173</sup> A subsequent, virtually identical, version of the memo came from Bybee addressed to Haynes and Gonzales on January 22, 2002.<sup>174</sup> The memo concluded that the treaties to which the United States was a party did not protect members of Al Qaeda or the Taliban. The legal rationale differed slightly for Al Qaeda and Taliban members: Al Qaeda members were not entitled to the protections of the Conventions since Al Qaeda was neither a state actor nor a signatory to any treaty. For Taliban members, Afghanistan's status as a failed state and the Taliban's failure to establish a government provided the legal grounds to find that members of the Taliban militia were also not entitled to the POW status described in the Conventions. The Taliban "was more akin to a non-governmental organization that used military force" and thus "its members would be on the same legal footing as Al Qaeda."<sup>175</sup>

The memo explicitly took no position whether, as a matter of policy, the U.S. military should adhere to the standards of conduct outlined in the treaties.<sup>176</sup> The memo went so far as to state even if the treaty *were* applicable, OLC found the president had the plenary constitutional power to suspend treaty obligations toward Afghanistan until the war's end.<sup>177</sup> The memo went on to assert that customary international law had no binding effect on either the president or the military, as "[international law] is not federal law, as recognized by the Constitution."<sup>178</sup>

William H. Taft IV, the legal adviser to the State Department, having read OLC's guidance on the application of the Geneva Conventions, sent Yoo a memo with notes on January 11.<sup>179</sup> Taft's memo was highly critical of OLC's legal analysis.

- "Both the most important factual assumptions on which your draft is based and its legal analysis are seriously flawed."<sup>180</sup>
- "The draft memorandum badly confuses the distinction between states and government in the operation of the law of treaties. Its conclusion that 'failed states' cease to be parties to treaties they have joined is without support."<sup>181</sup>
- "Its argument that Afghanistan became a 'failed state' and thus was no longer bound by treaties to which it had been a party is contrary to the official position of the United States, the United Nations and all other states that have considered the issue."<sup>182</sup>
- "In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the Conventions. I have no doubt we can do so here, where a relative handful of persons is involved."<sup>183</sup>

- “Only the utmost confidence in our legal arguments could, it seems to me, justify deviating from the United States unbroken record of compliance with the Geneva Conventions in our conduct of military operations over the past fifty years. Your draft acknowledges that several of its conclusions are close questions. The attached draft comments will, I expect, show you that they are actually incorrect as well as incomplete.”<sup>184</sup>

Taft's draft comments proceeded as a wholesale repudiation of Yoo's premise: (1) that Afghanistan ever ceased to be a party to the Geneva Conventions; (2) that the president had the ability to suspend articles of the Geneva Conventions or the Conventions in their entirety; and (3) disputing the position that customary international law had no legally binding effect on the United States.<sup>185</sup>

After Taft's complaints, several still-classified memos were then believed to have been exchanged between the parties involved in advising on this issue:

- On January 11, 2002, Bybee is believed to have authored a memo to Gonzales on the authority of DOJ (including OLC and the attorney general) and DOS to interpret treaties and international law.<sup>186</sup>
- The same day, January 11, 2002, Yoo authored a memo to Gonzales discussing the Geneva Conventions.<sup>187</sup>
- Three days later, Yoo sent a memo to Taft on the prosecution of Al Qaeda members under the War Crimes Act.<sup>188</sup>
- Two days after Bybee's January 22 memo, Yoo is believed to have sent Gonzales a memo on the topics of the Geneva Conventions and POWs.<sup>189</sup>
- That same day, January 24, 2002, Yoo also sent a memo to the office of the deputy attorney general discussing the application of international law.<sup>190</sup>

On January 18, 2002, White House Counsel Alberto Gonzales advised the president that GCIII did not apply to Al Qaeda or the Taliban and the president concurred.<sup>191</sup> The next day, Secretary of Defense Donald Rumsfeld rescinded the order that the Geneva Conventions were to be applied to detainees in the field, which had originally been issued by General Tommy Franks on October 17.<sup>192</sup> Secretary of State Colin Powell requested the president reconsider his decision and find instead that GCIII did apply or, in the alternative, that a military board, on a case-by-case basis, should determine whether Al Qaeda and Taliban fighters were prisoners of war under GCIII.<sup>193</sup>

Gonzales drafted a memo for the president on the matter and sent it to Powell for comment.<sup>194</sup> This draft memo advised that the positives of concluding GCIII didn't apply preserved “flexibility” and “substantially reduce[d] the threat of domestic criminal prosecutions under the WCA.”<sup>195</sup> The memo provided arguments in support of the secretary of state's contrary position but, Gonzales wrote, he found those arguments unpersuasive.<sup>196</sup> In support of Powell's position, the memo states,

“A determination that [GCIII] does not apply to Al Qaeda and the Taliban

could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries.”<sup>197</sup>

In his written comments the following day to Gonzales’s draft memo, Powell expressed concern that “the draft does not squarely present to the president the options that are available to him.”<sup>198</sup> Powell believed the president should determine GCIII applied because a failure to do so would “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.”<sup>199</sup>

Attorney General John Ashcroft weighed in on the matter, sending a letter to President Bush dated February 1, 2002.<sup>200</sup> By that time, Ashcroft wrote it was his understanding that “the [president’s] decision that al Qaeda and Taliban detainees are not prisoners of war remains firm. However, reconsideration is being given to whether [GCIII] applies to the conflict in Afghanistan.”<sup>201</sup> He advised “a determination that [GCIII] does not apply, will provide the United States with the highest level of legal certainty available under American law.”<sup>202</sup> Moreover, he added, opting out of Geneva “would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention or interrogation of detainees.”<sup>203</sup>

As the debate seemed to have shifted during the exchange of the several memos, Taft, in a doomed effort to return the debate to its earlier stage, sent a memo to Gonzales the following day:<sup>204</sup>

The paper should make clear that the issue for decision by the President is whether the Geneva Conventions apply to the conflict in Afghanistan in which U.S. armed forces are engaged. ... The structure of the [current] paper suggesting a distinction between our conflict with Al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions.<sup>205</sup>

The debate finally concluded when, on February 7, 2002, the president signed a memo in which he determined none of the provisions of the Geneva Conventions would apply to members of Al Qaeda.<sup>206</sup> Additionally, the president determined that Common Article 3 would not apply to either Al Qaeda or Taliban detainees.<sup>207</sup> Furthermore, the president determined Taliban detainees were unlawful combatants and did not qualify as POWs under Article 4 of GCIII.<sup>208</sup> Finally, the president did determine that the Geneva Conventions would apply to the present conflict with the Taliban but he reserved the right to unilaterally suspend the Geneva Conventions between the United States and Afghanistan at a later time.<sup>209</sup>

On February 7, in response to the president’s decision, OLC issued a memo to Gonzales concluding that the president had reasonable factual grounds to determine that no members of the Taliban were entitled to prisoner of war status under GCIII Article 4 and that there existed no reason to convene a tribunal under GCIII Article 5 to determine the status of Taliban detainees.<sup>210</sup> The categorical determination that all detainees were not POWs, absent an Article 5 hearing, effectively rendered GCIII moot. Notably, throughout and on all sides of the debate amongst the small group of individuals involved, no consideration was given to the application of GCIV to Afghan civilians. All captured Afghans were assumed to be either Al Qaeda or

Taliban members. From known records, it apparently did not occur to any of the participants in the debate that Afghan civilians, unaffiliated with either organization, could be picked up and detained. Absent guidance on lawful detainee treatment under existing U.S. and international law, OLC would soon set out on the task of fashioning new legal parameters.

## Detainee Interrogation Policy is Established in the Absence of the Geneva Conventions

Once the federal government determined the Geneva Conventions would not apply to detainees, it found it necessary to generate its own detainee policy. A comprehensive policy would not be crafted in advance; rather, memorandum by memorandum, issues involving detainees were addressed piecemeal as they arose. OLC addressed a wide range of policy questions, even going so far as to wade into the minutiae of specific interrogation tactics.

### Legal Status and Legal Rights Afforded to Detainees

In a February 26, 2002, memo, Bybee advised that the Self-Incrimination Clause of the Fifth Amendment was not applicable in the context of a trial by military commissions.<sup>211</sup> While broadly addressing legal constraints applicable to all interrogations, the memo also focused on the case of John Walker Lindh, an American citizen captured while serving with the Taliban.<sup>212</sup>

Finally, we note that even if the Government did in fact violate Rule 4.2 by having military lawyers interrogate represented persons (including Mr. Walker) without consent of counsel, it would not follow that the evidence obtained in that questioning would be inadmissible at trial.<sup>213</sup>

A March 5, 2002, still-classified memo from OLC addressed the availability of *habeas corpus* relief to detainees.<sup>214</sup> Additionally, a March 28, 2002, memo from Yoo to Taft on an unknown topic remains classified.<sup>215</sup> When Sen. Patrick Leahy proposed a bill, the Swift Justice Authorization Act, which would vest in the president the authority to detain certain individuals involved in terrorist acts and establish military commissions, OLC saw the bill as an unconstitutional interference in the president's exercise of his commander in chief authority.<sup>216</sup> The OLC memo, written April 8, 2002, pushed back against the legislation. Congress "cannot constitutionally restrict the President's authority to detain enemy combatants or to establish military commissions."<sup>217</sup> The memo is consistent with the reasoning found in OLC's October 2001 memo, which, by contrast, approvingly viewed the AUMF as appropriate congressional action. The AUMF, the October 2001 memo found, had merely *acknowledged* the president's inherent constitutional authority.<sup>218</sup> The April 8 memo, written by Patrick Philbin, a deputy assistant attorney general with OLC, adopted similar logic:

If [the Swift Justice Authorization Act] merely reaffirmed the President's existing authority, it would likely do no harm. As drafted, however, the proposed legislation attempts to impose substantive limits on the President's authority that ... are unconstitutional.<sup>219</sup>

The case of John Walker Lindh was not the only instance when OLC considered how the United States could legally treat its own citizens involved in terrorist activities. The issue arose again

when Jose Padilla was captured by federal officials on May 8, 2002.<sup>220</sup> In federal court in August of 2007, despite his pleas, Padilla, an American citizen, was found guilty of providing material support to terrorists. At the time of his arrest at Chicago O'Hare International Airport in May of 2002, a material-witness warrant had been issued for him in connection with an on-going grand jury investigation of the September 11 terrorist attacks.<sup>221</sup> On May 22, 2002, Padilla's lawyer moved to vacate the warrant and submitted a motion to that effect on June 7, 2002.<sup>222</sup> A court conference on the motion was scheduled four days later on June 11. The conference would never take place. Instead, on June 9, the government notified the court the president had issued an order designating Padilla an enemy combatant and had directed the secretary of defense to take him into custody.<sup>223</sup>

The day before the president's order, on June 8, 2002, Bybee, in an OLC opinion addressed to Attorney General Ashcroft, determined that Padilla was "properly considered an enemy combatant and could be turned over to military authorities for detention as an unlawful enemy combatant."<sup>224</sup> The memo examined past Supreme Court jurisprudence, *Ex Parte Quirin*,<sup>225</sup> where the court had found military-commission jurisdiction existed for the defendant, and *Ex Parte Milligan*,<sup>226</sup> where the court found military-commission authority did not exist. Bybee concluded the instant case of Jose Padilla was "far closer to the scenario presented in *Quirin* than *Milligan*."<sup>227</sup> The memo further concluded that the Posse Comitatus Act, which prevents the use of the military for law enforcement purposes in the United States, "present[ed] no statutory bar to the transfer of Padilla to the Department of Defense."<sup>228</sup>

In briefings that followed to the Senate Judiciary Committee and Senate Select Committee on Intelligence, concerns were raised as to whether Padilla's transfer to the Defense Department had violated 18 U.S.C. § 4001.<sup>229</sup> That section provides, in part:

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b) (1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General. ...

Yoo's June 27, 2002, memorandum, which found the detention of enemy belligerents did not violate 18 U.S.C. § 4001(a), regardless of the belligerent's status as a U.S. citizen, echoed a familiar theme.

[T]he President's authority to detain enemy combatants, including U.S. citizens, is based on his constitutional authority as Commander in Chief. We conclude that section 4001(a) does not, and constitutionally could not, interfere with that authority."<sup>230</sup>

Yoo's memo found that plenary executive authority to detain U.S. citizens as enemy combatants "arises out of the President's constitutional status as commander in chief."<sup>231</sup> In support of this finding Yoo noted:

- Congress specifically authorized the president to use force against enemy combatants pursuant to the AUMF.<sup>232</sup>

- “[M]ilitary detention of enemy combatants serves a particular goal, one that is wholly distinct from that of detention of civilians for ordinary law enforcement purposes. The purpose of law enforcement detention is punitive. ... The purpose of military detention, by contrast, is exclusively preventive.”<sup>233</sup>
- “Nothing in section 4001 indicates that its provisions were meant to reach the President’s authority, as Commander in Chief, to detain enemy combatants. To the contrary, section 4001 addresses the Attorney General’s authority with respect to the federal civilian prison system. ... As a structural matter, the placement of section 4001(a) in the United States Code signifies it was not intended to govern the detention of enemy combatants by U.S. Armed Forces. Title 18 of the United States Code covers ‘Crime and Criminal Procedure.’ Statutes concerning military and national security, by contrast, are generally found in Title 10 (‘Armed Forces’) and in Title 50 (‘War and National Defense’).”<sup>234</sup>
- “The fact that a detainee is an American citizen, thus, does not affect the President’s constitutional authority as Commander in Chief to detain him, once it has been determined he is an enemy combatant.”<sup>235</sup>

OLC was “compelled” to conclude that Section 4001 did not interfere with what it found was the president’s plenary authority, as “statutes are not to be construed in a manner that presents constitutional difficulties so long as a reasonable alternative construction is available.”<sup>236</sup>

## Rendition

The rendition policy of the United States over the past two decades is treated in greater detail in Chapter 5 of this report. Here we address only a March 13, 2002, OLC memorandum by Bybee that would appear to underpin the so-called “extraordinary rendition” policy of the United States during the early 2000s. The question presented in the memo was whether the president had plenary constitutional authority to transfer individuals who were captured and held “outside” the United States to another country.<sup>237</sup> In this 34-page memo, OLC concluded that the commander in chief had plenary authority under the Constitution to transfer any prisoners captured during hostilities. The memo acknowledged that GCIII and CAT both regulated the transfer of enemy prisoners, but it found GCIII did not apply because of the president’s earlier determination in February that Al Qaeda and Taliban prisoners were not legally entitled to POW status within the meaning of the conventions.<sup>238</sup> Moreover, CAT “poses no obstacle to transfer” as “the treaty does not apply extraterritorially.”<sup>239</sup>

The memo limited its conclusions to those “outside” the United States as individuals within the United States “may be subject to a more complicated set of rules established by both treaty and statute.”<sup>240</sup> “We need not address” those in custody in United States territory, as Al Qaeda and Taliban prisoners were, the memo’s author found, detained *outside* of United States territory at Guantánamo Bay or in Afghanistan.<sup>241</sup> As with other determinations by OLC, the Supreme Court would later rule that Guantánamo Bay was within the jurisdiction of the U.S. courts.

## Interrogation Techniques

As controversial as OLC's legal advice may have been on many topics in the aftermath of September 11, none was more controversial than the advice it gave on the use of certain interrogation techniques for detainees. It has been reported that sometime in May 2002, attorneys from the CIA's Office of General Counsel met with Attorney General John Ashcroft, National Security Adviser Condoleezza Rice, Deputy National Security Adviser Stephen Hadley, Legal Adviser to the National Security Council John Bellinger III, and White House counsel Alberto Gonzales, and discussed interrogation methods.<sup>242</sup> The CIA had not, prior to September 11, been authorized to detain or interrogate individuals and, in fact, lacked institutional experience and expertise in doing so.<sup>243</sup>

In those meetings that discussed detainee interrogations, in the spring of 2002, an operations manual is said to have been distributed.<sup>244</sup> The operations manual, used to train American military members to withstand torture in the military's Survival, Evasion, Resistance and Escape (SERE) program, was prepared by the DOD's Joint Personnel Recovery Agency (JPRA).<sup>245</sup> OLC members also attended these meetings. Bellinger and Rice told the Senate Armed Services Committee in 2008 they either did not see or did not recall seeing the JPRA manual in these meetings.<sup>246</sup> The operations manual, dated May 7, 2002, was found in OLC's files, but it could not be determined when or how the manual came into OLC's possession.<sup>247</sup> The operations manual contained seven of the 10 interrogation techniques that OLC would approve for use on detainees at Guantánamo Bay in an August 1, 2002, memo to the CIA general counsel authored by Yoo and signed by Bybee.<sup>248</sup> Yoo recalled a conversation with Bellinger in which Bellinger told him that access to the interrogation program was extremely limited and that the Department of State should not be informed.<sup>249</sup> Unlike OLC's memo on the application of the Geneva Conventions to members of Al Qaeda and the Taliban, which had been circulated to DOS, this work would not be so circulated. A log sheet from OLC's records designated "John Rizzo Central Intelligence Agency" a client on a pending matter on April 11, 2002.<sup>250</sup>

Yoo wrote a letter to John Rizzo at the CIA on July 13, 2002.<sup>251</sup> The letter was written "in response to your inquiry at our meeting today" and discussed the legal elements incident to the crime of torture.<sup>252</sup> The letter focused on the definitions of "severe pain or suffering" within the Torture Statute (18 U.S.C. § 2340(2)).

Moreover, to establish that an individual has acted with the specific intent to inflict severe pain or suffering, an individual must act with specific intent, i.e., with the express purpose of causing prolonged mental harm in order for the use of any of the predicate acts to constitute torture. Specific intent can be negated by a showing of good faith. . . . 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 [been] 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.<sup>253</sup>

The letter concludes, "As 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."<sup>254</sup> Yoo recalled providing regular briefings about the pending memo to

Attorney General Ashcroft and Ashcroft's counselor, Adam Ciongoli.<sup>255</sup> Yoo also recalled mentioning to Ashcroft at the time that the CIA had requested advance assurances that CIA officers would not be prosecuted for the use of "enhanced interrogation techniques" (EITs).<sup>256</sup> Ashcroft was sympathetic to the CIA's request and asked Yoo if such an "advance pardon" was possible.<sup>257</sup> Yoo informed Ashcroft it was not, and that Michael Chertoff, assistant attorney general at the criminal division, had rejected the CIA's request for such an "advance pardon."<sup>258</sup> Chertoff, later confirmed as the Secretary of Homeland Security in 2005, suggested in his testimony at his Senate confirmation hearing that his only part had been to warn the CIA it had "better be careful" as it was dealing in an area where there was potential criminality.<sup>259</sup>

As interrogation policy continued to take shape, Yoo sent a still-classified memo to Gonzales on July 22, addressing the applicability of CAT.<sup>260</sup> A July 24, 2002, fax was addressed to Yoo from an unknown source at the CIA and contained a six-page psychological assessment of detainee Abu Zubaydah.<sup>261</sup> It is clear, based on a subsequent OLC memo, that the fax must have come from the CIA.<sup>262</sup> Abu Zubaydah, as discussed elsewhere in this report, would later be subjected to EITs. The faxed psychological assessment posited, "He denies and there is no evidence in his reported history of thought disorder or enduring mood or mental health problems."<sup>263</sup> Also, the

subject is familiar and probably well versed regarding al-Qa'ida's detentions and resistance training materials. Thus one would expect that subject would draw upon this fund of knowledge as he attempts to cope with his own detention.<sup>264</sup>

The guidance Yoo had promised arrived on August 1, 2002, when OLC provided a letter and a memo to Gonzales at the White House, as well as a memo to Rizzo at the CIA. The White House had dictated the pace of the OLC legal analysis, demanding that one opinion be signed no later than the close of business on August 1, 2002.<sup>265</sup> Yoo, with the assistance of a still-classified OLC line attorney, had completed the first draft of the memo to Gonzales on April 30, 2002, followed by drafts on May 17, June 26, and July 8, 2002.<sup>266</sup> Yoo later said he did not feel pressure to complete the memoranda quickly.<sup>267</sup> Bybee later said "The memos were well underway, and we did have some — we did have some pressure at the very end."<sup>268</sup> The July 8 draft was the first draft circulated outside of OLC for comment.<sup>269</sup> In emails to the unnamed OLC line attorney, Yoo referred to the memo to Gonzales as "the bad things" opinion. On Friday morning July 12, 2002, Yoo emailed, "Let's plan on going over [to the White House] at 3:30 to see some other folks about the bad things opinion."<sup>270</sup> Yoo was uncertain who, other than either Addington or Flanigan, attended the July 12, 2002, White House meeting.<sup>271</sup> Of the attorney general, Bybee later recalled:

We advised the Attorney General. He was generally aware that the memo was being prepared. I advised him of the substance of our advice; and the Attorney General, the one comment that has stuck with me that I remember was the Attorney General said something to the effect that he was sorry that this was necessary.<sup>272</sup>

The 50-page memo to Gonzales, signed by Bybee, examined, generally, behavior under the Torture Statute to address which actions would be torture under the law and which would not.<sup>273</sup> The memo began by examining the text and meaning of the Torture Statute. It is from this memo that OLC derived its definition of torture. The memo was concerned with CAT only insofar as it was implemented by the Torture Statute. It concluded that:

- Acts intended to inflict severe pain or suffering, whether mental or physical, must be of an extreme nature to rise to the level of torture under the law.
- Certain acts may be cruel, inhuman or degrading, but will not produce pain and suffering of the requisite intensity to fall within the Torture Statute's proscription against torture.
- Pain, be it physical or mental, must be "severe" to meet the definition of torture.
- Congress's use of the phrase "severe pain" elsewhere in the U.S. Code sheds light on its meaning; the phrase "severe pain" appears in statutes defining an emergency medical condition for the purpose of providing health benefits.
- Although the health care statutes address a substantially different subject from the Torture Statute, they are nonetheless helpful for understanding what constitutes severe physical pain. The health care statutes treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure, or the permanent impairment of a significant body function.
- 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.
- For purely mental pain or suffering to amount to torture under the Torture Statute, it must result in significant psychological harm of significant duration lasting for months or even years.
- CAT only requires general intent, but the specific-intent language found in the legislative history of the United States' ratification reservation means a perpetrator must have specific intent to cause "severe" pain.
- In determining what actions reach the threshold of torture in the criminal context, courts are likely to take a totality-of-the-circumstances approach to determine whether the Torture Statute has been violated.
- The Torture Statute may be unconstitutional if applied to interrogations of detainees undertaken pursuant to the president's constitutional commander in chief power to conduct a military campaign.
- Under the current circumstances in the War on Terror, even if an interrogation method crossed the line drawn by the Torture Statute, a defendant might be able to utilize certain justification defenses, the defense of necessity or self-defense, to eliminate criminal liability.

The July 8 draft and earlier drafts of the memo had not discussed the president's constitutional power as commander in chief to conduct a military campaign nor had they addressed possible defenses to violations of the torture statute.<sup>274</sup> Those sections were added only after a July

16, 2002, meeting Yoo had at the White House.<sup>275</sup> The OLC line attorney who assisted Yoo in drafting those two additional sections did not believe they had been added in response to any request from the White House, NSC or CIA.<sup>276</sup> Similarly, Yoo was “pretty sure” those sections were added because he, Bybee and Philbin “thought there was a missing element to the opinion.”<sup>277</sup> Bybee and Philbin did not know or did not recall why the two sections had been added.<sup>278</sup> When Philbin inquired about the two sections and was critical of their inclusion in the August 1, 2002, memo to Gonzales, Yoo had told him, “They want it in there.”<sup>279</sup> Philbin hadn’t inquired further about who Yoo meant when he referred to “they.”<sup>280</sup> In his testimony before the House Judiciary Committee in June 2008, David Addington recalled that he told Yoo, in July 2002, “Good, I’m glad you’re addressing these issues” when he learned Yoo planned to include in the memo possible defenses to the Torture Statute and discussion of the plenary authority of the president.<sup>281</sup>

Earlier drafts of the August 1, 2002, memo to Gonzales had been addressed to John Rizzo at the CIA but, as Rizzo would later state, the CIA did not want an unclassified memo as it would have confirmed the existence of a classified program.<sup>282</sup> The recipient of the memo was changed to Gonzales.

A six-page letter to Gonzales dated August 1, 2002, accompanied the memo and supplemented it, addressing the legality of interrogation methods under international law.<sup>283</sup> This six-page letter was authored by Yoo and frequently refers to Bybee’s longer, 50-page memo addressed to Gonzales. Specifically, the letter provided an opinion on whether methods, found not to have violated the Torture Statute, could either (a) violate the United States’ obligations under CAT or (b) create the basis for prosecution by the International Criminal Court (ICC).<sup>284</sup> Yoo advised that interrogation methods that comply with the Torture Statute would not violate international obligations under CAT because of the specific understandings attached by the United States to the instrument of ratification.<sup>285</sup> Additionally, actions taken as part of an interrogation of an Al Qaeda member did not fall within the ICC’s jurisdiction.<sup>286</sup> Yoo’s letter cautioned

We cannot guarantee, however, that the ICC would decline to investigate and prosecute interrogations of al Qaeda members. ... We cannot predict the political actions of international institutions.<sup>287</sup>

The August 1 memo and supplemental letter to Gonzales did not address the application of specific interrogation methods to a detainee. Those were discussed in a separate OLC memo, also dated August 1, 2002, addressed to Rizzo.<sup>288</sup> The Rizzo memo, in three parts, directly addressed the proposed interrogation of Abu Zubaydah. On July 24, 2002, Yoo had telephoned Rizzo and told him that six enhanced interrogation techniques were approved for use on Abu Zubaydah: attention grasp, walling, facial hold, facial slap, cramped confinement and wall standing.<sup>289</sup> As for other techniques, Yoo told Rizzo that DOJ was waiting for more data from the CIA.<sup>290</sup> At some point thereafter, Rizzo remembered Yoo asking how important a specific, still-classified interrogation technique was to the CIA, because it would “take longer” to complete the memorandum if it were included.<sup>291</sup> The legal analysis contained in the memo to Rizzo is identical to the legal analysis in the Gonzales memo of the same date. It is extremely informative to see the analysis applied in a practical model.

The initial de-classified release of the memo to Rizzo was heavily redacted. It began “You have asked for this Office’s views on whether certain proposed conduct would violate the prohibition

against torture. ... This letter memorializes our previous oral advice given on July 24, 2002 and July 26, 2002.”<sup>292</sup> It continued: “Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. If these facts were to change, this advice would not necessarily apply.”<sup>293</sup>

- The memo stressed that Abu Zubaydah appeared to have vital intelligence, that terrorist “chatter” existed at a level equal to that prior to September 11, and that Abu Zubaydah had become accustomed to traditional interrogation techniques.
- As part of an “increased pressure phase” Abu Zubaydah would have contact only with an interrogation specialist and a training psychologist, versed in the military’s SERE program. The phase would likely last no more than a few days but could last up to 30 days.
- The interrogation during this phase would utilize 10 techniques including (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard.<sup>294</sup>
- In the second part of the memorandum, OLC reviewed the context in which the procedures would be applied, discussing, at length, Abu Zubaydah’s psychological assessment.<sup>295</sup> It stressed that these techniques were used on military members during their SERE training and no substantiated reports of long-term mental harm have followed. The memo also highlighted that interrogators have consulted experts to ensure no long-term harm would result from these interrogation methods.
- The memo to Rizzo determined no specific intent to cause severe pain or suffering appeared to be present in the application of these methods. It reiterated that an individual must have the specific intent to cause prolonged harm or suffering as required under the statute.<sup>296</sup>

In the August 1, 2002, memoranda from Bybee to Rizzo, by stating “if these facts were to change, this advice would not necessarily apply,” OLC had placed itself as a necessary involved party in all future interrogations involving enhanced interrogation techniques. In April 2003, in response to a review of the CIA’s detention and interrogation program by the CIA inspector general, OLC attorneys worked with attorneys from the CIA’s Counter Terrorism Center to draft a list of “bullet points” summarizing OLC’s guidance to the CIA.<sup>297</sup> That document, however, was unsigned, undated, and not drafted on OLC stationary. OLC later disavowed the bullet points after Yoo no longer worked at OLC.<sup>298</sup> Apart from the April 2003 bullet points, any continuing legal advice after August 1, 2002, from OLC on the conduct of interrogations remained classified until late 2003 — with one notable exception.

That notable exception came on March 14, 2003, when Yoo wrote an 81-page memo to Haynes.<sup>299</sup> It was born out of the significant disagreement [discussed in greater detail in Chapter 1] amongst several Pentagon lawyers that arose once the August 2002 OLC advice became known. Military attorneys (JAGs) and several federal civilian attorneys believed OLC’s

legal guidance was inadequate. A “working group” was established in January 2003 at the Pentagon to examine the domestic and international laws that applied to detainee policy. Yoo’s March 14 memo addressed precisely that subject.

Yoo’s advice to Haynes on the domestic and international law applicable to the interrogation of detainees by military members mirrored the advice provided in Bybee’s August 1 memo to Gonzales. Yoo advised:

- The Fifth and Eighth Amendments did not extend to enemy combatants held abroad, nor did generally applicable criminal laws apply to the interrogation of alien unlawful combatants held abroad. Any law that purported to do so would conflict with the president’s plenary authority as commander in chief.
- CAT’s requirement that signatories undertake to prevent “cruel, inhuman, or degrading treatment or punishment” extends only to conduct that is “cruel and unusual” under the Eighth Amendment or otherwise shocks the conscience” under the Due Process Clauses of the Fifth and 14th Amendments.
- Customary international law supplies no additional standards to the interrogation of detainees, and in any event, customary international law is not federal law and could be overridden by the president.
- Even if criminal prohibitions applied, the defenses of necessity or self-defense could provide justifications for any criminal liability.<sup>300</sup>

Despite disagreements between OLC and attorneys at the Pentagon, on April 16, 2003, the state of flux surrounding the federal government’s detainee interrogation policy ended when Rumsfeld authorized 24 of 35 previously unapproved interrogation techniques for Guantánamo detainees. In July 2003, the CIA’s general counsel, likely relying on the bullet points, briefed “senior Administration officials” on the expanded use of EITs, and, at that time, according to the CIA’s inspector general, the attorney general is said to have affirmed that the CIA’s proposed conduct remained well within the advice provided in OLC’s August 1, 2002, opinion.<sup>301</sup>

## Evolution of Legal Advice Governing Detainee Treatment

The legal advice pertaining to detainees changed as both OLC’s personnel changed and as OLC reacted to events such as Supreme Court rulings.

### Jack Goldsmith III Replaces Jay Bybee

In late May 2003, Yoo resigned from OLC and returned to his teaching position at Berkeley.<sup>302</sup> Bybee had already departed OLC on March 28, 2003, after his confirmation as a judge on the U.S. Court of Appeals for the Ninth Circuit.<sup>303</sup> Gonzales had wanted Yoo to take over from Bybee.<sup>304</sup> Ashcroft reportedly objected to Yoo’s appointment because he believed Yoo was too close to the White House and wanted his counselor, Adam Ciongoli, to take the job instead.<sup>305</sup> Gonzales, alternatively, was opposed to Ciongoli’s appointment because he felt Ciongoli was

too close to Ashcroft.<sup>306</sup> Bybee's replacement, Jack Goldsmith III, was eventually suggested as a compromise candidate.<sup>307</sup> Goldsmith had been working for Haynes at the DOD's Office of General Counsel since September 2002, and he began his tenure leading OLC on October 6, 2003.<sup>308</sup>

In late October 2003, a few weeks into his new position, Goldsmith is believed to have received a still-classified memo on the Geneva Conventions from an unidentified individual within OLC.<sup>309</sup> In mid-November 2003, Goldsmith and Robert Delahunty are believed to have sent a still-classified memo to the DOD on the application of the Geneva Conventions. Goldsmith asked Patrick Philbin to bring him copies of any OLC opinions that might be problematic, and Philbin gave Goldsmith copies of OLC's August 1, 2002, memoranda sometime in December 2003.<sup>310</sup> In his book *The Terror Presidency*, Goldsmith wrote that by December 2003 he had determined that some of OLC's legal opinions would need to be withdrawn and replaced.<sup>311</sup> Goldsmith called Haynes to inform him that the Defense Department should not rely on Yoo's March 2003 memo.<sup>312</sup> When Haynes asked what was wrong with the opinion, Goldsmith responded, "There are many potential problems with it."<sup>313</sup>

On March 2, 2004 the CIA's Office of General Counsel sent a fax to Goldsmith asking OLC to reaffirm the guidance provided in the two August 1 memos, the August 1 letter from Yoo, and the still-classified June 2003 memo.<sup>314</sup> The fax stated:

We rely on the applicable law and OLC guidance to assess the lawfulness of detention and interrogation techniques. ...

in addition to the sitting and kneeling stress positions discussed earlier with OLC, the Agency has added to its list of approved interrogation techniques two standing stress positions involving the detainee leaning against a wall. We also would like to share with you our views on three additional interrogation techniques ... and two uses of water not involving the waterboard.<sup>315</sup>

One of the uses of water described in the fax was "pouring, flicking, or tossing (*i.e.*, water PFT)," where up to one pint of potable water would be used to startle, humiliate and cause insult.<sup>316</sup> The other technique was called "water dousing," where a detainee, dressed or undressed, would be restrained by shackles and/or interrogators while potable water was poured on the detainee from a container or garden hose.<sup>317</sup>

March 2004 undoubtedly had to have been a particularly stressful time at OLC. Ashcroft was unexpectedly hospitalized and in poor health. In Ashcroft's absence, Deputy Attorney General James Comey had become the acting attorney general. On March 11, 2004, a still-classified intelligence program, believed to be a National Security Agency (NSA) program, was set to expire.<sup>318</sup> Comey and Ashcroft, the week before the March 11 deadline, and prior to Ashcroft's illness, had discussed and agreed that certain aspects of the secret intelligence program could not be certified lawful by DOJ, as required to renew the program.<sup>319</sup> Comey had so informed the White House. On the evening of March 10, 2004, Gonzales and White House Chief of Staff Andrew Card went to visit Ashcroft at his hospital room. When the two men arrived, Comey, Goldsmith and Philbin were already in the room.<sup>320</sup> Comey dramatically testified to the Senate Judiciary Committee that he had run up the stairs of the hospital when he arrived to Ashcroft's

**“The IG found the CIA had ‘failed to provide adequate staffing, guidance and support to those involved with the detention and interrogation of detainees.’”**

bedside in the intensive care unit, worried that, if the White House staff arrived there first, they might ask Ashcroft, in his compromised medical state, to overrule him on the classified program.<sup>321</sup> Gonzales did ask Ashcroft to authorize the secret program and was rebuffed by Ashcroft.<sup>322</sup>

Goldsmith sent a series of still-classified memos: one on March 11 to Gonzales clarifying OLC advice on classified foreign intelligence activities and one to Comey on classified foreign intelligence activities dated March 12.<sup>323</sup> On Saturday March 13, Goldsmith phoned Comey at home and asked to meet with him that same day.<sup>324</sup> Philbin and Goldsmith discussed with Comey problems that existed in the Yoo memo.<sup>325</sup> Goldsmith felt the memo's discussion of presidential powers was incorrect, that there were problems with the memo's discussion of possible defenses, and that the memo had arrived at an unduly high threshold for the application of the term "severe pain."<sup>326</sup> A still-classified memo from Goldsmith to Comey on OLC views regarding legal issues concerning classified foreign intelligence activities (followed on March 15).<sup>327</sup> Comey, in turn, sent to Gonzales a still-classified memo containing legal recommendations regarding classified foreign intelligence activities.<sup>328</sup>

On March 18, 2004, Goldsmith authored a memo on the application of GCIV to the conflict in Iraq.<sup>329</sup> Notably, in contrast with OLC's advice in late 2001, this memo considered and concluded that the Convention *did* apply to the United States' occupation of Iraq. Both the United States and Iraq had ratified GCIV.<sup>330</sup> U.S. nationals, foreign nationals of a state not bound by GCIV, and nationals of a co-belligerent state were *not* "protected persons" within the meaning of GCIV, the memo argued. However, it found, Iraqi nationals and permanent residents of Iraq *would be* protected.<sup>331</sup> Thus, Al Qaeda operatives — those who were Iraqi nationals or permanent residents — would be protected, the memo reasoned. It is a contrast from earlier OLC memos, not only in its finding that an existing international convention affected the options on U.S. action, but also because nowhere in the memo was the president's plenary authority as commander in chief discussed. "They're going to be really mad," Philbin told Goldsmith. "They're not going to understand our decision. They've never been told 'no.'" <sup>332</sup> Members of the War Council were, indeed, not pleased. "Jack, I don't see how terrorists who violate the laws of war can get the protections of the laws of war," Gonzales told Goldsmith.<sup>333</sup> Of Addington, Goldsmith observed

If Gonzales seemed puzzled and slightly worried, David Addington was just plain mad. "The President has already decided that terrorists do not receive Geneva Convention protections," he barked. "You cannot question his decision."<sup>334</sup>

The next day Goldsmith followed up with a draft memo on the permissibility of transferring persons to and from Iraq.<sup>335</sup> GCIV prohibited "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory ... regardless of motive."<sup>336</sup> The memo advised that the United States may "remove 'protected persons' who are illegal aliens from Iraq pursuant to local immigration law."<sup>337</sup> Additionally, the temporary relocation of "protected persons" who have not been accused of an offense to another country, for a brief but not indefinite period, to facilitate interrogation, was deemed permissible.<sup>338</sup>

Two still-classified documents were later exchanged. Goldsmith sent a memo to the deputy assistant attorney general on March 22, 2004, confirming oral advice provided by OLC concerning classified foreign intelligence activities.<sup>339</sup> Eight days later, the deputy assistant attorney general briefed and summarized OLC's conclusions regarding a terrorist surveillance program for the attorney general in a still-classified document.<sup>340</sup>

It is worth noting that, in April 2004, the Abu Ghraib scandal became public knowledge and Goldsmith reportedly went to work on a replacement draft for the August 1, 2002, Gonzales memo assisted by then-Principal Deputy Assistant Attorney General Steven Bradbury, who would later become OLC's acting assistant attorney general.<sup>341</sup> On May 6, 2004, Goldsmith sent a still-classified document to the attorney general consisting of a legal review of classified foreign intelligence activities.<sup>342</sup>

In May 2004, the CIA inspector general (IG) released a report critical of the CIA's interrogation program. The report focused on the period after September 11 up through October 2003.<sup>343</sup> Its conclusions were startling. The IG found the CIA had "failed to provide adequate staffing, guidance and support to those involved with the detention and interrogation of detainees. ... Unauthorized, improvised, inhumane and undocumented detention and interrogation techniques were used."<sup>344</sup> CIA officials had "neither sought nor been provided a written statement of policy or a formal signed update of the DOJ legal opinion, including such important determinations as the meaning and applicability of Article 16 of [CAT]."<sup>345</sup> The inspector general discovered CIA officers at different levels were concerned that they would be vulnerable to legal action in the United States or abroad in the future.<sup>346</sup>

Although the current detention and interrogation Program has been subject to DOJ legal review and Administration political approval, it diverges sharply from previous Agency policy and practice, rules that govern interrogations by U.S. military and law enforcement officers, statements of U.S. policy by the Department of State, and public statements by very senior U.S. officials, including the President, as well as the policies expressed by Members of Congress, other Western governments, international organizations, and human rights groups.<sup>347</sup>

Goldsmith sent a letter to the IG in late May and asked to review the description of OLC's advice contained in the report and provide comment before the report would be sent to Congress.<sup>348</sup> He sent Scott Muller at the CIA Office of General Counsel (OGC) a letter two days later advising the CIA to suspend the use of the waterboard technique "until we have had a more thorough opportunity to review the Report and the factual assertions in it" and ensure, with respect to the other nine enhanced interrogation techniques, that they be used in accordance with the OLC's August 2002 memo.<sup>349</sup> Goldsmith talked with Yoo by telephone on June 9, 2004, about the bullet points OLC had helped craft in the spring of 2003.<sup>350</sup> Yoo told Goldsmith that the bullet points did not constitute the official views of OLC.<sup>351</sup> The following day, 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."<sup>352</sup> Four days later, Muller responded to Goldsmith that the bullet points had been jointly prepared by OLC and the CIA OGC, that OLC knew they would be provided to the CIA IG for the purposes of the IG's report, and that the bullet points had been used in a briefing slide at a July 2003 meeting attended by the vice president, the national security advisor, the attorney general, the director of the CIA, Patrick Philbin, and others.<sup>353</sup> The following day, the CIA OGC informed OLC that, because the offices had different views about the legal advice OLC had previously provided, the CIA would not be a joint signatory in a letter to the CIA IG.<sup>354</sup> OLC's comments and requested changes to the CIA IG report would later be submitted separately as an attachment to the report.

On June 8, 2004, *The Washington Post* reported that a secret August 2002 DOJ memo had authorized torture.<sup>355</sup> Five days later, the August 1, 2002, memo to Gonzales was posted to the *Post's* website.<sup>356</sup> Shortly after the leak, Goldsmith was asked by the White House to affirm the advice contained in the memo, which Goldsmith concluded he could not do.<sup>357</sup> He consulted with Comey and Philbin, who agreed with his decision and, on June 15, 2004, Goldsmith informed the attorney general and David Ayres, John Ashcroft's chief of staff, of his decision to withdraw the August 1, 2002, memorandum, and the following day offered his letter of resignation.<sup>358</sup> Goldsmith wrote of this time:

For a week I struggled with what to do. In the end I withdrew the August 2002 opinion even though I had not yet been able to prepare a replacement. I simply could not defend the opinion. ...

Ashcroft was, in context, extraordinarily magnanimous and, as always, supportive. But I sensed for the first time that he might be questioning my judgment, and I wondered when I left his office whether he would agree with my decision or exercise his prerogative to overrule me.<sup>359</sup>

The decision to withdraw the Bybee August 1 memorandum to Gonzales was formally announced that same month by Comey, who then directed OLC to prepare a replacement memorandum.<sup>360</sup> The replacement memo for the Bybee August 1 memo to Gonzales, written by Goldsmith's replacement, Daniel Levin, would be provided at the end of the year, on December 30, 2004.<sup>361</sup>

Less than two weeks after Goldsmith submitted his resignation, the Supreme Court ruled that detainees at Guantánamo Bay were indeed within the jurisdiction of the U.S. courts, which could review whether a detainee was wrongfully detained.<sup>362</sup> On July 16, Goldsmith sent to Ashcroft a still-classified memo on the implications of the recent Supreme Court decision for certain foreign-intelligence activities.<sup>363</sup> Ashcroft sent a letter dated July 22, 2004, to the acting CIA director that the interrogation of an unidentified detainee, outside territory subject to U.S. jurisdiction, would not violate the law if it utilized nine interrogation techniques (other than the waterboard) described in Bybee's August 1 memorandum.<sup>364</sup> After Goldsmith's disavowal of the bullet points, the CIA appeared to have decided to seek written approval whenever it intended to use enhanced interrogation techniques.<sup>365</sup>

### **Acting Assistant Attorney General Daniel Levin**

With the departure of Jack Goldsmith III, two acting assistant attorneys general filled the role for the remainder of the Bush presidency. Daniel Levin first served as acting assistant attorney general, from June 2004 until February 2005.<sup>366</sup> He had been chief of staff to the director of the FBI from 2001 to 2002.<sup>367</sup>

Shortly after assuming the post, on July 22, 2004, Levin worked on the preparation of a replacement memo. Levin stated that when he first read the August 1, 2002, memo to Gonzales he remembered "having the same reaction I think everybody who reads it has — 'this is insane, who wrote this?'"<sup>368</sup> He wrote to Scott Muller at the CIA requesting assistance in OLC's assessment of "whether a certain detainee in the war on terrorism may be subjected to the 'waterboard interrogation technique'" consistent with the Torture Statute.<sup>369</sup> The letter cites the

IG's concerns that the technique in practice did not match the technique upon which OLC's prior opinion had been based.<sup>370</sup> Levin's letter asked:

It would greatly assist us if you could address the details of the technique, including whether the technique on which we would now opine differs in any respect from the one considered in our earlier memorandum. If there are differences but you believe those differences should not alter our conclusion that the technique is lawful under the statute, we would appreciate receiving an explanation of your view, including any medical or other factual support on which you rely. Finally, we would be grateful if you could provide information about the facts and circumstances of this detainee, including his medical and psychological condition, of the sort, provided with respect to the detainee discussed in our earlier opinion.<sup>371</sup>

The CIA responded with a still-classified letter dated July 30, 2004.<sup>372</sup> A second, nonclassified fax, was submitted to Levin on August 5, 2004, with specific details about the water used in a waterboard session.<sup>373</sup> The next day Levin sent a letter to the CIA confirming OLC's advice:

[A]lthough it is a close and difficult question, the use of the waterboard technique in the contemplated interrogation of [redacted] outside territory subject to United States jurisdiction 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.<sup>374</sup>

A number of still-classified letters from the CIA flowed to Levin that described CIA interrogation techniques, presumably for OLC's review.<sup>375</sup> Levin took up each interrogation request in turn. On August 26, 2004, he wrote that dietary manipulation, nudity, water dousing and abdominal slaps were lawful with certain conditions.<sup>376</sup> On September 6, 2004, Levin wrote that attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, dietary manipulation, nudity, water dousing, and abdominal slap were lawful with certain conditions.<sup>377</sup> The conditions necessary were that the techniques conform to all representations previously made to OLC, that no medical or psychological contraindications existed to any of the medical and psychological assessments provided to OLC, and that medical officers would be present.<sup>378</sup> An almost identical letter to the September 6 letter, so similar that it may apply to the same detainee, was written by Levin to the CIA on September 20.<sup>379</sup>

Sometime in September 2004, Levin sent a memo to the attorney general and the deputy attorney general on the "Status of Interrogation Advice."<sup>380</sup> When discussing the Bybee August 1, 2002, memo to Gonzales, Levin stated, "It contains discussion of a variety of matters that are not necessary to resolving any issues raised to date."<sup>381</sup> Additionally, when discussing the March 14, 2003, memo to Haynes, Levin wrote "[the memo to Haynes] contains extensive discussion of the torture statute and other matters that is not necessary to resolve any issue."<sup>382</sup> Levin added that the lawfulness of the tactics themselves "was *reaffirmed* ... in a July 7, 2004 letter from Jack Goldsmith to Scott Muller [referring to approval of both CIA and DOD techniques] and also in a July 17, 2004 fax by Jack."<sup>383</sup>

While working on the replacement memo, Levin was reportedly so concerned about the

controversial technique of waterboarding that he went to a military base near Washington and underwent the procedure himself.<sup>384</sup>

### **Bybee's August 1, 2002, Memorandum to Gonzales is Replaced**

The first draft of a replacement memo was produced by OLC in mid-May 2004, and at least 14 additional drafts followed.<sup>385</sup> Two days before the beginning of 2005, in the midst of the winter holiday season, Levin released a memorandum,<sup>386</sup> superseding the Bybee August 1 memo to Gonzales in its entirety, that

- stated that the discussion in the August 1 memo concerning the president's commander in chief plenary power and the potential defenses to liability was — and remains — unnecessary;<sup>387</sup>
- modified the August 1 memo's analysis of the legal standards applicable under the Torture Statute (*e.g.*, under some circumstances "severe physical suffering" may constitute torture even if it does not involve "severe physical pain");<sup>388</sup>
- found that the only relevant definition of "torture" is the definition contained in CAT;<sup>389</sup>
- acknowledged that "drawing distinctions among gradations of pain ... is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain" and relied on several judicial interpretations of the Torture Victims Protection Act;<sup>390</sup>
- concluded that "[w]hile we have identified various disagreements with the August 2002 Memorandum, *we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.*"<sup>391</sup>

Thus, as with the Bybee memo to Gonzales, this memo did not get into specifics in regard to any one detainee's interrogation. Moreover, in its significant footnote, it stated *none* of OLC's conclusions as to the treatment of detainees would have been any different under the new standards now set forth in Levin's memorandum. Officials at the White House had insisted that footnote be included in the memo.<sup>392</sup> Of Levin's memo, Goldsmith wrote: "[N]o approved interrogation technique would be affected by this more careful and nuanced analysis. The opinion [the Bybee memo] that had done such enormous harm was completely unnecessary to the tasks at hand."<sup>393</sup>

Prior to Levin's departure, OLC was consulted in still-classified documents about the individual interrogation of detainees.<sup>394</sup> On February 4, 2005, as he was leaving, Levin sent a still-classified memo to Haynes on the topic of interrogation policy that, perhaps, is a replacement for the March 2003 memo Yoo had authored for Haynes.<sup>395</sup> Levin said the CIA never pressured him as he examined the issue of detainee interrogation; however, the White House had "pressed" him on this issue.<sup>396</sup> "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.”<sup>397</sup> Levin left OLC to take over Bellinger’s job as the legal adviser to the NSC. Levin had not initially been interested in the job, but Gonzales, White House Counsel Harriet Miers, and the new National Security Advisor Stephen Hadley had encouraged him to take the position.<sup>398</sup> Deputy Assistant Attorney General Comey later said that senior levels of the Justice Department understood that Levin had been denied appointment as the permanent head of OLC because he had not “delivered” to the White House its desired memoranda on interrogation.<sup>399</sup>

**“Of waterboarding, in 2007 McCain said ... ‘It is not a complicated procedure. It is torture.’”**

Levin arrived at his new position and found he had “nothing to do.”<sup>400</sup> After about a month, Levin asked for permission to leave his new position and returned to private practice.<sup>401</sup> The behavior toward Levin was not, according to Philbin, an isolated incident. Addington approached Philbin in November 2004 and told him he had violated his oath to uphold, protect and defend the Constitution by participating in the withdrawal of Yoo’s NSA opinion and the withdrawal of the August 1 memo to Gonzales.<sup>402</sup> Addington told Philbin that he would prevent Philbin from receiving any advancement to another job in the government and suggested Philbin resign immediately and return to private practice.<sup>403</sup> In the summer of 2005, Solicitor General Paul Clement chose Philbin to be the principal deputy solicitor general; Gonzales agreed, and the proposal was sent to the White House for approval. According to Philbin, Addington objected strenuously to the appointment and the vice president called Gonzales personally to ask Gonzales to reconsider the proposal.<sup>404</sup> When told by Gonzales that he would not receive the job to preserve good relations with the White House, Philbin told Gonzales that he should have defended him, to which Gonzales told Philbin that, if he felt that way, he should resign.<sup>405</sup> Philbin resigned and returned to private practice.<sup>406</sup>

### **Acting Assistant Attorney General Steven G. Bradbury**

Levin had replaced the August 1 memo to Gonzales before his departure, and had been working on a “techniques” memo but had been unable to complete it.<sup>407</sup> Comey was concerned. In an internal DOJ email on April 27, 2005, Comey, who had already submitted his resignation by this time and would leave DOJ in August, wrote:

The Attorney General explained that he was under great pressure from the Vice President to complete both [replacement] memos, and that the President had even raised it last week, apparently at the Vice President’s request and the Attorney General had promised they would be ready early this week.<sup>408</sup>

Comey was worried Bradbury “was getting similar pressure. ... 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.”<sup>409</sup> Later, Comey said no one was ever specific about end results from OLC but one would have to “be an idiot not to know what was wanted.”<sup>410</sup> Bradbury stated he never felt nor received any pressure from the White House counsel’s office, the vice president’s office, the CIA, the NSC, or the attorney general as to the outcome of his opinions concerning the legality of the CIA’s interrogation program.<sup>411</sup> Moreover, Bradbury’s nomination as assistant attorney general had already been approved by the president in April 2005, prior to his completion of the replacement memos. However, it was not forwarded to the Senate until June 23, 2005.<sup>412</sup>

On May 10, 2005, Bradbury authored two memoranda to Rizzo at the CIA. The first, a 46-

page memo, looked at whether certain specified interrogation techniques designed for use on high-value Al Qaeda detainees complied with the Torture Statute.<sup>413</sup> This memo

- utilized the legal analysis in Levin's December 2004 memo and applied the CIA's request to that analysis;<sup>414</sup>
- assumed that, prior to interrogation, each detainee is evaluated by medical and psychological professionals from the CIA's Office of Medical Services to ensure that he is not likely to endure any severe physical or mental pain or suffering;<sup>415</sup> and that medical and psychological personnel are on-scene;<sup>416</sup>
- discussed in detail the following techniques: dietary manipulation, nudity, attention grasp, walling, facial hold, facial slap (insult slap), abdominal slap, cramped confinement, wall standing, stress positions, water dousing, sleep deprivation, and waterboarding;<sup>417</sup>
- found that, subject to the understandings, limitations, and safeguards discussed, including ongoing medical and psychological monitoring and team intervention as necessary, each of the techniques, considered individually, would not violate the Torture Statute,<sup>418</sup> but that the issues raised by sleep deprivation and the waterboard require great caution in their use;<sup>419</sup>
- determined that, in sharp contrast to those practices universally condemned as torture over the centuries, the techniques considered here were carefully evaluated to avoid causing severe pain or suffering to the detainees.<sup>420</sup>

The second memo to Rizzo from Bradbury, a 20-page memo, addressed the same techniques in combination to assess their legality pursuant to the Torture Statute without reference to a particular detainee.<sup>421</sup>

- [A]ny physical pain resulting from the use of these techniques, even in combination, cannot reasonably be expected to meet the level of "severe physical pain" contemplated by the statute.<sup>422</sup>
- Moreover, although it presents a closer question ... we conclude that the combined use of these techniques also cannot reasonably be expected to cause severe physical suffering.<sup>423</sup>
- The authorized use of these techniques in combination "would not reasonably be expected to cause prolonged mental harm and could not reasonably be considered specifically intended to cause severe mental pain or suffering."<sup>424</sup>
- The waterboard may be used simultaneously with two other techniques: sleep deprivation and dietary manipulation. The remaining techniques cannot be employed during the actual waterboard session, but "may be used at a point in time close to the waterboard, including same day."<sup>425</sup>
- [OLC] stress[es] that these possible questions about the combined use of

these techniques ... are difficult ones and they serve to reinforce the need for close and ongoing monitoring by medical and psychological personnel and by all members of the interrogation team and active intervention if necessary.<sup>426</sup>

Later the same month, on May 30, 2005, Bradbury sent a memo to Rizzo on whether the CIA's interrogation techniques were consistent with U.S. obligations under Article 16 of CAT, which forbids cruel, inhuman or degrading treatment that did not amount to torture.<sup>427</sup> Article 16, Bradbury's memo posited, was limited to conduct within "territory under [U.S.] jurisdiction."<sup>428</sup> Territory of the United States "includes, at most, territory over which the United States exercises at least de facto authority as the government."<sup>429</sup> Thus, the memo concludes,

the CIA interrogation program is not conducted in the United States ... and 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 ... the question is unlikely to be subject to judicial inquiry.<sup>430</sup>

Philip Zelikow, the counselor of the Department of State at the time in 2005, had been working at DOS to persuade the rest of the government to join in developing an option that would abandon technical defenses and embrace the definitions of Common Article 3.<sup>431</sup> Of Bradbury's May 30, 2005, opinion, Zelikow testified to the Senate Judiciary Committee in 2009:

The OLC had guarded against the contingency of a substantive "CID" review in its May 30, 2005 opinion. OLC had held that, even if the standard did apply, the full CIA program — including waterboarding — complied with [the standard]. This OLC view also meant, in effect, that the McCain amendment was a nullity,<sup>432</sup> it would not prohibit the very program and procedures Senator McCain and his supporters thought they had targeted.<sup>433</sup>

Sen. Lindsey Graham, one of the co-sponsors of the Detainee Treatment Act in 2005 along with Sen. McCain, said of the legal memoranda that approved waterboarding, "the [legal] guidance that was provided during this period of time, I think, will go down in history as some of the most irresponsible and shortsighted legal analysis ever provided to our Nation's military and intelligence communities."<sup>434</sup> In an interview with Task Force staff, Graham said: "They were tortured legal reasoning. ... They were trying their best to create legal lanes that, I think, were (1) dubious, and (2) long term, damaging."<sup>435</sup> Of waterboarding, in 2007 McCain said: "All I can say is that it was used in the Spanish Inquisition, it was used in Pol Pot's genocide in Cambodia, and there are reports that it is being used against Buddhist monks today. ... It is not a complicated procedure. It is torture."<sup>436</sup>

In mid-February 2006, Zelikow wrote a memo challenging OLC's interpretation of the constitutional law contained in the May 2005 memo.<sup>437</sup> Zelikow later heard his memo was thought to be "not appropriate" for further discussion and that copies of his memo were

**"OPR concluded that Yoo 'had committed intentional professional misconduct when he violated his duty to exercise independent legal judgment...'"**

collected and destroyed.<sup>438</sup> At least one copy survived, however, and was located in the State Department's files in 2009.<sup>439</sup> On June 29, 2006, the Supreme Court released its decision in *Hamdan v. Rumsfeld*, finding that Common Article 3 applied to the government's treatment of detainees.<sup>440</sup> According to Bradbury, OLC (along with DOS and DOD) had a central role in analyzing the legal issues and legislative options of the Military Commissions Act of 2006, which was a response to the *Hamdan* decision.<sup>441</sup>

Notably, after *Hamdan*, there was an absence of response by OLC to the Supreme Court's holding in the case. One reason may have been that President Bush was deciding on a course of action at the time. Zelikow testified:

Internal debate continued into July [2006], culminating in several decisions by President Bush. Accepting positions that Secretary Rice had urged again and again, the President set the goal of closing the Guantánamo facility, decided to bring all the high-value detainees out of the "black sites" and move them toward trial, sought legislation from the Congress that would address these developments (which became the Military Commissions Act) and defended the need for some continuing CIA program that would comply with relevant law. President Bush announced these decisions on September 6.<sup>442</sup>

The next known memorandum on the topic of detainee treatment from OLC is dated July 20, 2007. For this opinion, Bradbury solicited input from the attorney general's office, the deputy attorney general's office, the criminal division, the national security division as well as DOS, the NSC and the CIA.<sup>443</sup> Bellinger, now legal adviser to Secretary of State Rice, raised multiple objections to the memo in an 11-page letter.<sup>444</sup> Bradbury responded to Bellinger in a 16-page letter dated February 16, 2007, and reproached Bellinger for taking positions that were inconsistent with his previous support of the CIA program, when he had been the NSC legal adviser.<sup>445</sup> Bradbury addressed Bellinger's comments on the memo in detail and rejected almost all of them.<sup>446</sup>

The July 20 memo began "the last eighteen months have witnessed significant changes in the legal framework applicable to the armed conflict with al Qaeda."<sup>447</sup> After this "significant change," the CIA was now "expecting to" detain further high-value detainees, subsequent to the president's announcement of September 6, 2006.<sup>448</sup> The CIA sought approval of six "enhanced interrogation techniques" for these high-value detainees.<sup>449</sup> OLC advised that the techniques would not violate, and were consistent with, (a) the War Crimes Act, as amended by the Military Commissions Act of 2006, (b) the Detainee Treatment Act of 2005, and (c) the requirements of Common Article 3.<sup>450</sup> In order that its determination would be conclusive under U.S. law, the memo continued, the president could exercise his authority to issue an executive order adopting OLC's interpretation of Common Article 3.<sup>451</sup>

We understand that the President intends to exercise this authority. We have reviewed his proposed executive order: the executive order is wholly consistent with the interpretation of Common Article 3 provided herein, and the six proposed interrogation techniques comply with each of the executive order's terms.<sup>452</sup>

The six techniques included in the July 20, 2007, memo were: dietary manipulation, extended sleep deprivation, the facial hold, the attention grasp, the abdominal slap, and the insult (or facial slap).<sup>453</sup> Later, Bradbury would, three different times — on August 23, November 6, and November

7, 2007 — advise the CIA that an additional period of authorization for its interrogation, the precise nature of which remains classified, would comply with all applicable legal standards.<sup>454</sup>

### Closing OLC Chapter of the Bush Presidency

On June 12, 2008, the Supreme Court repudiated OLC's earlier detainee policies yet again when it ruled, in *Boumediene v. Bush*, that detainees had a right to challenge their captivity in *habeas corpus* proceedings in federal court.<sup>455</sup>

Bradbury authored a memo on October 6, 2008, that “advise[d] caution” before relying “in any respect on the Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001) as a precedent.”<sup>456</sup> The memo continues:

It is important to understand the context of the 10/23/01 Memorandum. It was the product of an extraordinary — indeed, we hope, a unique — period in the history of the Nation; the immediate aftermath of the attacks of 9/11. Perhaps reflective of this context, the 10/23/01 Memorandum did not address specific and concrete policy proposals; rather it addressed in general terms the broad contours of hypothetical scenarios involving possible domestic military contingencies that senior policy makers feared might become a reality in the uncertain wake of the catastrophic terrorist attacks of 9/11.<sup>457</sup>

A follow-up memo from Bradbury on January 15, 2009, casts an even broader net of retraction. The January 15 memo, Bradbury's last at OLC, issued five days before the inauguration of President Barack Obama, confirmed “that certain propositions issued by the Office of Legal Counsel in 2001–2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office.”<sup>458</sup> Again, “caution should be exercised before relying in other respects on the remaining opinions identified below.”<sup>459</sup> Those opinions upon which, Bradbury advised, should not be relied included:

- Bybee's March 13, 2002, memo to Haynes on the president's power to transfer captured terrorists to the control and custody of foreign nations ;
- Philbin's April 8, 2002, memo to Bryant regarding the Swift Justice Authorization Act;
- Yoo's June 27, 2002, memo on the applicability of military detention to a U.S. citizen;
- Bybee's August 1, 2002, memo to Gonzales on the Torture Statute;
- Yoo's March 14, 2003, memo to Haynes on the interrogation of detainees by the military;
- Yoo's February 8, 2002, memo to Haynes on the interpretation of the Foreign Intelligence Surveillance Act;

- Yoo and Delahunty's November 15, 2001, memo to Bellinger on the authority of the president to suspend certain provisions of the ABM Treaty;
- Bybee's January 22, 2002, memo to Gonzales and Haynes on the application of treaties and laws to Al Qaeda and Taliban prisoners;
- Yoo's September 25, 2001, memo to David S. Kris regarding the Foreign Intelligence Surveillance Act.

On January 22, 2009, President Obama issued an executive order that no member of the executive branch rely on any interpretation of the law governing detainee interrogations issued by the Department of Justice between September 11, 2001, and January 20, 2009.<sup>460</sup>

## Why the OLC Opinions Must Be Rejected

On July 29, 2009, DOJ's Office of Professional Responsibility (OPR) released a 289-page report documenting its 5½-year investigation into OLC relating to the CIA's "enhanced interrogation technique" program.<sup>461</sup> Based on the results of its investigation, OPR concluded that Yoo "had committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."<sup>462</sup> It also concluded Jay Bybee "had committed professional misconduct when he acted in reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice."<sup>463</sup> Notably, the report

did not attempt to determine and did not base [its] 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.<sup>464</sup>

Moreover, the report "did not find that the other Department officials involved in this matter committed professional misconduct."<sup>465</sup> On January 5, 2010, Associate Attorney General David Margolis wrote a memo to the attorney general in which he did not adopt OPR's findings of misconduct for Bybee and Yoo and did not authorize OPR to refer its findings to the state-bar disciplinary authorities in the jurisdictions where the two men were licensed.<sup>466</sup> In reaching his decision, Margolis stated:

This decision should not be viewed as an endorsement of the legal work that underlies those memoranda. However, OPR's own analytical framework defines "professional misconduct" such that a finding of misconduct depends on application of a known, unambiguous obligation or standard to the attorney's conduct. I am unpersuaded that OPR has identified such a standard.<sup>467</sup>

There are many criticisms of OLC's practices and conduct during this period. Alberto Mora and Philip Zelikow, who aired their concerns at the time, remain highly critical of OLC's advice and the attendant policies that followed.<sup>468</sup> The noted historian Arthur Schlesinger, on the policies authorized by OLC, said, "No position taken has done more damage to the American reputation in the world — ever."<sup>469</sup>

The 1952 seminal decision in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>470</sup> in which the Supreme Court found the president's authority to act was limited to authority specifically enumerated under Article II of the Constitution or to statutory authority granted by Congress, wasn't even discussed in Bybee's now infamous August 1, 2002, memo to Gonzales. Nor, critics say, had the memo discussed the DOJ's 1984 prosecution of a Texas sheriff and his deputies for "water torture."<sup>471</sup> Nor had the memo discussed war crimes prosecutions of Japanese soldiers who had waterboarded American aviators during World War II. Nor had the memo, in its discussion of the invocation of necessity or self-defense, discussed a Supreme Court decision from just a year prior in which the Court indicated a necessity defense was only available when Congress had explicitly said such a defense was available.<sup>472</sup> Yoo and Bybee's conclusion that the president's commander in chief authority trumped all else during wartime set a dangerous precedent. Their reliance upon the health-care statute, in defining severe pain, was extremely poor legal scholarship. The OPR report described much of the criticism of Bybee and Yoo's work:<sup>473</sup>

Harold [Hongju] Koh, then Dean of Yale Law School, characterized the memorandum as "blatantly wrong" and added: "[i]t's just erroneous legal analysis." Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, Financial Times, June 10, 2004. A past chairman of the international human rights committee of the New York City Bar Association, Scott Horton, stated that "the government lawyers involved in preparing the documents could and should face professional sanctions." *Id.* Cass Sunstein, a law professor at the University of Chicago, said: "It's egregiously bad. It's very low level, it's very weak, embarrassingly weak, just short of reckless." Adam Liptak, *Legal Scholars Criticize Memos on Torture*, New York Times, June 24, 2004 at A14. In the same article, Martin Flaherty, an expert in international human rights law at Fordham University, commented, "The scholarship is very clever and original but also extreme, one-sided and poorly supported by the legal authority relied on." *Id.* ...

Similar criticism was raised by a group of more than 100 lawyers, law school professors and retired judges, who called for a thorough investigation of how the Bybee Memo and other, related OLC memoranda came to be written. Fran Davies, *Probe Urged Over Torture Memos*, Miami Herald, August 5, 2004 at 6A; Scott Higham, *Law Experts Condemn U.S. Memos on Torture*, Washington Post, August 5, 2004 at A4. A few lawyers defended the Bybee Memo. In a Wall Street Journal op-ed piece, two legal scholars argued that the Bybee Memo appropriately conducted a dispassionate, lawyerly analysis of the law and properly ignored moral and policy considerations. Eric Posner and Adrian Vermeule, *A "Torture" Memo and Its Tortuous Critics*, Wall Street Journal, July 6, 2004 at A22.<sup>474</sup>

Others have argued that Bybee and Yoo share an unfair portion of the criticism. Even those OLC lawyers who believed that using tough tactics was a serious mistake had agreed that the methods themselves were legal.<sup>475</sup> OLC attorneys did not retract Bybee and Yoo's infamous August 1, 2002, "Torture Memo" until after it had been leaked to the public in 2004, but then did so almost immediately, suggesting the attorneys in the office knew they could not defend in public that which had been signed-off on in secret. Once Yoo and Bybee had said "yes," none of their successors at OLC were willing to say that they had been wrong in saying yes. At most, the criticism from their successors at OLC, and from many others in and outside the Justice Department, was that Yoo and Bybee had written more than was needed and/or

engaged in *dicta* — not that they had approved illegal interrogation tactics. Under Daniel Levin's analysis, if the use of the waterboard and other "enhanced" techniques didn't violate any U.S. statute or the Constitution, there existed no barrier to using the CIA's interrogation practices on our own domestic criminal suspects. Under Steven Bradbury's analysis, the CIA's techniques could be used by a foreign enemy against U.S. troops in the future as the uses of the techniques were consistent with Common Article 3. In his article *The Sacrificial Yoo*, David Cole wrote:

Yoo and Bybee are in some sense easy targets. Their memos were the first to be written, and they employed less polished rhetoric and less nuanced argument than the memos that followed years later, written by authors who had the benefit of hindsight and were aware of the public condemnation that the initial memo had occasioned.<sup>476</sup> ...

And by focusing on Yoo's methods, rather than his result, the OLC failed to confront the real failing. It was not only in Yoo's work, but also in that of those who, following him, authorized the CIA to engage in torture and cruel, inhuman and degrading treatment.<sup>477</sup>

Noted constitutional scholar Bruce Ackerman has gone further than many critics and suggested that the memoranda of Bybee, Yoo, and their successors at OLC in the Bush administration are symptomatic of a larger problem in how OLC operates today, one that is present irrespective of whether a Democrat or Republican occupies the White House.<sup>478</sup> Ackerman, a Yale Law School professor, believes OLC as an institution relies too heavily on the individual ethics and personalities of those who occupy its offices to ward off legal abuses. OLC lawyers are expected to push back against a White House even though, Ackerman points out, institutional and perhaps personal incentives are in place for OLC to provide amenable answers. So long as the status quo remains, Ackerman fears, so too does the possibility OLC would, in the future, tell a White House not what it needs to hear from its lawyers, but what it wants to hear. He suggests an independent body should be created to advise the president as to the legal limits of his or her executive power, one that would operate at arms-length from the White House.<sup>479</sup>

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Bybee and Yoo, and those at OLC who came after them, made the same, initial, signature mistake from which everything flowed. They promulgated a fundamental and egregious misunderstanding of the Geneva Conventions. The Geneva Conventions, duly ratified in accordance with the U.S. Constitution, were the latest codification of laws of war that dated back centuries. They laid out civilized rules of treatment for all categories of people caught up in armed conflicts — not just "lawful combatants." The Geneva Conventions openly contemplated and addressed what could be done to nonuniformed "unlawful" combatants. Such persons could be interrogated.<sup>480</sup> They could, after a trial, even be executed.<sup>481</sup> But they could not be physically or psychologically tortured or subject to cruel, inhuman or degrading treatment. They had to be treated "with humanity."<sup>482</sup> Torture and degrading treatment were clearly prohibited not only by the Geneva Conventions and the Convention Against Torture, two bodies of international law, but they were illegal under the War Crimes Act and the Torture Statute — domestic law — as well.

The humane treatment of prisoners is deeply ingrained in the fabric of the United States' history and its military. During the Revolutionary War, the British Army had viewed American soldiers as "unlawful" combatants by reason that all of them were viewed as having committed treason. The British brutalized and killed American prisoners: American soldiers were refused the ability to surrender, starving prisoners were mistreated in the hulks of prison ships in New York harbor, and the homes and property of suspected American sympathizers were plundered and destroyed.<sup>483</sup> By contrast, American leaders, Benjamin Franklin and Thomas Jefferson among them, resolved that the war would be conducted by the revolutionaries with a respect for human rights consistent with the values of their society and the principles of their cause, true to the expanding humanitarian ideals of the American Revolution.<sup>484</sup> As leaders in this cause, John Adams gave words to the policy and George Washington put the policy into practice.<sup>485</sup> In a letter to his wife Abigail, Adams wrote:

I who am always made miserable by the Misery of every sensible being, am obliged to hear continual accounts of the barbarities, the cruel Murders in cold blood, even the most tormenting ways of starving and freezing committed by our Enemies. ... These accounts harrow me beyond Description. ...

I know of no policy, God is my witness, but this — Piety, Humanity and Honesty are the best Policy. Blasphemy, Cruelty and Villainy have prevailed and may again. But they won't prevail against America, in this Contest, because I find the more of them are employed, the less they succeed.<sup>486</sup>

Washington ordered his troops to treat British captives humanely:

[L]et them have no reason to complain of us copying the brutal manner of the British Army. ... While we are contending for our own liberty we should be very cautious of violating the rights of conscience in others, ever considering that God alone is the judge of the hearts of men, and to Him only in this case, are they answerable.<sup>487</sup>

America's superior treatment of its prisoners boosted the morale of Washington's troops and was seen as hard evidence of the ideals for which the American revolutionaries were fighting. A few Americans managed to escape British captivity and the stories of their cruel treatment at the hands of the British Army helped rally and fortify the opinions of many Americans against the British.

During the U.S. Civil War, the United States continued to lead the way when Frances Lieber drafted the first, modern, comprehensive code for the laws of war. The "Lieber Code" established the idea that criminals were not the same as soldiers and, therefore, soldiers must not be detained in punishing conditions. Starvation, torture, intentional suffering and "other barbarity" were all outlawed. Lieber's code was adopted at two important international diplomatic conferences at The Hague in 1899 and in 1907, which would put American egalitarianism at the core of future international humanitarian law.<sup>488</sup>

Seen in this light, the Geneva Conventions and the Convention Against Torture, which the United States championed, are not limits on American hegemony; rather, they reflect the ideals that have coursed through the country's history since its founding. Not only are these

ideals interwoven into those two international treaties, as well as the Torture Statute and the War Crimes Act, they are at the origins of the nation's founding document, the Constitution.

Rather than counseling the president and other senior officials on ways in which the applicable law could be avoided, OLC and its attorneys could have, and should have, in a time of great fear and panic, reinforced the country's commitment to the rule of law and helped put a stop to clearly illegal practices. Had they done so, they would have done their country an immeasurable service. The effect of their failure to do so continues to reverberate and is felt to this day.