THE OFFICE OF LEGAL COUNSEL "TORTURE MEMOS": A CONTENT ANALYSIS OF WHAT THE OLC GOT RIGHT AND WHAT THEY GOT WRONG
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INTRODUCTION

On August 1, 2002 John Yoo, Deputy Assistant U.S. Attorney General in the U.S. Department of Justice Office of Legal Counsel (OLC) responded to White House Counsel Alberto Gonzales’ inquiry of “whether interrogation methods used on captured al Qaeda operatives, which do not violate the prohibition on torture1... would either: a) violate... the Torture Convention, or b) create the basis for a prosecution [in] the... International Criminal Court (ICC).”2 Yoo’s famous Memorandum for Alberto R. Gonzales Counsel to the President: Standards of Conduct for Interrogation under 18 U.S.C.A. §§ 2340

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1Torture is a specific intent crime in which a person must have the intent to cause “severe physical or mental pain and suffering” and the result of the act must be the causing of “prolonged mental harm.” Violation of Section 2340 carries a criminal sanction of imprisonment for up to 20 years. Section 2340A reads as follows:
   (a) Offense. — Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
   (b) Jurisdiction. — There is jurisdiction over the activity prohibited in subsection (a) if—
      (1) the alleged offender is a national of the United States; or
      (2) the alleged offender is present in the United States, irrespective of the of the victim or alleged offender.
   (c) Conspiracy. — A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

to 2340A (August 2002 Memo)\(^3\) (and the second memo submitted to the Central Intelligence Agency (CIA) on the same day)\(^4\) explained that the interrogation techniques described in the memos did not violate federal or international law and even if they did, federal law prohibiting U.S. government officials from engaging in torture would not apply to suspected terrorists because such an application would infringe upon the power of the President as Commander-in-Chief.

The Bush Administration came under increased scrutiny in general,\(^5\) and the OLC opinions\(^6\) were specifically\(^7\) repudiated after their public

\(^3\) *Memorandum for Alberto R. Gonzales Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C.A. §§ 2340 to 2340A (August 1, 2002)* [hereafter *August 2002 Memo*].

\(^4\) *Jay S. Bybee, Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency Re: Interrogation of al Qaeda Operative (Aug. 1, 2002)* [hereinafter *CIA Interrogation Memo*].


\(^6\) See Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: The How and Why They are Significant*, 76 Alb. L. Rev. 217 (2013), for a discussion on the historical development of the quasi-judicial authority of the At-
release⁸ by the academic and legal community, almost without dissent⁹ for policies that were viewed as directly authorizing torture. Although the critiques of the memos include the correct conclusion that they sought to protect the policy initiatives of the Bush Administration rather than provide neutral exposition of the law, the OLC was not wrong in asserting that the federal torture law had a narrow application in regard to the treatment of captured enemy combatants. Further, the OLC was not wrong in asserting that international treaties did not govern the meaning of torture under U.S. law. Further, the acceptance of the limitations of federal law defining torture does not equate to approving and authorizing torture. In order to clear away the political assessment of the OLC opinions this article will focus on the actual text of the federal torture statute and the OLC opinions; with a focus on two specific issues: first, what does the federal law prohibiting torture actually require and prohibit in comparison to what people think it


⁸Infra notes 26–28, 100–106 and accompanying text.

prohibits, and second, evaluate exactly what the OLC opinions actually asserted.

The Federal Law Prohibiting Torture

The federal statute that defines torture is 18 U.S.C.A. § 2340, which reads as follows:

(1) “torture” means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from -
   (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
   (B) 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;
   (C) the threat of imminent death; or
   (D) 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; and

(3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.\(^{10}\)

When President Bush asserted that the United States does not engage in torture, under U.S. law, the context of his assurance was that no one “acting under color of law” for the United States would conduct interrogation of al Qaeda or Taliban enemy combatants with the “specific[] inten[t] to inflict severe physical or mental pain or suffering”; which means causing “prolonged mental harm” due to an “intentional infliction or threatened infliction of severe physical pain or suffering” or “the administration . . . of mind-altering substances . . . or the threat of death” or threatening or doing so to upon “another person within his custody or physical control.”

In addition to Section 2340, the United States is a signatory to the 1987 U. N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which in article 1 defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from

him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.\textsuperscript{11}

Article 16 of the CAT requires that

\textit{[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.}

The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.\textsuperscript{12}

The United States signed the treaty on April 18, 1988 under President Reagan and was ratified by the Senate on October 21, 1994. In exercising its constitutional authority of Advise and Consent to treaties obligating the United States, the Senate provided certain reservations and definitions that governed U.S. obligations to the treaty. Specifically, the Senate asserted the following understandings which were registered by the U.S. in the U.N.:

Reservations:

I. The Senate's advice and consent is subject to the following reservations:

1. That the United States considers itself bound by the obligation under article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

II. The Senate's advice and consent is subject to the following

\textsuperscript{11}\textsuperscript{U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article I (1987) (emphasis added) [hereinafter U.N. Convention].}

\textsuperscript{12}\textsuperscript{U.N. Convention, supra note 12, at art. 16 (emphasis added). Articles 10-12 address the obligation of signatories to educate military and law enforcement units within the jurisdiction of signatories on the definition of torture and how to avoid committing torture. Article 13 requires a method of review of complaints of accusations of torture by such agencies within the jurisdiction of signatories.}
understandings, which shall apply to the obligations of the United States under this Convention:

(1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) 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.

III. The Senate’s advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing.

IV. The Senate’s advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.13

The significance of these reservations and declarations is that the definition of torture is limited in applicability to U.S. law on the subject, not international standards based on foreign law or United Nations (U.N.) declarations.14 Article I made clear that torture, as defined by U.S. law, only involves the intentional infliction of “severe physical or


14 Thus American law limits the definition and focus of torture, a distinction that is important and has been lost on many of the negative commentaries on the memos. See, e.g., Louis-Philippe F. Rouillard, Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum, 21 Am. U. Int’l L. Rev. 9, 12 (2005) (“Based on historic and recent case law, as interpreted in light of applicable treaty law, I conclude that the threshold of what constitutes torture under international law is much lower than what has been submitted by the Office of Legal Counsel and that, even under the proposed standards, ill treatment is no more permissible under
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mental pain or suffering and that mental pain or suffering refers to prolonged mental harm”; and Article 16 which prohibits “cruel, inhuman or degrading treatment or punishment,” which is a lower level of prohibited action, is defined under U.S. law by federal interpretation of the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution. The text of Section 2340, the CAT, and the reservations that the Senate placed on ratification of the CAT are key in understanding the torture memos and what the law requires regarding the meaning and application of the prohibition on torture.

The OLC Torture Memos: What Did the OLC Say the Law Required?

On October 11, 2002 Department of Defense Joint Task Force 170 submitted a memo requesting authority to use techniques to counter the resistance strategies being used by detainees at the military base at Guantanamo Bay, Cuba (GITMO). The memo requested permi-

international law than torture itself.”); David J. Gottlieb, How We Came to Torture, 14 Kan. J.L. & Pub. Pol’y 449, 449 (2005) (“My thesis is as follows: The law of war and international human rights agreements place limits on the conduct of American soldiers on and off the battlefield. Some of these limits apply even when soldiers have captured members of the enemy who have violated the laws of war and are therefore illegal or unprivileged combatants.”); Paust, supra note 6, at 813 (“During an international armed conflict such as the war between the United States and the Taliban regime, all of the customary laws of war apply. These also apply during a belligerency. Customary laws of war include the rights and duties reflected in the 1949 Geneva Conventions.”). Paust concludes that the Bush Administration consciously determined to break international law regarding treatment of detainees on a level such that “[n]ot since the Nazi era have so many lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war.” Paust, supra note 6, at 811.


According to the memo, category one techniques were described as follows: “During the initial category of interrogation the detainee should be provided a chair and the environment should be generally comfortable. The format of the interrogation is the direct approach. The use of rewards like cookies or cigarettes may be helpful. If the detainee is determined by the interrogator to be uncooperative, the interrogator may use the following techniques.” Category two had the following description: “With the permission of the OIC [Officer-in-Charge], Interrogation Section, the interrogator may use the following techniques.”

Category three was premised as follows: “Techniques in this category may be used only by submitting a request through the Directory, JIG, for approval by the Commanding General with appropriate legal review and information to Commander USSOUTHCOM. These techniques are required for a very small percentage of the most uncooperative detainees (less than 3%). The following techniques and other
sion to use eighteen techniques that could be used to break the resistance of detainees. They were divided into three categories as follows:

Category One:
1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems)
2) Techniques of deception:
   (a) Multiple-interrogator techniques.
   (b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

Category Two:
3) Use of stress positions (like standing) for a maximum four hours.
4) Use of falsified documents or reports.
5) Use of the isolation facility for up to 30 days. Request must be made through the OIC, Interrogation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected detainees, the OIC, Interrogation Section will approve all contacts with the detainee, to include medical visits of a non-emergent nature.
6) Interrogating the detainee in an environment other than the standard interrogation booth.
7) Deprivation of light and auditory stimuli.
8) The detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.
9) The use of 20 hour interrogations.
10) Removal of all comfort items (including religious items).
11) Switching food of detainees from hot rations to MREs.
12) Removal of clothing.
13) Forced grooming (shaving of facial hair, etc.).
14) Using detainee phobias (such as fear of dogs) to induce stress.

Category Three:
15) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.
16) Exposure to cold weather or water (with appropriate medical monitoring).

aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies, may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any of these techniques that require more than light grabbing, poking, or pushing, will be administered only by individuals specifically trained in their safe application."
17) Use of wet towel and dripping of water to induce the misperception of suffocation.

18) Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

The memo made clear that category three techniques “are required for a very small percentage of the most uncooperative detainees (less than 3%)” and these “and other aversive techniques, such as those used in U.S. military interrogation resistance training” (S.E.R.E.) would be “administered only by individuals specifically trained in their safe application.”16 This request was supplemented by an opinion by the Staff Judge Advocate General that these techniques were lawful under

16Phifer, supra note 16, at 228. S.E.R.E (Survival, Evasion, Resistance, and Escape) training developed by the Air Force after the Korean War and adopted by the Army and Navy during the Vietnam war is designed to acclimate military personnel that are at high risk of capture (pilots, special forces, est.) is techniques to resist emotional, psychological, and physical abuse by the enemy as well as how to evade capture if shot down or otherwise pursued by the enemy behind enemy lines. The goal of S.E.R.E training is how to survive capture by an enemy that does not comply with the Geneva conventions and uses torture to secure information and /or cooperation from captured military personnel. The Bush Administration used the techniques of S.E.R.E. to break the resistance of captured enemy combatants.

The irony of using S.E.R.E techniques that by definition were considered outside of the Geneva Convention and used for purposes of training American personnel on how to survive the treatment of a non Geneva compliant adversary was lost on the Administration. Additionally, the techniques for S.E.R.E training were never intended to actually secure viable and useful information; they are designed to acclimate and inoculate personnel from being psychologically broken by a non Geneva Convention adversary. The purpose and method of S.E.R.E was explained in a Senate Armed Services Committee as follows:

Mr. Chairman, physical and psychological pressures are used in resistance training for several reasons. Historically, coercive pressures have been used against US soldiers in numerous captivity situations. Including simulated physical and psychological stresses to our training adds more realism and effectiveness to the training. Additionally, in the realm of the training science world, simulated physical and psychological stresses would be recognized during the task analysis as some of the conditions under which the resistance skills must be applied. The overall goal is to instill good habits in trainees and the ability to think clearly and solve problems during repeated exposure to stressful situations to ensure that performance does not degrade under stress.

In S.E.R.E resistance training, physical and psychological pressures consist of contact with a student, as well as use of threats and ploys that are designed to test the students’ resistance. The pressures are designed to cause some physical and emotional discomfort. These pressures are definitely not designed to cause injury or anything other than minor, temporary irritation. All pressures are reviewed by medical and psychological staff before they are used to ensure that a good margin of physical and psychological safety exists when they are used, and to limit their use on personnel with pre-existing medical and psychological concerns. Additionally, when physical pressures are used, the use is continuously monitored by multiple levels of out of role school personnel to ensure that the pressures are used within established limits. The psychological purpose of physical and psychological pressures at the Air Force Survival School was always to enhance student
Eighteenth Amendment Supreme Court case law which governs the meaning of the CAT and the prohibition against cruel, inhuman and degrading treatment or punishment. On December 2, 2002 Secretary of Defense Rumsfeld approved the 18 techniques commenting in the margin of his memo “However, I stand for 8-18 hours a day. Why is standing limited to 4 hours?” This approval occurred three months after the OLC issued the August 2002 Memo that Section 2340 was not violated by a similar set of techniques being utilized by the CIA.

The Rumsfeld approval of the techniques (December 2002), sup-

decision-making, resistance, confidence, resiliency, and stress inoculation, and not to break the will of the students or to teach them helplessness.

In conclusion Mr. Chairman, let me emphasize again that the purpose of our training of U.S. military personnel is to increase their level of confidence that they can survive captivity and interrogation situations, comply with the Code of Conduct, and return with the least amount of physical and psychological damage. Our basic concept for this training is that if a service member has met the types of interrogation conditions even once before, they will begin to be familiar with them and thus more able to cope with an otherwise extremely stressful and confusing situation. Although there are many sacrifices and harrowing circumstances that our soldiers, marines, sailors, and airmen are called to task to face, I can think of none more amazing and confusing than being held captive by your enemy. I believe we have a moral obligation to provide our personnel this training. Through our training, we prepare our nation’s best for the worst, so that if they fall into the hands of the enemy, they can see that situation through the lens of an experience that they’ve already dealt with successfully — providing them with hope and courage to survive and return with honor.


17 Diane E. Beaver, Lt. Col. Staff Advocate General, USA, JFT 170-SJA Memorandum for Commander Joint Task Force 170 Subject: Legal Brief on Proposed Counter-Resistance Strategies, October 11, 2002, in The Torture Papers, supra note 16, at 229–35. As regards to the American Convention on Human rights which prohibits inhumane treatment and provides rights similar to those in the Fifth and Fourth Amendments to the U.S. Constitution, Lt. Col. Beaver observed that the “United States signed the convention on 1 June 1977, but never ratified it.” Beaver, supra note 18, at 230. Under American law a treaty that is not ratified by the Senate is not considered part of the law of the land. Lt. Col. Beaver also correctly observed that although there are international Court cases defining torture under the CAT and the Convention on Human Rights “not only is the United States not part of the European Human Rights Court, but as previously stated, it only ratified the definition of cruel, inhuman, and degrading treatment consistent with the U.S. Constitution.” Beaver, supra note 18, at 230–31. See also infra note 23.


19 The memo concluded that the following ten techniques did not violate Section 2340A “(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9)
ported by the *August 2002 Memo* and the *CIA Interrogation Memo*, was also supported by the opinion of the President in February 2002. On January 9th and 22nd, 2002 the OLC issued two opinions that informed the Department of Defense and the President that the Geneva Conventions and war crimes treaties did not apply to al Qaeda or the Taliban fighters. The OLC opinions did not stand without opposition. Secretary of State Colin Powell and the State Department Legal Advisor both opposed the OLC opinions and requested that the White House National Security Advisor make the President aware of their dissent. On January 25, 2002 White House Counsel Alberto Gonzales drafted a memo to the President with an opinion explaining the arguments made by the OLC and Secretary Powell. Secretary Powell and the State Department Legal Advisor both provided written responses.

insects placed in a confinement box, and (10) the waterboard. [All of which would] be used in some sort of escalating fashion, culminating with the waterboard, though not necessarily ending with this technique." *CIA Interrogation Memo*, supra note 5, at 2. See also infra note 48 for the OLC discussion of the revised CIA techniques.

20 John Yoo, Memorandum for William J. Haynes, General Counsel, Department of Defense RE: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) ("[1] Al Qaeda’s status as a non-state actor renders it ineligible to claim the protections of the treaties specified by the WCA [War Crime Act 18 U.S.C.A. § 2441], [2] the nature of the conflict precludes application of common article 3 of the Geneva Conventions, and [3] al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under Geneva Convention III.") and Jay S. Bybee, Memorandum for Alberto R. Gonzales Counsel to the President and William J. Haynes, General Counsel of the Department of Defense RE: Application of Treaties and Laws to al Qaeda and Taliban Detainees, January 22, 2002, ("We conclude that these treaties do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that that [sic] President has sufficient grounds to find that these treaties do not protect members of the Taliban militia" because the Afghanistan is a failed state.) *The Torture Papers*, supra note 16, at 38–79, 81–117.


22 Alberto Gonzales, White House General Counsel, To the President Subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002).
to the Gonzales memo. On February 7, 2002 the President issued a memorandum affirming the OLC opinions that (1) the Geneva Convention did not apply to al Qaeda, (2) that Article 3 of the Geneva Convention did not apply to al Qaeda or the Taliban, and (3) that the Taliban are not protected by Article 4 of the Geneva convention and did not enjoy POW status and protection; but ordered (1) that when in line with military necessity all detainees are to be treated humanly consistent with the principles of the Geneva convention, and (2) that although the Constitution authorized him to suspend the Geneva Convention between the United States and Afghanistan, he would not exercise that right. A full review of the issues and arguments.

23Colin Powell, to Counsel to the President Assistant to the President for National Security Affairs Re: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002) and William H. Taft IV, General Counsel to Counsel to the President Re: Comments on your paper on the Geneva Convention (Feb. 2, 2002).

24President George W. Bush, Memorandum Re: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002).

25President Bush asserted that the final determination on what techniques would be used on captured enemy combatants was exclusively his. Congress, led by the efforts of Senator McCain, opposed the President and with public support in opposition to the views of the President, President Bush was forced to accept an amendment to the 2006 Defense Department Appropriation that prohibited the entire class of techniques approved by the President. Part of the Detainee Treatment Act of 2005, the McCain Amendment reads as follows:

No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

P.L. 109-163, 119 Stat. 3475, Title XIV § 1402(a), 1403(a) and 1403(d) (2006), respectively. The President in his signing statement countered asserting that

The executive branch shall construe [the McCain Amendment], relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.

President’s Statement on Signing of H.R. 2863, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico,
involved in the debate between the OLC, the Attorney General, the State Department, the White House General Counsel, and the President are beyond the subject matter of this Article. But the significance of the February 2002 ruling by the President\(^{26}\) that the


Notwithstanding President Bush’s implication that the McCain Amendment would be interpreted in line with his view of Presidential power, the McCain Amendment ended the political and policy debate on the use of enhanced techniques to be used by the military, which was in practice applied to the CIA. Thus the President lost the power struggle and debate over detainee interrogation techniques and who would have the final word on the subject.

The President was not without political supporters and under pressure McCain agreed to an additional amendment, which provided immunity to those who acted under the advice of the OLC. The Amendment reads as follows:

\[
\text{PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL.— In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent’s engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.}
\]


\(^{26}\)After the revelations of abuse at GITMO and Abu Ghraib in 2004, along with the Supreme Court decision Hamdan in 2006 and the passage of the Military Commissions Act of 2006, President Bush issued Executive Order 13440 Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency on July 20, 2007 which in
Geneva Convention did not apply to al Qaeda and the Taliban and that they did not enjoy prisoner of war (POW) status is that it raised part actually reversed his February 2002 decision while defending the general assertion that Article 3 of the Geneva Convention did not apply. The President's order stated as follows:

[section 1] . . . On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination.

Sec. 3. Compliance of a Central Intelligence Agency Detention and Interrogation Program with Common Article 3. (a) Pursuant to the authority of the President under the Constitution and the laws of the United States, including the Military Commissions Act of 2006, this order interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations, and shall be treated as authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse distinction as to their race, color, religion or faith, sex, birth, or wealth.

Emphasis added. The order however applied the wrong definition to Article 3. Article 3 prohibits as follows:

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(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.

Geneva Convention Common Article 3 (emphasis added). As discussed above, Section (a) is defined by Articles 1 and 16. Thus Section (c) is not defined by Section (a). Section (c) has its own meaning.

President Bush in his order defined violations of Article 3 to include torture, “other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment,” “any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act,” or “willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threaten-
new legal questions regarding how captured al Qaeda and Taliban

ing the individual with sexual mutilation, or using the individual as a human shield.”
Executive Order 13440 Section (b)(a)–(e).

The problem with the order is it defined violations of Article 3 on the same level
as those of Article 1 (which defines torture as “any act by which severe pain or suf-
f ering, whether physical or mental, is intentionally inflicted on a person for such
purposes as obtaining from him or a third person information or a confession”) and
Article 16 (“prevent in any territory under its jurisdiction other acts of cruel, inhuman
or degrading treatment or punishment which do not amount to torture as defined in
article 1”), which prohibit a much higher level of abuse which is defined by the Eighth,
Fifth, and Fourteenth Amendments. Article 3 provides protection from humiliating and
degrading treatment, a standard of care that does not rise to the abuse of Article 1
and 16.

Furthermore, the order defined “humiliating or degrading” to be “a manner so
serious that any reasonable person, considering the circumstances, would deem the
acts to be beyond the bounds of human decency” and if that was not limiting enough,
the order clarified the definition with example of “sexual or sexually indecent acts
undertaken for the purpose of humiliation, forcing the individual to perform sexual acts
or to pose sexually, threatening the individual with sexual mutilation, or using the
individual as a human shield.” Such was the behavior of the soldiers at Abu Ghraib
and GITMO, thus by definition, not the techniques that the OLC authorized on paper.

Subsequent to President Bush reluctantly applying Common Article 3 to the
Detainees, President Obama affirmed the applicability of protections of the Geneva
Conventions in his own order. President Obama issued Executive Order13492 Review
and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure
of Detention Facilities (Jan. 22, 2009), which ordered that “(n)o individual currently
detained at Guantánamo shall be held in the custody or under the effective control
of any officer, employee, or other agent of the United States Government, or at a facility
owned, operated, or controlled by a department or agency of the United States,
except in conformity with all applicable laws governing the conditions of such confine-
ment, including Common Article 3 of the Geneva Conventions.” Executive Order
13492 Section 6.

The change in policy between the Bush and Obama executive orders was not
in the application of Common Article 3, that policy / legal battle was settled in 2006,
but that the order from Obama ordered the closing GITMO within a year. The Senate
twice rejected legislation that would have authorized funds for the closing, May 20,
2009 and November 29, 2011. With the closing of GITMO prevented, On March 7,
2011 President Obama issued Executive Order 13567 Periodic Review of Individuals
Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of
Military Force which authorized and required periodic reviews of all detainees at
GITMO.

President Obama revoked Executive Order 13440 with Executive Order 13491
Ensuring Lawful Interrogations (Jan. 22, 2009). Executive Order 13491 ordered that
(1) Common Article 3 forms the baseline for interpreting the Federal Torture Act
and the Detainee Treatment Act of 2005, (2) Interrogations would be governed by the U.S.
Army field Manual, and (3) that interrogations of detainees may occur in reliance with
the Army Field Manual but may not relay on any interpretations of law governing inter-
rogations and the Geneva Conventions issued by the Department of Justice between
order read as follows regarding treatment of detainees:
fighters could be questioned, which led to the issuance of the famed torture memos six months later.

The August 2002 Memo, signed by Jay S. Bybee Chief of the OLC but generally believed to have been written by John Yoo, concluded that Section 2340 required a specific intent to inflict severe pain or suffering and that “certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture.”28 Up until this point, the memo was clearly reflecting the text of the statute and the CAT. Neither Section 2340 nor the CAT limit the tools of interrogation for information to questioning one would expect from police interviewing of suspected criminals — techniques that involve psychological, emotional, and intellectual trickery.29 Article 16 makes clear that cruel, inhuman, and degrading punishment is prohibited, but the U.S. Senate limited the meaning of the phrase to constitutional definitions by the Fifth, Eighth, and Fourteenth Amendments.30 Cruel and unusual punishment is prohibited under the Eighth Amendment which requires

Sec. 3. Standards and Practices for Interrogation of Individuals in the Custody or Control of the United States in Armed Conflicts.

(a) Common Article 3 Standards as a Minimum Baseline. Consistent with the requirements of the Federal torture statute, 18 U.S.C.A. 2340 to 2340A, Section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C.A. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

(b) Interrogation Techniques and Interrogation-Related Treatment. Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3 (Manual).

Although Executive Order 13491 revoked Executive Order 13440, it retained the incorrect definition of outrages upon personal dignity, in particular humiliating and degrading treatment to be defined by Article 1 and Article 16; although it also ordered that Article 3 be defined by the treatment authorized in the Army field Manual.

28 August 2002 Memo, at 1.


30 As discussed below, these are much more stringent standards than those advanced by international law and custom when addressing issues of torture or infliction of cruel and inhumane treatment.
“wanton, malicious, or sadistic” infliction of punishment or a “deliberant indifference to safety or health” of the person contained. In 1976 the Supreme Court explained that the Eighth Amendment prohibition against cruel and unusual punishment includes the prohibition against torture and barbarous methods of torture which are concededly inhuman, or involve punishment that involve torture or a lingering death.

In Whitley, the court held that the Eighth Amendment cruel and unusual punishment application to prison guards that apply force to inmates to maintain order is not deliberant indifference to pain and suffering but an even higher standard being “the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.’” Whitley, 475 U.S. at 320–21 (internal citations omitted). The court ruled in Hudson that “we hold that, whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in Whitley: whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Hudson, 503 U.S. at 6–7.

Even more importantly, the level of injury alone does not settle the matter regarding the force used or its reasonableness. The Hudson court made clear “In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat ‘reasonably perceived by the responsible officials,’” and “any efforts made to temper the severity of a forceful response.” Hudson, 503 U.S. at 6–7. The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it.” Hudson, 503 U.S. at 7 (citing Whitey, 475 U.S. at 321).

Approvably citing Rhodes v. Chapman, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981), the Court in Hudson explained that regarding the Eighth cruel and unusual punishment prohibition “Because routine discomfort is “part of the penalty that criminal offenders pay for their offenses against society,” (Rhodes, 452 U.S. at 347) “only those deprivations denying “the minimal civilized measure of life’s necessities” are sufficiently grave to form the basis of an Eighth Amendment violation.” Wilson v. Seiter, 501 U.S. 294, 298, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991) (quoting Rhodes, 452 U.S. at 347) (internal citation omitted).” Hudson, 503 U.S. at 9.

The Hudson case involved a beating of a prison inmate by at least two guards which left various injuries. The case revolved on whether the injuries were serious enough to trigger Eighth Amendment violation, to which the court observed “the blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not de minimis for Eighth Amendment purposes. The extent of Hudson’s injuries thus provides no basis for dismissal of his 1983 claim.” Hudson, 503 U.S. at 10.

Estelle, 429 U.S. at 102 (internal citation omitted).
The Court explained that the Eighth Amendment “embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency [and] the evolving standards of decency that mark the progress of a maturing society,” regarding the application of sanctioned punishments.\textsuperscript{33} The Fifth and Fourteenth Amendments require a violation of due process of law. The Due Process Clause “protects certain ‘fundamental liberty interest[s]’ from deprivation by the government, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest.”\textsuperscript{34} and the right to fundamental liberty interests is protected by substantive due process analysis, the test of which is the “shock the conscience standard”\textsuperscript{35} whereby the government action must have the intent to cause harm “unjustifiable by any government interest.”\textsuperscript{36} It is asserted here that the eighteen techniques approved by Rumsfeld and the ten used by the CIA on paper did not rise to wanton, malicious, or sadistic infliction of punishment or the deliberate indifference to safety or health. The application of the methods is another matter.

The abominations at Abu Ghraib\textsuperscript{37} and GITMO\textsuperscript{38} were the results of military and interrogation personnel moving beyond controlled inter-

\textsuperscript{33}Estelle, 429 U.S. at 102–03 (internal citation omitted).

\textsuperscript{34}Chavez v. Martinez, 538 U.S. 760, 775, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003).


\textsuperscript{36}County of Sacramento v. Lewis, 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).


rogation techniques to committing acts that were wanton, malicious, or sadistic infliction of punishment or the deliberate indifference to safety or health. General Counsel of the Navy Alberto J. Mora in a memo to the Navy Inspector General explained how military personnel treatment of detainees can degrade from the use of lawful interrogation to the use of unlawful interrogation techniques. His memo recounted a meeting he had with the Director of the Naval Criminal Investigation Service (NCIS), the NCIS Chief Psychologists, and the Navy Judge Advocate General (JAG) on December 2, 2002. The meeting was called as a result of the NCIS Director relaying concerns from NCIS agents at GITMO that some of the detainees “were being subjected to physical abuse and degrading treatment” and that the “military interrogators believed that such techniques were not only useful, but were necessary to obtain the desired information.” He relayed the opinion of Dr. Gelles, the NCIS Chief Psychologists, on the danger regarding how the techniques were being used at GITMO:

[T]here was great danger, he said, that any force utilized to extract information would continue to escalate. If a person being forced to stand for hours decided to lie down, it probably would take force to get him to stand up again and stay standing. In contrast to the civilian law enforcement personnel present at Guantanamo, who were trained in interrogation techniques and limits and had years of professional experience in such practices, the military interrogators were typically young and had little or no training or experience in interrogation. Once the initial barrier against the use of improper force had been breached, a phenomenon known as “force drift” would almost certainly begin to come into play. This term describes the observed tendency among interrogators who rely on force. If some force is good, these people come to believe, then the application of more force is better. Thus, the level of force applied against an uncooperative witness tends to escalate such that, if left unchecked, force levels, to include torture, could be reached. Dr. Gelles

39 Albert J. Mora, Memorandum for Inspector General, Department of the Navy Subj: Statement for the Record: Office of General Counsel Involvement in Interrogation Issues (June 18, 2004) [hereafter Mora memo]. See also Testimony of Alberto J. Mora before the Senate Armed Services Committee hearing “The Origins of aggressive interrogation techniques: Part I of the Committees inquiry into treatment of detainees in U.S. Custody” on June 17, 2008 [hereafter Mora testimony] and speech given at the ABA’s Center for Human Rights Fourth Annual House of Delegates Luncheon (February 2008) at www.abavideonews.org/ABA496/media/pdf/navycounsel__OMK_all.pdf.

40 Mora memo, supra note 40, at 3.

41 Mora memo, supra note 40, at 3.
was concerned that this phenomenon might manifest itself at Guantanamo.\textsuperscript{42}

On December 20, 2003 Mora met with the Department of Defense (DOD) General Counsel William Hayes in which he asserted that the techniques, which Rumsfeld’s approved on December 2, 2002, constituted torture. He argued that

\[\text{[n]ot only could individual techniques applied singly constitute torture, I said, but also the application of combinations of them must surely be recognized as potentially capable of reaching the level of torture. Also, the memo’s fundamental problem was that it was completely unbounded — it failed to establish a clear boundary for prohibited treatment. That boundary, I felt, had to be at that point where cruel and unusual punishment or treatment began. Turning to the Beaver Legal Brief, I characterized it as an incompetent product of legal analysis, and I urged him not to rely on it.}\textsuperscript{43}

These meetings were among the first of many in which General Counsel Mora advocated for the secession of the techniques and threatened to issue an opinion asserting that the techniques violated domestic and international law as practiced.\textsuperscript{44} In his 2008 testimony before the Senate Armed Services Committee, Mora noted that the problem with the techniques were both legal and practical. He explained:

\begin{quote}
Our Nation’s policy decision to use so-called “harsh interrogation techniques” during the war on terror was a mistake of massive proportions. It damaged, and continues to damage, our Nation. This policy, which may aptly be labeled a policy of cruelty, violated our founding values, our constitutional system, and the fabric of our laws, our overarching foreign policy interests, and our National security. The net effect of this policy of cruelty has been to weaken our defenses, not to strengthen them.
\end{quote}

\textsuperscript{42} Mora memo, supra note 40, at 4.

\textsuperscript{43} Mora memo, supra note 40, at 7–8. Mora later submitted three memos drafted by Dr. Gelles to the DOD Working Group that asserted that the literature on interrogation made clear that relationship based non coercive interrogation techniques based on mutual trust was best in breaking the resistance of individuals with the psychological profile of al Qaeda or Taliban detainees and coercive physical force was counterproductive. Mora memo, supra note 40, at 16.

\textsuperscript{44} Senator Carl Levin (chairman) opening statement, Senate Armed Services Committee hearing, Senate Armed Services Committee Hearing supra note 17 [hereinafter Levin Statement]. When asked by Chairman Levin regarding if his statement was correct that Mr. Mora threatened to issue an opinion that stated the techniques were not lawful, Mr. Mora answered that the statement was accurate. Levin Statement, supra note 17, at 99. See also Arthur H. Garrison, The Role of the OLC in Providing Legal Advice to the Commander-in-Chief after September 11\textsuperscript{th}: The Choices Made by the Bush Administration Office of Legal Counsel, 32 J. Nat’l Ass’n Admin. L. Judiciary 648, 700 (2012).
Before examining the damage, it may be useful to draw some basic legal distinctions. The choice of the adjectives “harsh” or “enhanced” to describe these interrogation techniques is euphemistic and misleading. The legally correct adjective is “cruel.” Many of the counter-resistance techniques authorized for use at Guantanamo in December 2002, constitute cruel, inhuman, or degrading treatment that could, depending on their application, easily rise to the level of torture.

Many Americans are unaware that there is a distinction between “cruelty” and “torture,” “cruelty” being the less severe level of abuse. This has tended to obscure important elements of the interrogation debate. For example, the public may be largely unaware that the government could evasively, if truthfully, claim, and did claim, that it was not “torturing,” even as it was simultaneously applying “cruelty.” Yet, Americans should know that there is little or no moral distinction between “cruelty” and “torture,” for “cruelty” can be as effective as “torture” in savaging human flesh and spirit and in violating human dignity. Our efforts should be focused not merely on banning “torture,” but on banning “cruelty.”

Except in egregious cases, it is difficult for outsiders to gauge the precise legal category of abuse inflicted on any detainee, because it hinges on the specific facts, including the techniques used and the medical and psychological impact. In general, however, it is beyond dispute that interrogation constituting cruel treatment was conducted, and certainly the admission that water boarding, a classic and reviled method of torture, was applied to some detainees, creates the presumption that those detainees were tortured.

The damage to our National security also occurred down at the tactical or operational level. I’ll cite four examples I heard about during my tenure.

First, some U.S. flag-rank officers maintained that the first and second identifiable causes of U.S. combat deaths in Iraq, as judged by their effectiveness in recruiting insurgent fighters into combat, are, respectively, the symbols of Abu Ghraib and Guantanamo. And there are others who are convinced that the proximate cause of Abu Ghraib was the legal advice authorizing abusive treatment of detainees that issued from the Department of Justice’s Office of Legal Counsel in 2002. Senator McCaskill was also skeptical of the antiseptic legalistic approach used by Beaver and Dalton regarding the list of 18 techniques authorized by the Rumsfeld memo (December 2002) and the Beaver memo (October 2002). She inquired on the meaning of techniques 8, 12 and 14 and how they were implemented.

Senator McCaskill: Let me start by saying how proud, as an American, I am of you, Mr. Mora. It’s — courage comes in all forms, and you showed great courage.

45 Mora Testimony, supra note 40, at 58–60.
Let me cut to the chase here and see if we can reach some agreement. Ms. Dalton and Ms. Beaver, do you both believe that putting a group of detainees together completely naked, hooded, and siccing dogs on them is legal under the UCMJ or anything else that our military should be paying attention to? Do you think that’s legal?

Admiral Dalton: Senator, I don’t believe that’s legal, and that was never approved by the Secretary of Defense.

Senator McCaskill: Okay. Ms. Beaver, do you think that’s legal?

Colonel Beaver: No, ma’am, and it never occurred at GTMO.

Senator McCaskill: Okay. All right. Well, I’m reading this legal memo, and I’m reading the memo by Mr. Feith. Now, I’ve got to tell you—you’re both trained lawyers, correct?

Colonel Beaver: Yes, ma’am.

Senator McCaskill: And you both know that words matter a lot in the law. The difference of one word can make a huge impact on a legal analysis, and that’s what you’re trained, as a lawyer, to understand. Is that correct? Ms. Beaver?

Colonel Beaver: Yes.

Senator McCaskill: Dalton?

Admiral Dalton: Yes, Senator.

Senator McCaskill: All right. I’m looking at this memo. It says, “removal of clothing,” under category 2. And it says, under category 2, “using detainee phobias, such as fear of dogs.” Now, I’m trying to figure out, as a lawyer, how removal of clothing and using fear of dogs does not envision naked people—and, by the way, the hood’s in there, too naked people having dogs sicced on them. How does not—that not occur to either of you, that that might be envisioned?

Colonel Beaver: Because, ma’am, in the discussions that the staff had, when you develop a plan, a professional plan of interrogation, there are limits and there are conditions, and there—you know, there’s command approval. And if somebody said, “Let’s sic the dogs on ‘em,” that would have never happened. I mean, that’s just not professional. That indicates something—

Senator McCaskill: But, it did happen.

Colonel Beaver: It did not happen, ma’am.

Senator McCaskill: Well, dogs were used with naked people.

Colonel Beaver: Dogs — well, in the context that you’re saying it, I’m not aware that that ever happened at Guantanamo Bay, Cuba.

Admiral Dalton: No, Senator. Those techniques that we’re talking about were approved for Guantanamo Bay, and Guantanamo Bay only. They did not involve nudity, they did not involve —

Senator McCaskill: Well, you say it —

Admiral Dalton: — siccing snarling dogs —

Senator McCaskill: — doesn’t involve nudity. It says “removal of” —

Voice: Can I ask that the witness be allowed to finish her answer before the question comes again

Admiral Dalton: Senator, as I was saying, the techniques approved by the Secretary did not involve nudity, they did not involve siccing snarling dogs on detainees.

Senator McCaskill: All right. “Removal of clothing.” Now, when you -

Colonel Beaver: Well, ma’am -

Senator McCaskill: — were discussing the safeguards, Ms. Dalton, within these discussions you had about safeguards, did anybody talk about putting in the word “all”? “Not allowed”? I mean, did anybody talk about that phrase, that removal of clothing — if I saw “removal of clothing,” and I was trying to get information out of a detainee, there’s nothing there that says “removal of some clothing.” It says “removal of clothing.” How would anyone know, from that guidance, that nudity was not allowed?

Admiral Dalton: Senator, that was one of the specific questions that was addressed in discussions with Guantanamo, with General Miller, and with others concerning these techniques. I specifically recall that we had discussions about that particular issue, and General — the people I spoke with — and my recollection is that it was General Miller — said it did not involve nudity.

Colonel Beaver: Right.

Senator McCaskill: Well, it doesn’t say that. There’s nothing in this, as a legal analysis, as a lawyer, that would tell you that nudity is prohibited. It says “removal of clothing.” It doesn’t say “removal of some clothing.” It just says “removal of clothing.” So, I don’t understand how that is a safeguard.

In defense of Lt. Colonel Beaver and Admiral Dalton, their testimony makes clear that they assumed the presence and authority of military discipline and the chain of command to create and implement controls on the use of the techniques, thus legal parameters were not necessary. Beaver’s memo makes clear that the use category two and

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46Senate Armed Services Committee hearing, supra note 17, at 78–80. See also Mora in response.

Chairman Levin: Mr. Mora, you’ve heard that the—what happened at Guantanamo did not constitute abuse of detainees. Do you agree with that?

Mr. Mora: Sir, I think abuse occurred, and potentially even torture of some detainees.

Chairman Levin: And in terms of the—what was authorized by the Secretary, do you believe that that constituted abuse? In other words, what he has said was okay, those category-2 and some of the category-3 techniques that he approved on December 2nd, in your judgment were those abuses permissible under Geneva or under other law?

Mr. Mora: Senator, it depends upon how those techniques would be applied.

Chairman Levin: Just—how about nakedness, nudity? Would that be permitted?

Mr. Mora: I think it would not be permitted, General —

Chairman Levin: How about use of dogs to induce stress?

Mr. Mora: It would not be permitted under Geneva.

Chairman Levin: All right.

Senate Armed Services Committee hearing, supra note 17, at 85.
three techniques required the interrogator to seek permission by higher military authority before their use. That requirement and any discussions regarding the request for the use of such techniques would per se prevent abuse of detainees. What they did not consider is what Mora called “force drift” as well as the breakdown of military discipline and control of the use of techniques. The techniques as far as Beaver and Dalton were concerned were legal because they did not violate the law and on paper were assumed to be properly used. It is also important to remember that the implementation of the interrogations was supervised and directed by the Counter Terrorism Center within the CIA and the interrogations were conducted by contract and CIA interrogators47 not by the military.

Returning to the OLC, while Mora opposed the techniques as

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47 Supra notes 38–39; Garrison, supra note 45. See also discussion of the 2005 OLC opinions, infra notes 123–26. Three years after Lt. Beaver drafted her memo, the OLC provided a similar assessment of the techniques being used by the CIA that were “imported from military Survival, Evasion, Resistance, and Escape ("SEAR") training.” Application of 18 U.S.C.A. §§ 2340 to 2340A to Certain Techniques That may be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), infra note 125, at 6 which included thirteen techniques: (1) dietary manipulation, (2) nudity, (3) attention grasp, (4) walling, (5) facial hold, (6) facial slap or insult slap, (7) abdominal slap, (8) cramped confinement, (9) wall standing, (10) stress positions, (11) water dousing, (12) sleep deprivation (more than 48 hours), (13) waterboarding, and the use of the techniques in combination thereof. See generally infra notes 123, 125. See also supra note 20 for discussion on the original CIA interrogation techniques.

Lt. Col. Beaver and Adm. Dalton’s assumption of military supervisory control over the use of the 18 techniques provides a background for their assertion that the techniques were lawful under Section 2340–2340A. It was this assumption that Senator McCaskill was alluding to in regard to the authorization to allow a detainee to be interrogated after the removal of clothing. What Lt. Col. Beaver and Adm. Dalton overlooked was how does a detainee end up with his clothing removed in an interrogation? The level of force (and control of that force) to make a grown Muslim man submit to the removal of his clothing sometimes in the presence of females is not discussed by the legal work by Beaver and Dalton. Lt. Col. Beaver and Adm. Dalton simply bypass the implementation of the techniques and simply make a determination that the techniques on paper were legal by assuming the techniques in implementation will be lawful. The OLC similarly focused on the medical safeguards in the implementation of the techniques but bypassed the practical implementation of the techniques. For example, the OLC made clear that the technique of nudity during an interrogation did not violate Sections 2340–2340A so long as the room the naked detainee was in was properly heated and that no sexual abuse or threatened abuse occurred. See Application of 18 U.S.C.A. §§ 2340 to 2340A to Certain Techniques That may be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), infra note 125 at 7–8, 12 and Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value Al Qaeda Detainees (May 30, 2005), at infra note 123, at 12, 30, and 36. The issue of how the detainee is made nude is completely bypassed and ignored. (It is not argued that removal of clothing or forced nudity is a violation of Section 2340–2340A or the Constitution, see Florence v. Board of Chosen Freeholders of
practiced\textsuperscript{48} the OLC focused on the legality of the techniques on paper and asserted that to violate the CAT one would have to violate Section 2340 and that a specific intent to cause severe pain or suffering was required. If the OLC analysis had stopped with the assertion that a specific intent to cause severe pain or suffering was required to violate Section 2340, the memo would have been on strong legal ground. As discussed in detail below, the Fifth and Eighth Amendments provide very limited protection regarding treatment and as such the \textit{August 2002 Memo} was correct in the assertion that “Section 2340 requires that a defendant act with the specific intent to inflict server pain, the infliction of such pain must be the defendant’s precise

\textit{County of Burlington}, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012) in which the Supreme Court held that forced strip searches and forced nude bodily inspections are lawful because prison authorities have a “legitimate interest” justifying the technique.)

Put simply the OLC, Lt. Col. Beaver and Adm. Dalton focused on the “what” of the techniques and completely abandoned the question of “how” regarding the practical — on the ground, in the detention cell, in the interrogation room—implementation of the techniques.

As it turned out, the “how” is what really mattered.

48 Both Lt. Col. Beaver and Rear Admiral Jane G. Dalton (ret.) (Legal Counsel to the Chairman of Joint Chiefs of Staff, 2000-2003) testified that the 18 techniques authorized by the DOD were lawful and humane if properly implemented and supervised. See Senate Armed Services Committee hearing, supra note 17, at 57, 68, and 73–74, 77–78, respectively. Mora explained that his complaint with the memo by Beaver was its lack of boundaries.

My concern with the memorandum is that it did not include a bright line of abuse which could not be transgressed. For example, you look at Lieutenant Colonel Beaver’s memorandum, and nowhere does it say that, “You may engage in these tactics just until you reach the point where it reaches cruel, inhuman, and degrading treatment, and you may go no further.” Because there was no such boundary anywhere in the memorandum, it was all subject to abuse.

\textit{Mora Testimony}, supra note 40, at 78. Admiral Dalton explained in her defense of the \textit{Beaver memo} that it had boundaries based on the context of implementation of the techniques and the fact that combat commanders would have to request permission to use them regardless of the fact that the secretary of Defense had authorized their use. Senate Armed Services Committee hearing, supra note 17, at 77. Lt. Col. Beaver similarly asserted:

I had built-in safeguards with legal opinion, medical involvement, and so forth. And so, it was not a blank check. It was from—what was from my view. If we did this professionally—there was a legitimate government purpose, there were safeguards—then there wouldn’t be abuses. . . . You can’t come up with all the conditions of an interrogation that, ahead of time . . . . I knew that if you would do these reviews and have these safeguards in place for these interrogations, that the law would be met. And I felt very strongly about that, and I believed in my colleagues from the intelligence community, that we would not allow the law to be violated or detainees to be harmed. And I still believe that today. And that’s why I believe there was no violation of the law at GTMO, despite what others may believe.

Beaver Testimony, Senate Armed Services Committee hearing, supra note 17, at 82.
Section 2340 requires a specific intent to cause severe pain.\textsuperscript{49} The error within part I of the August 2002 Memo is that it did not stop with an analysis of the law but provided an assessment of how to defend against criminal charges in the same manor as a defense attorney would advise a client. The opinion explained that as “a matter of proof, therefore, a good faith defense will prove more compelling when a reasonable basis exists for the defendant’s belief” that “his acts would not constitute the actions prohibited by the statute . . ..”\textsuperscript{50} Regardless of whether “a jury would acquit in such a situation”\textsuperscript{51} or whether “as a theoretical matter [specific knowledge that an act will inflict severe pain\textsuperscript{52} and suffering constitutes] specific intent,”\textsuperscript{53} the

\textsuperscript{49}August 2002 Memo, supra note 4, at 3.

\textsuperscript{50}“Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control . . ..” Further, a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits [i.e., torture — the intentional infliction of pain and suffering] negates specific intent.” August 2002 Memo, supra note 4, at 4.

\textsuperscript{51}August 2002 Memo, supra note 4, at 5.

\textsuperscript{52}August 2002 Memo, supra note 4, at 5.

\textsuperscript{53}The memo explained that Section 2340 “does not, however, define the term severe” and under its normal or ordinary meaning severe “conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.” August 2002 Memo, supra note 4, at 5. True as this is the memo made clear that the answer does not help “the client” because the memo then clarified what “severe pain” means “elsewhere in the United States Code.” The error of the memo, among others, resides in the attitude that it is being provided to “the client”. The President is not the client of the OLC. The OLC is part of a legal system within the executive branch to protect the rule of law within the executive branch. The satisfaction of the President to the legal analysis is not the point. The significance of an OLC opinion is that the President is served with the best view of the law. See Garrison, supra notes 7, 45.

The August 2002 Memo sought to define the term “severe pain” in statutes dealing with health care when they define severe pain in the context of emergency medical conditions. While admitting that the chosen statutes “address a substantially different subject from Section 2340, they are nonetheless helpful in understanding what constitutes severe pain. They 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 permanent impairment of a significant body function. These statutes suggest that ‘severe pain,’ as used in Section 2340, must rise to a similarly high level — the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions — in order to constitute torture.” August 2002 Memo, supra note 4, at 6.
purpose of OLC opinions are not to provide analysis of the law as a

Section 2340(2) also outlaws the infliction of “severe mental pain or suffering” which it defines as the infliction of “prolonged mental harm” which Yoo wrote “adds a temporal dimension to the harm . . . the harm must be one that is endured over some period of time . . . the harm must cause some lasting, though not necessarily permanent, damage.” August 2002 Memo, supra note 4, at 7. “For example, the mental strain experienced by an individual during a lengthy and intense interrogation — such as one that state and local police might conduct upon a criminal suspect — would not violate Section 2340(2). On the other hand, the development of a mental disorder such as posttraumatic stress disorder . . . might satisfy the prolonged harm requirement.” August 2002 Memo, supra note 4, at 7. “Not only must the mental harm be prolonged to amount to severe mental pain and suffering, but also it must be caused by or result from one of the acts listed in the statute.” “In other words, other acts not included within Section 2340(2)’s enumeration are not within statutory prohibitions.” August 2002 Memo, supra note 4, at 8.

The OLC rescinded the August 2002 Memo in December 2004, infra note 100. In the December 2004 Memo the OLC sought to define serve physical pain or suffering by first observing that the CAT defines torture as “extreme form of cruel, inhuman, or degrading treatment” thus the CAT “formalizes a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them.” December 2004 Memo, infra note 100, at 6 (internal citation omitted). The OLC concluded that Congress did not intend the meaning of severe physical pain and suffering to be limited to mean “conduct involving “excruciating and agonizing” pain or suffering.” December 2004 Memo, infra note 10, at 8. While Yoo used a medical statute to define the meaning of pain, the OLC used by analogy the Torture Victims Protection Act (TVPA) violations of which require “extreme and outrageous” conduct that rises to the level of torture — “The more intense, lasting, or heinous the agony, the more likely it is to be torture.” December 2004 Memo, infra note 10, at 9. Specifically, the acts “themselves [must be] so unusually cruel or sufficiently extreme and outrageous as to constitute torture . . .” The OLC asserted that torture under Section 2340, by analogy to the TCPA, requires that the pain must be the result of actions that per se are torturous:

Cases in which courts have found torture suggest the nature of the extreme conduct that falls within the statutory definition. See, e.g., Hilao v. Estate of Marcos, 103 F.3d 789, 790–91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a “suffocatingly hot” and cramped cell, and eight years of solitary or near-solitary confinement, constituted torture); Mehinovic v. Vuckovic, 196 F. Supp. 2d 1322, 1332–40, 1345–46 (N.D. Ga. 2002) (concluding that a course of conduct that included, among other things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim’s forehead; hanging the victim and beating him; extreme limitations of food and water; and subjecting to games of “Russian roulette,” constituted torture); Daliberti v. Republic of Iraq, 146 F. Supp. 2d 19, 22–23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of “physical torture, such as cutting off . . . fingers, pulling out . . . fingernails,” and electric shocks to the testicles); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 64–66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial, constituted torture).
private attorney would advise a client by commenting on the fact that “juries are permitted to infer from the factual circumstances that such intent is present” or how to argue a case to prevent felony convictions. The error in the opinion from the start is not just that the memo asserted an extreme version of presidential power in an institutionally binding legal opinion rather than simply interpreting a statute; the error was in the overarching approach in the memo by opining on how to avoid prosecution and conviction under the statute. As discussed below, these errors where compounded by the assertion that a domestic criminal statute was unconstitutional as applied to the President when he makes policy addressing the war on terror.

The President as Commander-in-Chief has the authority to determine how military operations are to be commenced and history has given the President plenary, if not exclusive, power to determine military and foreign policy as a constitutional matter.

August 2002 Memo, supra note 4, at 5.

Garrison, supra note 7.

to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign.” 59 The memo greatly exaggerated the legal positions of prior Attorneys General and OLC opinions regarding legislative encroachments on the power of the President to act as Commander-in-Chief. 60 When the OLC, for example, opposed and defended the power of the President in the face of the War Powers Resolution or opposed legislation that prohibited the President from placing American forces under direct command of the North Atlantic Treaty Organization (NATO), the opposition resulted from a frontal challenge to the power of the President as Commander-in-Chief not to a criminal statute prohibiting torture. 61 It is one thing to assert that Congress cannot order the President not to place American forces under NATO command or require him to withdraw forces if Congress does not sanction the deployment, 62 but it is quite another to assert that a statute that prohibits torture by government agents is unconstitutional if it’s applied to the President’s power to interrogate prisoners for information.

The August 2002 Memo made the broad assertion that as “Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence . . .. Any effort to apply Section 2340A in a manner that interferes with the President’s direction of such core war matters as the detention and

59 August 2002 Memo, supra note 4, at 31.


61 Supra note 61. See also William Dellinger, Memorandum for the Abner J. Mikva, Counsel to the President Re: Presidential Authority to Decline to Execute Unconstitutional Statutes 18 Op. O.L.C. 199 (Nov. 2, 1994).

62 See Arthur H. Garrison, The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama, 43 Cumberland L. Rev. 375 (2013), for discussion on the history of executive legal opinions on the commander-in-chief powers and the defense of those powers against congressional actions.
interrogation of enemy combatants thus would be unconstitutional.”

The memo asserted that “Congress lack[s] authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war.” The memo summarized the assertion as follows:

[T]he President’s power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander-in-Chief. A construction of Section 2340A that applied the provision to regulate the President’s authority as Commander-in-Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions. Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe Section 2340A to avoid this constitutional difficulty, and conclude that it does not apply to the President’s detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.

The memo concluded that the President, under the Constitution, is entrusted with the power and responsibility ensure the security of the United States and to deal with emergencies both seen and unforeseen.

Supplementing the assertion that Section 2340 was unconstitutional in application to the plenary Commander-in-Chief power, the memo

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63 August 2002 Memo, supra note 4, at 31. See also James Comey testimony on the power of the president to detain citizens on captured on U.S. soil for acts of terrorism and the power of the President to detain such a person indefinitely:

It is my view that, as long as the armed conflict with al Qaeda and its associated forces is ongoing, it would be constitutional to detain persons, including U.S. citizens, apprehended on U.S. soil in connection with that conflict. Those persons would have the right to challenge their detention in habeas corpus actions. This detention authority, in my view, stems from the 2001 Authorization for Use of Military Force, which I believe permits detention until cessation of hostilities. The U.S. Court of Appeals for the Fourth Circuit concluded that Padilla’s detention was lawful. I understand that the President has stated that, as a matter of policy, his Administration will not hold U.S. citizens in indefinite military detention without trial, and if I am confirmed as FBI Director, the FBI would act consistent with that policy.

Senator Dianne Feinstein, Questions for the Record, James B. Comey, Jr., Nominee, Director of the Federal Bureau of Investigation, U.S. Senate Judiciary Committee Hearing July 9, 2013 Questions for the Record at 2. See also Comey’s answer to Senator Franken: “It is my understanding that the President has the power to determine whether an individual is an enemy combatant, subject to relevant legal constraints and appropriate judicial review.” Senator Al Franken, Questions for the Record, James B. Comey, Jr., Nominee, Director of the Federal Bureau of Investigation, U.S. Senate Judiciary Committee Hearing July 9, 2013 Questions for the Record at 11.

64 August 2002 Memo, supra note 4, at 34–35.
65 August 2002 Memo, supra note 4, at 35.
66 August 2002 Memo, supra note 4, at 37.
cited Johnson v. Eisentrager and the Prize Cases. But, Johnson v. Eisentrager stands for the proposition that the Courts have no jurisdiction to review a case from enemy combatants (or for that matter POWs) held outside of the United States and the Prize Cases at best stand for the proposition that the President can order a blockade in times of war even if Congress has not declared or even recognized a state of war when such a state is imposed by rebellion or invasion. The exclusive ability of the President to respond to war is far from the proposition that the President can disregard domestic criminal law because it limits the range of techniques of interrogation. It is one thing to assert that the President is plenary in war and foreign policy but it is quite another to assert that in times of war all domestic law is subject to his determination of whether they shall be obeyed. Not only has such an assertion never been advocated by the courts, the Supreme Court has affirmatively rejected such an assertion of presidential power. Although true that the Founders “entrusted the President [with the] decision to deploy military force in defense of United States interests” they did not assert that such powers included the power to disregard domestic criminal statutes at will. Both the Federalists and Anti-Federalists asserted that the power of the national government must be granted but controlled. As James Wilson explained, “Liberty and security in government depend not on the limits, which rulers may please to assign to the exercise of their own powers, but on the boundaries, within which their powers are limited.”

67 August 2002 Memo, supra note 4, at 38.

On April 19, 1861, five days after the surrender of Fort Sumter, President Lincoln ordered a blockade of the ports of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, Texas and then added North Carolina and Virginia to the list on April 27, 1861. The Court was presented with the question of whether the blockade order was constitutional because Congress had not declared war on the Confederate States and as such only Congress could authorize a blockade because a blockade is an act of war. Lincoln asserted that he had the power to issue the blockade order under his power as Commander-in-Chief. The Prize Cases involved owners who brought suit based on the seizure of their ships due to the implementation of the blockade. The Supreme Court ruled that a de facto war existed and the President did not need Congress to recognize an armed rebellion and attack on the United States before the President could act to repel and answer the armed attack. See Garrison, supra note 59, at 61–69.

68 See U.S. v. Curtiss-Wright Export Corporation, 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936), and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 30 L.R.R.M. (BNA) 2172, 21 Lab. Cas. (CCH) P 67008, 26 A.L.R.2d 1378 (1952) for the Supreme Court position that foreign policy is the exclusive province of the President but the President is bound by the domestic laws passed by Congress even when such laws have an impact on the President’s power as Commander-in-Chief. The Court made clear that the unbridled power of the President in foreign affairs does not translate into the powers the President exercises in the domestic area. See also infra note 71.
circumscribed by the constitution.” The debate was over how to control government power while at the same time equipping the national government with the power to maintain the new nation. The Commander-in-Chief power was given in order to protect the nation in times of national emergency and war, not to allow the President to subject the nation to serfdom under his hand in times of war to protect the nation. The President is indeed empowered to be Commander-in-Chief but is also obligated to faithfully execute the laws, the laws passed by Congress. The constitutional power to control the military and implement its strategy has never successfully been argued to include the power to disregard the other constitutional command of faithfully executing the law. Even if one could argue that in times of war they are in conflict, it is not true that in such conflict the Commander-in-Chief power by definition prevails.

This notwithstanding, the Bush Administration OLC asserted the

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70 See generally Garrison, supra note 59. The drafters of the Constitution believed in a strong system of separation of powers and a strong executive but they maintained that the Constitution required that the executive was under the law. James Wilson, a federalist, a key partner to James Madison during the Constitutional Convention and a future Supreme Court Justice, wrote regarding the power of the executive:

To foreign transactions, the British parliament is no party: to foreign nations, the British parliament is totally unknown. Alliances, treaties of peace, even declarations of war, are made in the name, and by the constitutional authority, of the king alone. But, it has never been pretended, that the prerogative of the king, as sovereign liege lord, extended so far as to bind his subjects by his laws. Even Henry the eighth, tyrant as he was, knew that an act of parliament was necessary, if even that could be sufficient, to endow his proclamations with legal obligatory force. But the king, by assenting to an act of parliament, can bind himself; and can bind all that portion of the sovereign power of the nation, which is entrusted to his management and care.

Supra note 70, at 195.

71 Garrison, supra note 59. See also Duncan v. Kahanamoku, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 (1946), in which the Court rejected the argument that the President under time of national emergency could impose martial law and close the civilian courts of the state of Hawaii when both the court were open and the state was not in rebellion. See also Ex parte Milligan, 71 U.S. 2, 18 L. Ed. 281, 1866 WL 9434 (1866), in which the Court rejected the assertion that the President could subject a civilian to military trial when such civilian was not supporting a armed rebellion and was not a member of the armed forces. See also U.S. ex rel. Toth v. Quarles, 350 U.S. 11, 76 S. Ct. 1, 100 L. Ed. 8 (1955), for the principle that the military cannot try former military personnel for crimes after they leave the military and Reid v. Covert, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957), for the proposition that civilians are not under the jurisdiction of military courts because they are dependents of active military personnel. In both cases the Court ruled that such individuals are to be tried in civilian federal courts.

72 The August 2002 Memo rises to the level of serious hubris when it asserts that “[i]t could be argued that Congress enacted 18 U.S.C.A. § 2340A with full knowledge
opposite. To its further detriment, the OLC redefined the torture statute to prohibit actions that caused pain on the level of organ failure and the prohibition against severe mental pain to be actions limited to those that produced post traumatic stress disorder (PTSD). In summary, the August 2002 Memo concluded:

For the foregoing reasons, we conclude that torture as defined in and proscribed by sections 2340-2340A, covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just, at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. Additionally, such severe mental pain can arise only from the predicate acts listed in Section 2340. Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.

Further, we conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President’s Commander-in-Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.  

One of the traditions of opinions issued by the OLC is that opinions should focus on legal analysis rather than achieve a particular legal/policy objective. This tradition was not followed in much of the analysis in the August 2002 Memo. As discussed above, in October 2002 the DOD Joint Task Force 170 at GITMO requested permission from the Secretary of Defense to use 18 techniques in the interviewing of captured prisoners. The request was supplemented by an opinion by Lt. Col. Diane E. Beaver, Staff Advocate General, U.S. Army, who concluded that the techniques did not violate the CAT because they did not violate the Eighth Amendment. The logic of Lt. Col. Beaver is reviewed here so as to show that a cogent argument can be made to support the techniques in comparison to the August 2002 Memo and consideration of the President’s Commander-in-Chief power, and that Congress intended to restrict his discretion in the interrogation of enemy combatants. Even were we to accept this argument, however, we conclude that the Department of Justice could not enforce Section 2340A against federal officials acting pursuant to the President’s constitutional authority to wage a military campaign.” August 2002 Memo, at 36. Aside from the fact that 2340 was not implemented to limit the President’s Commander-in-Chief power, the OLC has no authority to opine on whether and how the Justice Department will prosecute a criminal violation of a federal statute. But if one is a defense attorney such an opinion would be of great help in creating immunization of ones client under a federal statute — a result the memo addresses Section VI.

73The August 2002 Memo, at 46.
which focused less on the law and more on projecting a specific legal policy and theory of executive power.

Taking as a given that the Geneva Convention did not apply to individuals captured and held at GITMO, based on the opinion issued by President Bush in February 2002, Lt. Col. Beaver sought to addressed the concerns of interrogators that they were still obligated to treat the detainees humanely in accordance with the Geneva Convention and not to “do anything that could be considered ‘controversial’ in accordance” with the President’s order.\(^74\) Beaver correctly asserted that the CAT prohibition against cruel, inhuman or degrading treatment or punishment applies to the U.S. in so far as the term is defined by the meaning of the Eighth Amendment under U.S. constitutional law. The International Covenant on Civil and Political Rights (ICCPR) which prohibits inhuman treatment and arbitrary arrest and detention was ratified by the U.S. with the same Eighth Amendment limitation on the meaning of inhuman treatment and arbitrary arrest and detention. Beaver also made clear that the American Convention on Human Rights, the International Criminal Court Treaty, the United Nations Universal Declaration of Human Rights, and the European Court of Human Rights have no authority over actions by the U.S. because they were not treaties ratified by the U.S. Thus what the law requires (as supposed to what people wanted the law to require) is that the U.S. is not subject to these international bodies or concepts of inhuman treatment and is subject to the CAT and the ICCPR prohibition against torture as defined by the prohibition against cruel and unusual punishment under the Eighth Amendment.

With the international law determinations of torture and inhuman treatment dispatched as providing legal boundaries for the interrogations at GITMO, Beaver turned to Eighth Amendment case law for direction. Beaver opined that Eighth Amendment law prohibits government agents from inflicting “unnecessary and wanton infliction of pain” and techniques that “maliciously and sadistically use force to cause harm” and both prohibitions turns on “whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and

\(^{74}\) Beaver, supra note 18, at 229–35. Lt. Col. Beaver concluded:

Since the detainees are not EPWs [Enemy Prisoners of War], the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on US personnel conducting detainee interrogations at GITMO. Consequently, in the absence of specific binding guidance, and in accordance with the President’s directive to treat the detainees humanely, we must look to applicable international and domestic law in order to determine the legality of the more aggressive interrogation techniques recommended in the J2 proposal.

Beaver, supra note 18, at 229.
sadistically for the very (emphasis added) purpose of causing harm.” Further citing both the Ninth and Eighth Circuit Courts Beaver summarized that the Eighth Amendment requires that the government agents must lack a good faith belief that the techniques used support a legitimate or compelling governmental interest and for the technique to rise to the level of constitutional violation it must under the totality of the circumstances rise to the level of unnecessary and wanton infliction of pain. Unlike the August 2002 Memo, Beaver never asserted that Section 2340 did not apply to the proposed techniques. Beaver accepted as a given that Section 2340 applied and asserted that the “torture statute . . . is the United States’ codification of the signed and ratified provisions of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment” and the Eighth Amendment defines such treatment as unnecessary and wanton infliction of pain. Thus the “specifically intended” mens rea of the statute is on the level of wanton infliction of pain without any legitimate or compelling governmental interest served by the infliction of the technique. Lt. Col. Beaver reached into the law as defined by the Eighth Amendment and American case law and used established definitions of wanton, malicious, or sadistic infliction of pain to define the torture and inhuman treatment prohibitions in Section 2340 and the CAT while the August 2002 Memo found an irrelevant medical statute and used bad legal reasoning at best to determine that torture requires long term injury or physical pain on the level of organ failure!

One could answer Beaver’s argument with at least three proposi-

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76 Beaver, supra note 18, at 232, citing Singh v. Holcomb, 977 F.2d 586 (8th Cir. 1992); Ferguson v. Cape Girardeau County, 88 F.3d 648 (8th Cir. 1996); Green v. Strack, 57 F.3d 1077 (9th Cir. 1995).
77 Lt. Col. Beaver concluded that
[s]o long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate governmental objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm, the proposed techniques are likely to pass constitutional muster. The federal torture statute will not be violated so long as any of the proposed strategies are not specifically intended to cause severe physical pain or suffering or prolonged mental harm. Assuming that severe physical pain is not inflicted, absent any evidence that any of these strategies will in fact cause prolonged and long lasting mental harm, the proposed methods will not violate the statute.
Beaver, supra note 18, at 233.
78 Yoo argued that Section 2340 “does not, however, define the term severe” and under its normal or ordinary meaning severe “conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.” August 2002 Memo, supra note 4, at 5. Specifically the memo finds definition
tions, (1) the assertion that the whole question of Section 2340 and the CAT in relation to the Eighth Amendment is one of first impression since the U.S. Supreme Court and the lower federal courts have not specifically addressed the meaning of the Eighth Amendment in relation to the CAT, (2) that domestic definitions of Eighth Amendment violations are related to police and prison officials in civil law suits not international treaties, thus the domestic definition are too narrow and are not appropriate to meet the needs and responsibilities of the U.S. under an international treaty, and (3) since Congress requires that the interpretation of the CAT be governed under Supreme Court jurisprudence and that jurisprudence has defined the Eighth Amendment to prohibit treatment that is rejected by the evolving standards of a civilized society, the views and definitions of torture can be defined by the evolving standards of international community sentiment and international law — which is broader than domestic definitions developed under civil liability cases. Thus the Eighth Amendment in

for the term “severe pain” in statutes dealing with health care when they define severe pain in the context of emergency medical conditions. While admitting that the chosen statutes “address a substantially different subject from Section 2340, they are nonetheless helpful in understanding what constitutes severe pain. They 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 permanent impairment of a significant body function. These statutes suggest that ‘severe pain,’ as used in Section 2340, must rise to a similarly high level — the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions — in order to constitute torture.”

August 2002 Memo, supra note 4, at 6.

An example of this type of argument was made by an amicus brief filed by Amnesty International in Graham v. Florida and Sullivan v. Florida, Nos. 08-7412 and 08-7621, which involved the application of the Eighth Amendment Cruel and Unusual Punishment Clause to the imposition of life without parole to juveniles sentenced for non-homicide convictions. The brief asserted that it was recognized by Supreme Court jurisprudence that

... the very constitutional provision at issue in this case — the Eighth Amendment’s prohibition on “cruel and unusual punishments inflicted” — traces its origin directly to the laws of another nation. The foundation for the phrase “cruel and unusual” Stems from the “Anglo-American tradition of criminal justice” Trop v. Dulles, 356 U.S. 86, 100 (1958). The phrase was taken directly from the English Declaration of Rights of 1688, and the principle came from the Magna Carta.

This Court has a proud history of looking to the standards of the international community, in particular in determining the contours of the Eighth Amendment’s cruel and unusual punishments clause. . . . To view the evolving standards of decency in an isolated and insular domestic environment would be contrary to all that the Founders considered essential to joining the ranks of nations.

Amnesty International in Graham v. Florida and Sullivan v. Florida, Nos. 08-7412 and 08-7621 amicus brief at 7-8. The brief cited various cases in which the Court took the views of the international community into account in determining the meaning and
fact may provide much broader protections when applied to defining the prohibitions against cruel, inhuman and degrading treatment or what constitutes torture under the CAT.

The point is however, that Lt. Col. Beaver approached the question focusing on what the law requires and did not seek to justify the use of the techniques and those agents that may use them in the event of future criminal prosecution. Lt. Col. Beaver approached the question in a quasi-judicial manner and applied the law in a quasi-judicial fashion. Beaver did not make a wholesale assertion that Section 2340 was unconstitutional en mass when applied to the President. As discussed above, the memo received acceptance by Rumsfeld and DOD General Counsel but condemnation within other parts of the military legal community and public legal scholars after it was released. When Lt. Col. Beaver testified before the Senate Armed Services Committee in 2008 regarding her memo she took responsibility for its conclusions but noted that she received no help regarding her legal analysis from her line colleagues and immediate supervisors in the military; in fact she noted that she was left all alone in providing legal analysis of the techniques and was shocked that her opinion was the opinion that the DOD relied on in regard to the question of the legality of the enhanced techniques.80

Returning back to the OLC, if the August 2002 Memo had any application of the Eighth Amendment. The Court found the amicus brief convincing. In Graham the Court wrote:

The State’s amici stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus. These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, “the overwhelming weight of international opinion against” life without parole for nonhomicide offenses committed by juveniles “provide[s] respected and significant confirmation for our own conclusions.”

The debate between petitioner’s and respondent’s amici over whether there is a binding jus cogens norm against this sentencing practice is likewise of no import. The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.


80 Beaver Testimony, supra note 17, at 56, 63–64. In the whole discussion of the use of the techniques there was a major schism between the intelligence community and the law enforcement community and Beaver testified that the law enforcement community was not happy that she opinioned on the techniques. See Beaver Testimony, supra note 17, at 69. The schism rises from the difference in securing
pretense in being a legal opinion that only sought to provide a neutral exposition of the law or even one with only a bias towards protecting the institution of the Presidency, it was lost when in Section VI it addressed the possible defenses an interrogator could use under indictment for violation of Section 2340. The memo asserted that “[e]ven if an interrogation method, however, might arguably cross the line drawn in Section 2340, and application of the statute was not held to be an unconstitutional infringement of the President’s Commander-in-Chief authority, we believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability.”

These include necessity and self-defense (defense of the country) in addition to the general application of the good faith assertion. Aside for the legalistic hedging in the advice (“certain justification defenses might be available”), the OLC completely abandoned the quasi-judicial status that it holds institutionally within the Justice Department by suggesting what defenses are available to defendants who are subjected to criminal violation of federal statutes. The quality or correctness of the advice is not what abandoned the expected quasi-judicial stature of OLC opinions, it is that the advice was given in the first place. The role of an OLC opinion is to explain what the law is not to provide rationalizations on how government action can be defended in a criminal trial.

Regardless of its weaknesses, the August 2002 Memo prevailed and was used to support the interrogation techniques used by both the CIA and the Defense Department until it was withdrawn December 30, 2004.

The second memo, CIA Interrogation Memo, submitted on August 1, 2002 addressed a list of specific techniques that the CIA requested legal assessment on as to their legality. The CIA Interrogation Memo focused on a list of techniques that were being used on Abu Zubaydah who was a senior level commander of al Qaeda and one of the key members of that organization that planned the attacks of September 11. The CIA Interrogation Memo answered the request of the CIA as information for intelligence purposes and securing information for law enforcement purposes. The Bush Administration made a policy determination at the presidential level that the techniques were used for the former not the latter.

For discussion on the dispute between the uniform Judge Advocates General, the OLC, and the DOD General Counsel William J. Hayes, see Garrison, supra note 44, at 694–705; Testimony of Admiral Dalton (morning panel) & William J. Hayes (afternoon panel) before the Senate Armed Services Committee hearing, supra note 17, available at http://www.armed-services.senate.gov/Transcripts/2008/06%20Jun e/A%20Full%20Committee/08-53%20-%206-17-08%20-%20pm.pdf.

81 August 2002 Memo, supra note 4, at 39.
82 See Garrison, supra note 45.
to whether the ten proposed techniques including grabbing Zubaydah by the clothing or by the face, using open hand facial slaps, cramped confinement, forced standing against a wall, stress positions, sleep deprivation, use of non lethal insects, and waterboarding violated Section 2340 or the CAT.\footnote{83}{CIA Interrogration Memo, supra note 5, at 2.} The CIA Interrogation Memo was signed by Jay Bybee and concluded that since none of the techniques involved the infliction of severe pain or suffering, or caused or resulted in severe prolonged mental pain or suffering, they were all legally supportable. As to the most politically disdainful technique, use of the waterboard, the CIA Interrogation Memo concluded that although the use of the technique clearly constituted a threat of immediate death, it does not cause prolonged mental harm of any significant length of time and it does not cause severe physical pain — since the technique is one that only causes fear of death not physical pain leading to death.\footnote{84}{CIA Interrogation Memo, supra note 5, at 15.} The OLC concluded that waterboarding did not constitute torture under Section 2340. In the third memo submitted on March 14, 2003, Memorandum for William J. Haynes II, General Counsel to the Department of Defense Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (hereafter Military Interrogations Memo), John Yoo addressed “the legal standards governing military interrogations of alien unlawful combatants held outside of the United States” to which Yoo concluded “federal criminal laws . . . do not apply to properly authorized interrogations of enemy combatants [and] if they were misconstrued to apply to the interrogation of enemy combatants, [they] would conflict with the Constitution’s grant of the Commander in Chief power solely to the President.”\footnote{85}{Memorandum for William J. Haynes II, General Counsel to the Department of Defense Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States 1 (Mar. 14, 2003) [hereinafter Military Interrogations Memo].} While the August 2002 Memo had significant errors in both logic and approach, the CIA Interrogation Memo and the Military Interrogations Memo were much more narrowly focused on the application of Section 2340 and the Fifth and Eighth Amendments to the proposed interrogation techniques. Both memos, although much less broad based in asserting plenary Presidential power, approached the question of the legality of the various specific techniques with an approach of a private attorney.\footnote{86}{For a discussion on the model used by the OLC regarding its role in providing legal research and opinions to the President, see Garrison, supra note 44.} The CIA Interrogation Memo concluded that none of the proposed techniques violated Section 2340 but did so with beginning phrases like “you have informed us” and “according to
your reports” regarding the possibility or lack thereof of infliction of severe physical pain or mental pain. The memo took as a given that the techniques would be imposed under medical, psychological, and military control so as not to impose long term pain. The CIA Interrogation Memo also encompassed the main sections of the August 2002 Memo which asserted that Section 2340 did not apply because the techniques did not entail the infliction of severe physical or mental pain. In essence the CIA Interrogation Memo approached the CIA question with the following logic and theme: the techniques are legal — as they have been described to the OLC — but in any event Section 2340 does not apply, but if Section 2340 does apply the techniques are legal if they are imposed as you (CIA) have informed us (the OLC) they will be implemented. Again, the point is that the approach chosen by the OLC was more of private counsel seeking to protect his client rather than discussing the nature of the law in the same manner as a court would approach a legal question. The Military Interrogations Memo to the DOD was more tempered than the memos of 2002 in that Yoo placed much more focus on what the law required. The memo concluded that (1) because the Fifth and Eighth Amendments are designed to control government power in criminal trials they have no applicability to captured combatants held outside of the United States, (2) that prohibitions of torture under the CAT are defined by the Eighth Amendment definition of whether the action amounted to cruel and unusual punishment, and (3) that international definitions of torture, cruel and inhuman treatment do not control and define U.S. obligations under the CAT.

Although a full review of the 81 page Military Interrogations Memo is outside of the scope of this Article, the memo, in part, is noted as an example of an OLC opinion that focuses on what the law requires. The result of such an inquiry is not necessarily what people want the law to require. The memo is correct that the Fifth and Eighth Amendments are procedural rights that govern criminal trials and punishment (right to grand jury, double jeopardy, forced confessions, due process of law, prohibition against cruel and unusual punishment) all of which has no application to either those in the U.S. military (they have the UCMJ) or captured enemies in combat; as the text of the Fifth makes clear its protections apply to all persons — “except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” As discussed above the CAT uses the Fifth and Eighth Amendments only to define torture and cruel and inhuman treatment. Both Lt. Col. Beaver and Yoo are correct that the Courts have defined the applicability of the Eighth Amendment prohibition of cruel and unusual punishment to the narrow prohibition of wonton, malicious, and sadistic infliction of pain and that the government agent’s actions must lack of good faith belief that the actions were
implemented to achieve a legitimate or compelling governmental interest and that the methods used “must be necessary and proportional in light of the danger that reasonably appears to be posed” to the government agent. 87 Regardless of whether one thinks Eighth Amendment analysis should entail a broader definition, the fact is that it does not and Lt. Col. Beaver and Yoo are correct that the level of force analysis under the Eighth Amendment turns on “whether the official acted in good faith or maliciously and sadistically for the very purpose of causing harm” 88 and whether the “interrogator acts with the honest belief that the interrogation methods used on a particular detainee do


88 Military Interrogations Memo, supra note 86, at 61. In addressing the issue of physical harm caused by condition of confinement or detention, the Military Interrogations Memo made the following assertion on the applicability of the Eighth Amendment:

The conditions of confinement cases provide a useful analogue to interrogation techniques that alter the conditions of a detainee’s cell and surrounding environment. The conditions of confinement analysis often arises in claims concerning the use of administrative segregation and conditions attendant to segregation. In those cases, a condition of confinement is not “cruel and unusual” unless it (1) is “sufficiently serious” to implicate constitutional protection (Rhodes, 452 U.S. at 347), and (2) reflects “deliberate indifference” to the prisoner’s health or safety (Farmer, 511 U.S. at 834. The failure to demonstrate either one of these components is fatal to the claim. The first element is objective, and inquires whether the challenged condition is cruel and unusual. The second, so called “subjective” element requires an examination of the actor’s intent and inquires whether the challenged condition is imposed as a punishment. Wilson, 501 U.S. at 300 (“If the pain inflicted is not formally meted out as punishment by the statute or sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.”) (emphasis in original).

As to the objective element, the Court has established that “only those deprivations denying ‘the minimal civilized measures of life’s necessities’ are sufficiently grave to form the basis of an Eighth Amendment violation.” Wilson, 501 U.S. at 298 (quoting Rhodes, 452 U.S. at 347). . . . [A] prisoner must show that he has suffered a “serious deprivation of basic human needs” . . . . The court has also articulated an alternative test inquiring whether an inmate was exposed to “a substantial risk of serious harm.” Farmer, 511 U.S. at 837.

To show deliberate indifference under the subjective element of the conditions of confinement test, a prisoner must show that “the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference can be drawn that a substantial risk of serious harm exists and he must also draw the inference.” Farmer, 511 U.S. at 837. This standard requires greater culpability than mere negligence.

not present a serious risk to the detainee’s health or safety.” Since Congress has locked the meaning of Section 2340 and the CAT to domestic definitions of cruel and unusual treatment, the OLC was correct to conclude malicious and sadistic treatment is prohibited. Whatever else can be said of the techniques used by the Bush Administration, they did authorize on paper the use of sadistic treatment as methods of interrogation.

The Fifth Amendment provides an equally narrow range of protection. In *Sacramento v. Lewis* the Court was presented with whether the Fourteenth Amendment substantive due process rights of Lewis were violated when he was killed accidentally by the police after a high speed car chase. To which the Court ruled no, concluding that “only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.” The Court asserted that substantive due process protection provided under the Fourteenth Amendment protects against arbitrary state action either as a result of fundamental denial of procedural fairness or “the exercise of power without any reasonable justification in the service of a legitimate governmental objective [because] the substantive due process guarantee protects against government power arbitrarily and oppressively exercised.” Two months after OLC issued the *Military Interrogations Memo*, the Supreme Court in *Chevez v. Martinez*, affirmed this view and held that even if government action violates a fundamental individual interest, there is not violation if the government has a compelling governmental interest. If this was not limiting enough with regard to what controls or creates “rights” under the CAT and

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89 *Military Interrogations Memo*, supra note 86, at 65.


91 The Court narrowed the applicability of the concept of substantive due process by requiring that an asserted violation of due process must not be covered by a specific constitutional right and if the violation is covered by a specific constitutional right, the analysis of the violation is constrained by the constitutional parameters of that specific right. See *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) and *U.S. v. Lanier*, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (cited in Lewis, 523 U.S. at 843).

92 *Lewis*, 523 U.S. at 836.

93 *Lewis*, 523 U.S. at 845–46 (internal citation omitted).

94 *Chevez*, 538 U.S. at 775. To this point of a compelling governmental interest establishing the lack of arbitrary government use of force even if such use may impact fundamental rights, Yoo advised the DOD that
Section 2340 regarding torture, the Court made clear in Lewis that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' because substantive due process is 'intended to prevent government officials from abusing [their] power, or employing it as an instrument of oppression.'"\(^95\) In defining the level of egregious and arbitrary use of government power that reaches constitutional substantive due process levels, the Court ruled that there has to be a specific intent to injure that raises to the level of shock the conscience.\(^96\) The Court held that because the Eighth Amendment requires deliberate indifference in custodial situations or intentional malicious or sadistic purpose to cause harm in the use of force context, the Fifth Amendment substantive due process requires the same malicious and sadistic purpose when government agents act pursuant of a legitimate or compelling governmental interest.

In the Military Interrogations Memo Yoo applied the substantive due process test and concluded that the shock the conscience standard would be met "if the interrogation methods were undertaken solely to produce severe mental suffering" or if the interrogator acts knowing that a serious risk to the health or safety of the detainee will occur due to his actions and consciously disregards that risk. Yoo correctly advised the DOD that as long as the techniques did not involve the use of force that rises to the level of brutal physical abuse (rape, severe beatings) or psychological abuse well above angry insults or idol threats, the techniques will not rise to the level of substantive due process violation. Because the CAT is defined by the Fourteenth, Eighth, and Fifth Amendments, the proposed DOD techniques do not violate the cruel, inhuman, or degrading treatment or punishment so long as they are not implemented to intentionally impose harm maliciously and sadistically. Yoo concluded that the legal question on what level of force can be used and what interrogation techniques violate the Fourteenth, Fifth, and Eighth Amendments is situational.

Here, depending upon the precise factual circumstances, such techniques may be necessary to ensure the protection of the government's interest here — national security . . . . If prison administration or the protection of one person can be deemed to be valid governmental interests necessitating the use of force, then the interest of the United States here — obtaining intelligence vital to the protection of thousands of American citizens — can be no less valid.

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\(^95\) Lewis, 523 U.S. at 846 (internal citations omitted).

\(^96\) Lewis, 523 U.S. at 849.
Whether the use of more aggressive techniques that involve force is permissible will depend on the information that relevant officials have regarding the nature of the threat and the likelihood that the particular detainee has information relevant to that threat.

Whether the interrogators have acted in good faith would turn in part on the injury inflicted. For example, if the technique caused minimal or minor pain, it is less likely to be problematic under this standard. The use of force must also be proportional, i.e., there should also be some relationship between the technique used and the necessity of its use. So, if officials had credible threat information that a U.S. city was to be the target of a large-scale terrorist attack a month from now and the detainee was in a position to have information that could lead to the thwarting of that attack, physical contact such as shoving or slapping the detainee clearly would not be disproportionate to the threat posed. In such an instance, those conducting the interrogations would have acted in good faith rather than maliciously and sadistically for the very purpose of causing harm.

While the August 2002 Memo sought to defend a political policy of plenary presidential power and thus suffered from serious legal and methodological flaws, the Military Interrogations Memo was much more focused on the describing the law and what the law required. The error in both the Military Interrogations Memo and CIA Interrogation Memo was the wholesale inclusion of the August 2002 Memo.

The August 2002 Memo, the Military Interrogations Memo and the CIA Interrogation Memo did not survive scrutiny after being made

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97 Military Interrogations Memo, supra note 86, at 61–62. The memo explained to the DOD that “interrogations methods that do not deprive enemy combatants of basic human needs would not meet the objective element of the conditions of confinement test [and under the] subjective component . . . the interrogators would have to act with deliberate indifference to the detainee’s health and safety.” Military Interrogations Memo, supra note 86, at 64–65. But, citing Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), the memo made clear to the DOD that the Supreme Court has interpreted the Eighth Amendment to prohibit the infliction of gratuitous wanton and unnecessary pain. “Thus, the necessity of the governmental action bears upon both the conditions of confinement analysis as well as the excessive force analysis.” Military Interrogations Memo, supra note 86, at 64.

98 John Yoo has written of the August 2002 Memo and the purpose of the OLC that the “Justice Department and specifically OLC serve in part as the lawyers for the executive branch. If they were to accept that Youngstown controlled the executive branch in war, the President’s powers would be crippled. If the President had no independent constitutional powers, Congress could pass laws preventing a President from firing cabinet members, signing international agreements, or directing foreign policy or military strategy without getting approval from Congress first. No President’s administration wants that, Republican or Democrat.” John Yoo, supra note 6, at 185–86.
In January 2009 the OLC rescinded various prior and subsequent memos prepared by Yoo and his successors. On December 30, 2004 the OLC formally rescinded the August 2002


The January 2009 Memo, issued five days before the inauguration of President Obama, while maintaining the traditional OLC defense of the Commander-in-Chief prerogatives of the President disavowed the assertions made by the OLC under John Yoo and Jay Bybee. Although defending the power of the President to control the military and act in the defense of nation without undue Congressional interference the January 2009 Memo concluded that the earlier OLC memos had applied this principle beyond its legitimate bounds.

It is well established that the President has broad authority as Commander in Chief to take military actions in defense of the country. See, e.g., Power to Use the Armed Forces Abroad Without Statutory Authorization, 4 A OP. O.L.C. 185, 187 (1980) (“The power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President’s general power as a matter of historical practice.”); Training of British Flying Students in the United States, 40 Op. Att’y Gen. 58, 62 (1941) (recognizing the President’s authority to “dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country”). Furthermore, this Office has recognized that Congress may not unduly constrain or inhibit the President’s exercise of his constitutional authority in these areas. See, e.g., Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 185 (1996) (Congress “may not unduly constrain or inhibit the President’s authority to make or to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field”).

We have no doubt that the President’s constitutional authority to deploy military and intelligence capabilities to protect the interests of the United States in time of armed conflict necessarily includes authority to effectuate the capture, detention, interrogation, and where appropriate, trial of enemy forces, as well as their transfer to other nations. Cf., e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality) (describing important incidents of war).

At the same time, Article I, Section 8 of the Constitution also grants significant war powers to Congress. We recognize that a law that is constitutional in general may still raise serious constitutional issues if applied in particular circumstances to frustrate the President’s ability to fulfill his essential responsibilities under Article II. Nevertheless, the sweeping assertions in the opinions above that the President’s Commander in Chief authority categorically precludes Congress from enacting any legislation concerning the detention, interrogation, prosecution, and transfer of enemy combatants are not sustainable.

January 2009 Memo, at 4. The memo went to hold that “[t]he prior opinion of this Office suggesting that Congress has no role to play concerning the prosecution of enemy combatants is incorrect See Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Swift Justice Authorization Act 2, 5, 12, (Apr. 8, 2002) 17-19,” January 2009 Memo, at 5. The memo went on to reject another key assertion made by Jay Bybee:
Furthermore, the power “[t]o make Rules for the Government and Regulation of the land and naval Forces,” U.S. Const. art. I, § 8, cl. 14, gives Congress a basis to establish standards governing the U.S. military’s treatment of detained enemy combatants, including standards for, among other things, detention, interrogation, and transfer to foreign nations. This grant of authority would support, for example, the provisions of the Detainee Treatment Act of 2005 that address the treatment of alien detainees held in the custody of the Department of Defense. We disagree with the suggestion in the Transfer Opinion [Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations (Mar. 13, 2002) [hereinafter March Transfer Opinion]] that this Clause does not permit Congress to establish standards for conduct for the military’s handling of detainees, but rather “is limited to the discipline of U.S. troops.” March Transfer Opinion, supra note 95, at 5.”

The Captures Clause of Article I, which grants Congress power to “make Rules concerning Captures on Land and Water,” also would appear to provide separate authority for Congress to legislate with respect to the treatment and disposition of enemy combatants captured by the United States in the War on Terror. Two of the opinions identified above reasoned that the Captures Clause grants authority to Congress only with respect to captured enemy property, such as enemy vessels seized on the high seas or materiel taken on the battlefield, and not captured persons, such as fighters or supporters of al Qaeda and its affiliates who are detained by the United States in the global War on Terror. See April 2002 Swift Justice Opinion, supra note 95, at 16–17; March Transfer Opinion, supra note 95, at 5. This Office has substantial doubts about that view.

January 2009 Memo, at 5. The opinion goes on to disavow prior opinions that asserted that the President is not bound to FISA because FISA does not directly address the power of the President to conduct warrantless searches in the area of intelligence gathering for national security reasons.

The proposition paraphrased above interpreting FISA and its applicability to presidential authority does not reflect the current analysis of the Department of Justice and should not be relied upon or treated as authoritative for any purpose. The general rule of construction that statutes will not be interpreted to conflict with the President’s constitutional authorities absent a clear statement that Congress intended to do so is unremarkable and fully consistent with longstanding precedents of this Office. See, e.g., Memorandum for Alan Kreczko, Legal Adviser to the National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Applicability of 47 U.S.C.A. § 502 to Certain Broadcast Activities at 3 (Oct. 15, 1993) (“The President’s authority in these areas is very broad indeed, in accordance with his paramount constitutional responsibilities for foreign relations and national security. Nothing in the text or context of [the statute] suggests that it was Congress’s intent to circumscribe this authority. In the absence of a clear statement of such an intent, we do not believe that a statutory provision of this generality should be interpreted to restrict the President’s constitutional powers” to conduct the Nation’s foreign affairs and to protect the national security). The courts apply the same canon of statutory interpretation. See, e.g., Department of Navy v. Egan, 484 U.S. 518, 530 (1988) (“[U]ntil Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”). However, the application of this canon of construction to conclude that FISA does not contain a clear statement that Congress intended the statute to apply to the President’s exercise of his constitutional authority is problematic and questionable, given FISA’s express references to the President’s authority. The statements to this effect in earlier opinions of OLC were not supported by convincing reasoning.

January 2009 Memo, at 7. The opinion also rejected Yoo and Bybee’s opinions, Memorandum for John B. Bellinger III, Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahanty, Special Counsel, Office of Legal Counsel, Re: Authority of the President to Suspend
Memo, the Military Interrogations Memo was rescinded on February 4, 2005, and the CIA Interrogation Memo was withdrawn in June 2002. On April 15, 2009 the OLC issued a memo that formally rescinded not only the CIA Interrogation Memo but also the three 2005 memos that addressed the CIA interrogation program post the withdrawal of the OLC 2002-2003 opinions. The January 2009 Memo rescinded a series of opinions that asserted in total that the

Certain Provisions of the ABM Treaty 12, 13 (Nov. 15, 2001) ("11/15/01 ABM Suspension Opinion") and Memorandum for Alberto R. Gonzalez, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees 11-13 ((Jan. 22, 2002) ("1/22/02 Treaties Opinion"), which asserted that the President has the power to suspend compliance with international treaties solely under his executive power. See January 2009 Memo, at 9.

The January 2009 Memo concluded with the rejection of Yoo's 2001 opinion, Memorandum for David S. Kris, Associate Deputy Attorney General, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the “Purpose” Standard for Searches at 8 (Sept. 25, 2001) ("9/25/01 FISA Option"), that asserted that "judicial precedents approving the use of deadly force in self-defense or to protect others justified the conclusion that warrantless searches conducted to defend the Nation from attack would be consistent with the Fourth Amendment . . .. We believe that this reasoning inappropriately conflates the Fourth Amendment analysis for government searches with that for the use of deadly force." See January 2009 Memo, at 10–11.

101 December 2004 Memo, supra note 100.

102 Letter from David Levin, Acting Assistant Attorney General, to William J. Haynes II, General Counsel, Department of Defense [Re: March 2003 Memorandum] in which he states “This letter will confirm that this Office has formally withdrawn the March 2003 Memorandum. The March 2003 memorandum has been superseded by subsequent legal analysis.” The letter informed Haynes that the December 2004 Memo governed OLC interpretation of 18 U.S.C.A. §§ 2340 to 2340A regarding CIA interrogation of unlawful enemy combatants.

103 Eric Holder letter to Senator John D. Rockefeller Re: OLC Opinions on the CIA Detention and Interrogation Program 8 (Apr. 17, 2009).

104 April 2009 Memo, supra note 101. The three opinions withdrawn, all three authored by Steven Bradbury (Principal Deputy Assistant Attorney General), were (1) Application of 18 U.S.C.A. §§ 2340 to 2340A to Certain Techniques That may be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), (2) Application of 18 U.S.C.A. §§ 2340 to 2340A to the Combined use of Certain Techniques in the Interrogation of high Value al Qaeda Detainees (May 10, 2005), and (3) Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that may be Used in the Interrogation of High Value Al Qaeda Detainees (May 30 2005). All four of the CIA memos asserted that the various techniques discussed in the August 2002 Memo and the CIA Interrogation Memo were lawful so long as they were imposed under strict CIA protocols and medical supervision.
President, as Commander-in-Chief, did not require Congressional concurrence in the war on terror and Congress had no authority to legislate or otherwise interfere with the President’s decisions regarding the war on terror. The December 2004 Memo together with the January 2009 Memo and April 2009 Memo withdrew all of the controversial OLC post 9/11 opinions of the Bush Administration.

The December 2004 Memorandum for James B. Comey Deputy Attorney General Re: Legal standards Applicable Under 18 U.S.C.A. §§ 2340 to 2340A specifically focused entirely on an analysis of the meaning of torture under Section 2340. The memo made clear that it “supersedes the August 2002 Memorandum in its entirety” but “while 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.”

The withdrawal of the August 2002 Memo has been argued by some to be a political move and that the December 2004 Memo was a political face saving document not one reasserting the rule of law against torture. Although true that the December 2004 Memo does not conclude that the interrogation techniques are in violation of Section 2340, the memo simply provided a neutral analysis of what “severe,” “severe physical pain or suffering,” “severe mental pain or suffering,” and “specifically intended” mean under Section 2340. The opinion bypassed constitutional assertions, exercising what the courts call constitutional avoidance, and

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105 December 2004 Memo, supra note 100, at 2.
106 December 2004 Memo, supra note 100, at 2 n.8.
107 See, e.g., Cole, supra note 6 (“As soon as the August 2002 Torture Memo became public, the Bush Administration was forced to rescind it . . . the OLC’s December 30, 2004, replacement memo made a public show of departing from the August 2002 Torture Memo on a number of specific points. But . . . the ostensibly contrite replacement memo did not change anything with respect to the bottom line. The December 2004 Memo was more an exercise in public relations than in law.”) Cole, supra note 6, at 25. On the proposition that the December 2004 Memo was the political reaction by the OLC and the White House after the August 2002 Memo was leaked to the press (the Washington Post published the memo on June 13, 2004), after the abuse revelations at Abu Ghraib became public (Apr. 2004) and during the same month that charges of abuse at GITMO were made, Cole found agreement with Yoo. Reflecting on the December 2004 Memo Yoo wrote “I cannot help but think that the Justice Department officials panicked when the Abu Ghraib scandal erupted . . . By refusing to defend its own logic, and pretending to distance itself from it, the administration only succeeded in eroding public support for the war against al Qaeda. Attorney General Ashcroft made that political decision, and I think it has become fairly clear that it was a mistake.” Yoo, War by Other Means, supra note 6, at 185–86.

108 See comparison of August 2002 Memo and December 2004 Memo on the definition of “severe physical pain or suffering” at supra note 54.
focused on the text of Section 2340 to determine that torture is a term “reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beatings, application of electric currents to sensitive parts of the body, and tying up or hanging in positions the cause extreme pain.”109 The December 2004 Memo asserted that the CAT makes a distinction between torture and other types of cruel and inhuman treatment because “Article 16, which refers to ‘other acts of cruel, inhuman or degrading treatment or punishment’ which do not amount to torture” and the “CAT formalizes a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them.”110

The December 2004 Memo made clear that torture “is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct.”111 The point being that the OLC was informing the Attorney General and the public that torture is a level of abuse and infliction of pain well above simple abuse or even serious abuse of a detainee. The context of torture includes murder, rape, severe beating, electric shocks, use of pipes, brass knuckles, cutting, pulling out of fingernails, and other like types of physical abuse or the threatened use of such methods.112 The opinion rejected the August 2002 Memo assertion that severe physical pain is distinct from severe physical suffering but did agree with the August 2002 Memo that there is a statutory difference between severe physical pain and severe physical suffering on the one hand and severe mental pain and suffering on the other and that “Congress precisely defined ‘mental pain and suffering’ in the statute [Section 2340A (2)] . . .. Consequently, ‘physical suffering’ must be limited to adverse ‘physical’ rather than adverse ‘mental’ sensations.”113 Thus “[w]e conclude that Congress intended the list of predicate acts to be exclusive — that is, to constitute the proscribed ‘severe mental pain and suffering’ under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts.”114

The December 2004 Memo concluded with a review of the required

109 December 2004 Memo, supra note 100, at 6, citing the Senate Foreign Relations Committee final report.
110 December 2004 Memo, supra note 100, at 6–7.
111 December 2004 Memo, supra note 100, at 7, citing Mark Richard, Deputy Assistant Attorney General, testimony before the Senate Committee of Foreign Relations in 1990.
113 December 2004 Memo, supra note 100, at 11.
114 December 2004 Memo, supra note 100, at 13.
specific intent to violate Section 2340. Fully abandoning the certitude of the August 2002 Memo, the December 2004 Memo asserted that understanding specific intent is not as simple as the August 2002 Memo proposed but it can be understood as requiring both the knowledge that one actions’ will result in the prohibited act and that he consciously desires that result. But it can also be understood as simply requiring that a person know that the prohibited result will occur as a result of his actions. In any event the December 2004 Memo asserted that

[w]e do not believe it is useful to try to define the precise meaning of “specific intent” in Section 2340. In light of the President’s directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.115

Why “would [it] not be appropriate”? Because indulging in such “parsing” is what private attorneys do for their clients, not what the Attorney General or the OLC does when providing legal analysis to the Office of the President or his cabinet members to support their obligation to faithfully execute the laws of the United States. The difference matters.116 Former Attorney General William Barr has written that the Attorney General and the OLC should provide the best answer regard-


116 See Garrison supra notes 7, 45. As Theodore Olsen wrote, explaining the purpose of the OLC, the OLC “is, more often than not, cast in the role of judge rather than advocate, . . . [e]ven when the head of OLC comes closest to being the advocate — when the presidency and the powers of the executive branch must be defended — the president or his subordinates may be so anxious to accomplish a major political or policy objective that they overlook technical legal impediments.” It is in such times that the need “for first-rate lawyering and the courage of the lawyers convictions become so great that advocacy must take a back seat to the rule of law.” Theodore B. Olsen, Judge Wikley and the Office of the Legal Counsel, 1985 BYU L. Rev. 607, 609, 610 (1985). There is no doubt that after the days of 9/11 the Bush administration wanted as much legal room as possible to find, secure, interrogate, and hold enemy combatants in order to protect the nation and prevent another attack. The motive and intentions were without fault, but the road to hell is paved with good intentions and as Benjamin Franklin warned to sacrifice liberty for safety is only to lose both. The error of the OLC torture memos was that they focused on advocacy to support a policy rather than focus on a clear, concise, and neutral exposition of what the law required and allowed.

The error has cost the OLC, at least in the legal academic community, much of its institutional credibility as “the legal conscience of the executive branch.” Olsen, supra note 110, at 609. See, e.g., Bradley Lipton, A Call for Institutional Reform of the Office of Legal Counsel, 4 Harv. L. & Pol’y Rev. 249 (2010); Bruce Ackerman, Abolish the White House Counsel: And the OLC should provide the best answer regard-
ing the law and not impose political legal policy outcomes into the analysis because the Attorney General and the OLC when providing legal opinions to the President are supporting the institution of the Presidency and the Executive Branch responsibility to faithfully execute the laws. An unbiased answer to the original question posed by the CIA and the military regarding the techniques is to inform both what the law requires and leave it to the policy makers of both agencies to apply the law to the policy and consider the political ramifications of the policy. It is not the role of the OLC to create legal cover for a policy.

The error of the Bush Administration OLC during the first two years after 9/11 was that it did the latter not the former.

Although the December 2004 Memo did not indulge in legal parsing of words to determine criminal liability if a government officer was brought to trial, it did make a distinction that escaped the August 2002 Memo; namely the difference between intent and motive. Motive is the reason one does something while intent is the rational decision to do something. It is the latter that constitutes the mens rea of a crime. “Thus, a defendant’s motive (to protect national security, for example) is not relevant to the question whether he acted with the requisite specific intent under the statute.” The December 2004 Memo also observed that it’s no answer to say that victim was not tortured because he complied with the interrogator before any harm came to him if the interrogator made it clear that torture would be applied if compliance was not forthcoming. Thus the threat of torture is covered by Section 2340. But the threatened act of torture must be, if done, an act that would constitute torture under the Fifth and Eighth Amendment jurisprudence, i.e., cruel and unusual punishment that rises to the level of wanton and sadistic acts that shocks the conscience.

118 Garrison, supra note 7.
119 Garrison, supra note 45.
120 December 2004 Memo, supra note 100, at 17. The memo did make clear that “the specific intent element of section 2340 would be met if a defendant performed an act and “consciously desire[d]” that act to inflict severe physical or mental pain or suffering. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate section 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result . . . nor to have “knowledge or notice” that his act “would likely have resulted in “the proscribed outcome.” December 2004 Memo, supra note 100, at 17 (internal citation omitted).
Although it is clear that Section 2340 applies to interrogation of detained enemy combatants, it is also a true that the federal law on torture is very narrow in definition. Section 2340 and the CAT are only defined by the Fifth and Eighth Amendments, as interpreted by the Supreme Court, and the Senates’ ratification of the CAT. The meaning of cruel and unusual treatment has a very narrow application and thus Section 2340 and the CAT also have a narrow definition and applicability. What the law states is different than what people think or want it to mean on the political normative level. But the rule of law only requires that government power obey what the law states not what political policy would like it to state.

By its text, Section 2340 and CAT restricts interrogation to areas of using techniques that causes severe pain, not techniques that are enhanced or go beyond those used by the police in normal criminal justice operations. What the OLC asserted was that the CIA could use techniques that did not involve physical contact that caused severe pain, suffering or severe mental suffering. The fact that people who opposed the Bush Administration likened torture to all techniques beyond what law enforcement can do does not make the law require such limitations. Torture and the visceral negative reactions to techniques used beyond the modern post Miranda era of police interrogation are not the same. Torture, as legally defined, is much different from the political or common definition of torture. In the former, specific intent to cause severe pain resulting in severe mental or physical pain is required; while in the latter torture is defined by the eyes of the beholder. It is the former that governs governmental action not the latter. The law of torture, the OLC concluded, does not prohibit by its terms the use of waterboarding, light slapping, slamming a person into a wall that moves upon contact, use of crimped areas, or the use harmless insects all to “soften” the resolve of the detainee to resist. What the CAT or the federal torture statute requires is a specific intent to cause severe prolonged pain. The context of the

121 During the 2008 Senate Armed Services Committee hearing, Dr. Jerald Ogrisseg; who was the Survival, Evasion, Resistance, and Escape (SERE) Psychologist for the United States Air Force Survival School at Fairchild Air Force Base from February 1999 to July 2002 and as of date of his testimony was the SERE Research Psychologist for the Joint Personnel Recovery Agency (JPRA) U.S. Department of Defense; testified on the nature of the 18 techniques and the use of SERE training. He explained that while waterboarding does not cause physical injury that wasn’t the point, as psychologically the waterboard produced capitulation and compliance with instructor demands 100% of the time. During debriefings following training, students who had experienced the waterboard expressed extreme avoidance attitudes such as a likelihood to further comply with any demands made of them if brought near the waterboard again. I told Lt Col Baumgartner that waterboarding was completely inconsistent
statute assumes that the severe prolonged pain involves more than infliction of normal pain, more psychological abuse than the psychological trickery or manipulation regularly used during a police interrogation, and treatment that rises to cruel, inhumane, and degrading treatment prohibited by Article 16 as defined by cruel and unusual punishment under U.S. Constitutional law.

In summary, the August 2002 Memo, the CIA Interrogations Memo, and the Military Interrogations Memo were incorrect in so far as they exaggerated the power of the President, as Commander-in-Chief, to act upon a military attack on the United States, by asserting that domestic criminal statutes could not be applied if they impacted his power as Commander-in-Chief. The President, both in times of war and peace, is obligated to both obey and enforce federal criminal laws. It is not for the OLC to interpret the law to support a policy initiative. But the OLC was correct that the definition of torture under the CAT and Section 2340 is narrowly defined because Congress confined the meaning of cruel and unusual and inhuman treatment to the Eighth Amendment meaning of cruel and unusual punishment as defined by the Constitution and the Supreme Court. The fact that the Fifth and Eighth Amendments have a narrow application and definition that requires the government or its agent to have a specific intent to act with a wanton, malicious, or sadistic infliction of pain that shocks with the stress inoculation paradigm of training that we used, and was more indicative of a practice that produces learned helplessness — a training result we tried strenuously to avoid.

The point Dr. Ogrisseg made was that waterboarding makes a person compliant and develops learned helplessness. SERE training is designed to inoculate students against the psychological effects of capture.

The psychological purpose of physical and psychological pressures at the Air Force Survival School was always to enhance student decision-making, resistance, confidence, resiliency, and stress inoculation, and not to break the will of the students or to teach them helplessness.

This result of learned helplessness is what separates what the purpose of SERE training and intelligence gathering, as the colloquy between Dr. Ogrisseg and Senator Graham revealed.

Dr. Ogrisseg: Senator, my expertise comes in the realm of training, and I certainly know that these techniques are effective in getting our trainees to learn the skills and develop the confidence that we need to in order to survive and return with honor from captivity. I do not have a -

Senator Graham: Based on your studies of this subject matter, is it fair to say that you can get almost anybody to say anything if you’re hard enough on ’em over time?

Dr. Ogrisseg: I would say that that’s true, but that’s also the problem. You could get them to say anything.

Senator Graham: Thank you.

Testimony of Dr. Ogrisseg, supra note 17, before the Senate Armed Services Committee Supra note 17 at 22, 25. The written statement of Dr. Ogrisseg can be found at http://www.loc.gov/rr/frd/Military_Law/pdf/Senate-Armed-Services-June-17-2008.pdf.
the conscience has been ignored by the legal community’s critiques of the OLC opinions which are accused of direct authorization of torture. As asserted in this Article, the memos did not provide any such authorization.\textsuperscript{122} The opinions, (especially the latter 2005 opinions)\textsuperscript{123} asserted that certain techniques could be used as described by the CIA in its request for an opinion on the techniques, especially when such techniques were supervised by medical personnel with authority to intervene in the use of the techniques.\textsuperscript{124} The techniques, on their face, did not rise to torture — the issue with the abuses of Gitmo

\textsuperscript{122}See Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value Al Qaeda Detainees (May 30 2005) at 2–3:

As detailed below in Part III, the relevant constraint here, assuming Article 16 did apply, would be the Fifth Amendment’s prohibition of executive conduct that “shocks the conscience.” . . ..

. . .. In particular, on balance the cases are best read to require a determination whether conduct is “arbitrary in the constitutional sense,” County of Sacramento v Lewis, 523 U.S. 833, 846 . . ..; that is, whether it involves the “exercise of power without any reasonable justification in the service of a legitimate governmental objective,” id. “[C]onduct intended to injure in some way unjustifiable by any governmental interest is the sort of official action most likely to rise to the conscience-shocking level.” Id at 849. Far from being constitutionally arbitrary, the interrogation techniques at issue here are employed by the CIA only as a reasonably deemed necessary to protect against grave threats to United States interests, a determination that is made at CIA headquarters, with input from the on-scene interrogation team, pursuant to careful screening procedures that ensure that the techniques will be used as little as possible on as few detainees as possible. Moreover, the techniques have been carefully designed to minimize the risk of suffering or injury and to avoid inflicting any serious or lasting physical or psychological harm. Medical screening, monitoring, and ongoing evaluations further lower the risk. Significantly, you have informed us that the CIA believes that this program is largely responsible for preventing a subsequent attack within the United States. Because the CIA interrogation program is carefully limited to further a vital government interest and designed to avoid unnecessary or serious harm, we conclude that it cannot be said to be constitutionally arbitrary.

\textsuperscript{123}Supra note 105.

\textsuperscript{124}See, e.g., OLC opinion Application of 18 U.S.C.A. §§ 2340 to 2340A to Certain Techniques That may be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005, at 15, which focused on the importance of medical personnel to monitor the techniques and the OLC assumption that the specific controls on the use of the techniques establish compliance with section 2340 and 2340A.

As noted, all of the interrogation techniques described above are subject to numerous restrictions, many based on input from OMS. Our advice in this memorandum is based on our understanding that there will be careful adherence to all of these guidelines, restrictions, and safeguards, and that there will be ongoing monitoring and reporting by the team, including OMS medical and psychological personnel, as well as prompt intervention by a team member as necessary, to prevent physical distress or mental harm so significant as possibly to amount to the “severe physical or mental pain or suffering” that is prohibited by sections 2340–2340A. Our advice is also based on our understanding that the authorized use of techniques is not designed or intended to cause severe physical or mental suffering, and also to understand and respect the medical judgment of OMS and the important role that OMS personnel play in the program.
and Abu Ghraib occurred because the techniques were not controlled

See also Application of 18 U.S.C.A. §§ 2340 to 2340A to the Combined use of Certain Techniques in the Interrogation of high Value al Qaeda Detainees (May 10, 2005) at 3

First, it is possible that the application of certain techniques might render the detainee unusually susceptible to physical or mental pain or suffering. If that were the case, use of a second technique that would not ordinarily be expected to—and could not reasonably be considered specifically intended to—cause severe physical or mental pain or suffering by itself might in fact cause severe physical or mental pain or suffering because of the enhanced susceptibility created by the first technique. Depending on the circumstances, and the knowledge and mental state, of the interrogator, one might conclude that severe pain or suffering was specifically intended by the application of the second technique to a detainee who was particularly vulnerable because of the application of thirst technique . . . . It is important that all participating CIA personnel, particularly interrogators and personnel of the CIA Office of Medical Services (“OMS”), be aware of the potential for enhanced susceptibility to pain and suffering from each interrogation technique. We assume that there will be active and ongoing monitoring by medical and psychological personnel of each detainee who is undergoing a regime of interrogation, and active intervention by a member of the team or medical staff as necessary, so as to avoid the possibility of severe physical or mental pain or suffering within the meaning of 18 U.S.C.A. §§ 2340–2340A as a result of such combined effects.

Second, it is possible that certain techniques that do not themselves cause severe physical or mental pain or suffering might do so in combination, particularly when used over the 30-day interrogation period with which we deal again. Again, depending on the circumstances, and the mental state of the interrogator, their use might be considered to be specifically intended to cause such severe pain or suffering. This concern calls for an inquiry into the totality of the circumstances, looking at which techniques as combined and how they are combined.

But, see the testimony of James Comey regarding the legality of combining the use of the CIA techniques during his U.S. Senate confirmation hearing for Director of the FBI on July 9, 2013 and his written answer to a question from Senator Al Franken regarding the two May 2005 memos. Comey stated the following:

Ever since I became the Deputy Attorney General, my reaction as a person, a citizen, and a leader has been that waterboarding is torture. It is, therefore, inappropriate. I cannot speak with authority to whether it is effective, but I believe that the FBI’s long-standing refusal to participate in such techniques has not in any way impaired the Bureau’s effectiveness in gathering information. If I am confirmed as FBI Director, I will continue that tradition.

The first OLC memorandum of May 10, 2005, presented the narrow legal question of whether waterboarding, standing alone and without being combined with other techniques, violates 18 U.S.C.A. §§ 2340 and 2340A. The opinion, in my view, set forth a serious and reasonable legal analysis of vague statutory language, as it would apply to waterboarding only, on the assumption that the technique could be viewed in isolation. Since I believed that the techniques described, including waterboarding, were always used in combination, I objected strongly to the second OLC memorandum on both legal and policy grounds. I believed that those objections would stop the entire program, if they prevailed, but they did not. Even though I lost on the legal issue, I continued to raise policy objections about the appropriateness of these techniques, but my arguments were rejected. By that time, I had already announced my resignation and I remained as the Deputy Attorney General until my predetermined departure date in order to fulfill other responsibilities, particularly those pertaining to violent crime.

I did not then and do not now believe that the United States government should engage in waterboarding. It is not appropriate for us to do so as Americans. I also believe that, for a variety of reasons, such conduct would be unlawful today.

Comey stated that this was his opinion as applied to the techniques of sleep deprivation and cramped confinement. Senator Al Franken, Questions for the Record, James

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and became arbitrary and inflicted severe pain and suffering in actual implementation. The techniques were clearly more “enhanced” than those used by normal law enforcement but there is a large legal difference between torture on the one hand and techniques more “enhanced” than those used in regular law enforcement interrogation on the other.

This Article agrees with the general legal community condemnation of the general opinion drafting approach the OLC adopted in regard to drafting the early (2001–2003) opinions and specifically the OLC opinions that asserted that (1) Section 2340–2340A did not constitutionally apply to the President when he is acting as Commander-in-Chief in times of war, (2) the general assertion of broad and plenary Presidential power in times of war, (3) that Article 16 of the CAT did not apply to the power of President to authorize CIA black sites (territory in which the U.S. Government does not have at least de facto authority as a government) or provide protection to those held at the sites, (4) that Common Article 3(1)(c) of the Geneva Convention (prohibition against “outrages upon personal dignity, in particular humiliating and degrading treatment”) did not apply to al Qaeda or Taliban prisoners held by the CIA or the military, and (5) that

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126 Garrison, supra note 45 and supra notes 6 and 8.

127 Supra note 123, at 1–2.

128 See Memorandum for Alberto R Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002) at 37.

Based on these considerations of constitutional text, structure, and history, we conclude that customary international law does not bind the President or the U.S. Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners.

**Conclusion**

For the foregoing reasons, we conclude that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners. We also conclude that the President has the plenary constitutional power to suspend our treaty obligations toward Afghanistan during the period of the conflict. He may exercise that discretion on the basis that Afghanistan was a failed state. Even if he chose not to, he could interpret Geneva III to find that members of the Taliban militia failed to qualify as POWs under the terms of the treaty. We also conclude that customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution.

We should make clear that in reaching a decision to suspend our treaty obligations or to construe Geneva III to conclude that members of the Taliban militia are not POWs, the President need not make any specific finding. Rather, he need only authorize or approve
Congress has only a secondary political role in post 9/11 policy making. But this article parts company on the assertion that the OLC approved of torture, per se. The failure of the legal community to recognize in its critique of the OLC opinions that (1) “cruel, inhuman, or degrading treatment” under Article 16 of the CAT is defined and limited in meaning by the prohibition against “cruel and unusual punishment” under the Eighth Amendment (“wonton, malicious, and sadistic infliction of pain”) and the “due process” clause of the Fifth Amendment (“shocks the conscience” and “arbitrary” use of executive power), (2) that abuse under Article 16 (“prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1”) is not synonymous with abuse under Article I (“torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted”), (3) that torture under Article I of the CAT (enforced by section 2340-2340A) prohibits a specific level of abuse not interrogation techniques more “enhanced” than regular police activity and (4) the failure to consider the legal significance of the medical and procedural protections the OLC assumed to be true as provided by the CIA is where this Article parts company with the prevailing condemnation of the OLC opinions.\(^\text{129}\)