Can CIA Interrogators Relying Upon Government Counsel Advice be Prosecuted for Torture?

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Abstract

In the spring of 2002, the CIA sought advice from the Office of Legal Counsel (OLC) regarding an interrogation program for high-level al Qaeda detainees. The proposed program included the use of techniques such as walling, stress positions, confinement, sleep deprivation and waterboarding.

On August 1, 2002, the OLC provided two memoranda of advice to the CIA on the lawfulness of the proposed program and the specific techniques intended. The OLC advised that the program and the techniques were lawful and did not constitute torture within the meaning of the Torture Statute, 18 U.S.C. §§2340–2340A.

This article considers whether interrogators who used these techniques can be prosecuted for torture. Specifically, the article considers whether reliance upon the advice constitutes a legal defense to a charge of torture, whether the Department of Justice is now estopped from prosecuting, and whether the Department should prosecute as a matter of policy, even if it can.
CAN CIA INTERROGATORS RELYING UPON GOVERNMENT COUNSEL ADVICE BE PROSECUTED FOR TORTURE?

INTRODUCTION

This paper considers whether officials of the U.S. Central Intelligence Agency (CIA) who used specific interrogation techniques upon high ranking al Qaeda members being held outside the United States, relying upon advice from the U.S. Department of Justice (DOJ) Office of Legal Counsel (OLC), may be prosecuted by the DOJ for torture, in violation of 18 U.S.C. §§ 2340–2340A.

In the spring of 2002, the CIA sought policy approval from the National Security Council (NSC) to begin an interrogation program for high-level al Qaeda detainees, following the capture and detention of Abu Zubaydah, a senior al Qaeda operative.\(^1\) The NSC referred the CIA to the OLC.\(^2\) The proposed program included the use of ten techniques, including “wallowing” (slamming the detainee into a flexible false wall using a neck collar), stress positions, confinement, sleep deprivation and “waterboarding” (simulated drowning).

On August 1, 2002, the OLC provided two memoranda of advice to the CIA. Each memorandum is signed by Jay Bybee, then Assistant Attorney General. The first memorandum (First Bybee Memorandum) is addressed to Alberto Gonzales, Counsel to the President, who was co-ordinating the DOJ’s advice to the CIA.\(^3\) The second memorandum (Second Bybee Memorandum) is addressed to John Rizzo, Acting General Counsel for the CIA.

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\(^2\) Id.

\(^3\) Id. at 32.

The reasoning in the First Bybee Memorandum has been widely criticized. It concluded that section 2340A prohibits only acts “of an extreme nature.” To rise to the level of torture, the Memo concluded, physical pain must be equivalent in intensity to that accompanying “organ failure, impairment of bodily function, or even death.” Mental pain, to constitute torture, must result in significant psychological harm “lasting for months or even years.”\(^6\) The Memo further opined that the application of section 2340A to interrogations undertaken pursuant to the President’s Commander-in-Chief powers might be unconstitutional, and hence not applicable to interrogations of al Qaeda terrorists, and that even if section 2340A was applicable, an interrogator might have a defense of necessity or self-defense, eliminating criminal liability.\(^7\)

The Second Bybee Memorandum\(^8\) concerned whether the ten specific techniques proposed to be used in the interrogation of Abu Zubaydah would violate section 2340A. The Memo


\(^7\) Id. at 200–14.

concluded that none of the ten techniques constitute torture within the meaning of section 2340, as interpreted in the First Bybee Memorandum. In effect, it authorized the use of the techniques.

The CIA relied upon the two Bybee Memoranda in setting interrogation policies for Abu Zubaydah and other high value detainees in the “war on terror.” The ten techniques appear to have been used on a number of detainees. In particular, three detainees (Abu Zubaydah, Khalid Sheikh Mohammed and Abd Al-Rahim Al-Nashiri) were waterboarded by the CIA. Although the Second Bybee Memorandum was limited in terms to the interrogation of Abu Zubaydah, the CIA and the OLC remained in contact as the interrogation program continued, and in about June 2003, the OLC concurred in a “bullet point summary” of legal principles applicable to CIA interrogation of al Qaeda operatives, which reaffirmed that the ten techniques were lawful.

The Bybee Memoranda were not made publicly available at the time they were prepared in August 2002. The First Bybee Memorandum was published by The Washington Post in June 2004. It was then withdrawn and later replaced with a memorandum by Daniel Levin dated

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13 Goldsmith, supra note 9, at 158.
December 30, 2004 (Levin Memorandum). The Second Bybee Memorandum relied upon reasoning in the First, and so it can be considered to have been not applicable following this withdrawal. However, two memoranda by Steven Bradbury dated May 10, 2005 (Bradbury Memoranda) dealt with many of the specific techniques considered in the Second Bybee Memorandum.

The Levin Memorandum differed significantly from the First Bybee Memorandum in its interpretation of sections 2340–2340A. However, the Bradbury Memoranda applied this interpretation and yet still approved (with some qualifications) the various interrogation techniques, including waterboarding, that had earlier been approved. These memos remained the executive’s official view of the Torture Statute until reliance upon them was disclaimed by executive order of the newly elected President Obama.

In April 2009, the DOJ publicly released the Second Bybee Memorandum in response to a request from the American Civil Liberties Union (ACLU) under the Freedom of Information Act. Upon the release of the Second Bybee Memorandum, the Attorney-General, Eric Holder,

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stated that the DOJ would not prosecute “intelligence community officials who acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful.”\textsuperscript{18}

This paper considers whether or not such officials can be prosecuted by the DOJ. It is limited to CIA officials\textsuperscript{19} who relied upon the Bybee Memoranda, especially those who used the techniques authorized by the second Memo. In Part I, I consider whether reliance upon the Bybee Memoranda provides a legal defense to a charge of torture under U.S. law. I consider the common law and statutory defenses of reliance upon the advice of counsel, as well as whether the mere existence of the Memos may afford operatives with a “superior orders” defense.

In Part II, I consider whether, even if reliance upon the Bybee Memoranda does not itself provide a legal defense, the authorization of the OLC gives rise to an estoppel preventing the DOJ from prosecuting offenders. Finally, in Part III, I consider whether, as a matter of policy, the DOJ should prosecute even if it can.

\textbf{I. RELIANCE UPON THE BYBEE MEMORANDA AS A LEGAL DEFENSE TO A CHARGE UNDER SECTION 2340A}

In this part, I consider whether or not an interrogator accused of torture under section 2340A could raise reliance upon the Bybee Memoranda as a legal defense.

\textsuperscript{18} DOJ, supra note 17.  
\textsuperscript{19} Similar advice was provided to the Department of Defence governing interrogations by Armed Forces personnel. The analysis in this paper may apply to these interrogators as well, although matters may be more complicated as the Uniform Code of Military Justice and Army Field Manual governing intelligence interrogation may apply.
A. The Prohibition on Torture

Acts of torture committed outside the United States are prohibited by 18 U.S.C. §§ 2340–2340A. This legislation was enacted to implement the Convention Against Torture, as understood by the United States in its Reservations, Declarations and Understandings submitted to the United Nations at the time it ratified the Convention.\(^20\) Section 2340 defines torture in a manner which tracks the U.S. understanding of the Convention:

(1) “torture” means an act committed by a person acting under the 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.

Torture in the context of interrogation is also proscribed by the War Crimes Statute, 18 U.S.C. § 2441. That statute defines torture in terms identical (and in part by reference) to section 2340 and so I have not treated it separately.\(^21\)


\(^{21}\) The War Crimes Statute prohibits both torture and cruel or inhumane treatment, insofar as they constitute grave breaches of Common Article 3 of the Geneva Conventions. However, the DOJ rendered advice that neither Common Article 3 nor the War Crimes Statute applied to the detention or interrogation of al Qaeda or Taliban operatives: Memorandum for Alberto R. Gonzales, Counsel to the President, and William J Haynes II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant
B. The Defense of Reliance Upon Advice of Counsel

At common law, reliance upon the advice of counsel has been recognized as a defense to criminal and civil liability in some circumstances. Reliance upon counsel does not operate as a “free-standing” defense; rather, “a lawyer’s fully informed opinion that certain conduct is lawful (followed by conduct strictly in compliance with that opinion) can negate the mental state required for some crimes.” United States v. Roti, 484 F.3d 934, 935 (7th Cir. 2007).

Thus reliance can negate the existence of intent, bad faith, or negligence; where proof of one of these mental states is essential to establishing liability, then reliance will be a good defense. United States v. Roti, 484 F.3d 934, 935 (7th Cir. 2007).

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Reliance upon advice of counsel is not an “absolute” defense; rather, it is usually seen as just one factor relevant to determining whether or not the requisite mental element has been established. Douglas W. Hawes and Thomas J. Sherrard, Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases, 62 VA. L. REV. 1, 7–8 (1976).

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Reliance upon counsel is an exception to the usual position that “ignorance of the law is no excuse.” Only where such ignorance negates an element of the offense can it amount to a defense. Id. at 18.

1. Elements of the Defense at Common Law

Precise formulations of the advice of counsel defense vary. Federal courts appear to apply the following requirements:

1. the defendant sought advice on the legality of her conduct before taking action;

2. she did so in good faith from an attorney she considered competent;

3. she made a full and accurate disclosure of all material facts to her attorney; and


22 United States v. Roti, 484 F.3d 934, 935 (7th Cir. 2007).


25 Id. at 18.
4. she acted strictly in accordance with her attorney’s advice.\textsuperscript{26}

Two issues arising from these requirements are important with respect to the Bybee Memoranda. First, a successful reliance defense may depend on the degree of certainty of the advice rendered. This is implied by the requirement that the defendant act strictly in accordance with the advice. Advice that is heavily qualified or uncertain will not provide a firm basis for action.

It has been suggested that, in some contexts, a defendant ought to be able to rely upon counsel’s advice that a course of action is “more likely than not” permissible (for example, to negate the mental state of bad faith).\textsuperscript{27} I suggest that in the context of negating criminal intent, which is applicable here, the standard should be that the advice must be reasonably unequivocal and have a degree of certainty. This is especially so where the offense, torture, is an extremely serious one that implicates the United States’ international obligations. In any event, as the “defense” of reliance upon counsel is not an absolute one, it is clear that the more equivocal or uncertain the advice, the less successful will be a reliance defense.

Second, to form the basis of a reliance defense, counsel’s advice must relate to a question of law.\textsuperscript{28} Where advice relates solely to a question of fact, the reliance defense is not available.\textsuperscript{29} However, counsel’s advice will often be on mixed questions of fact and law. In such cases, it will

\textsuperscript{26} See United States v. Van Allen, 524 F.3d 814, 823 (7th Cir. 2008); United States v. Bush, 599 F.2d 72, 76 (5th Cir. 1979); Any v. United States, 47 F.3d 1156, 1156 (1st Cir. 1995); United States v. Lindo, 18 F.3d 353, 356 (6th Cir. 1994); United States v. Rice, 449 F.3d 887 (8th Cir. 2006); United States v. Wenger, 427 F.3d 840 (10th Cir. 2005); United States v. West, 392 F.3d 450 (D.C. Circ. 2004); SEC v. Manor Nursing Centers, 458 F.2d 1082, 1101–02 (2d Cir. 1972).

\textsuperscript{27} Hawes and Sherrard, \textit{supra} note 24, at 32–34.

\textsuperscript{28} Note, \textit{supra} note 23, at 984–85; Hawes and Sherrard, \textit{supra} note 24, at 30.

\textsuperscript{29} Williams v. Confidential Credit Corp., 114 So.2d 718 (Fla. App. 1959); see Note, \textit{supra} note 23, at 985 n.31; Hawes and Sherrard, \textit{supra} note 24, at 30.
be important to separate out, as far as possible, the advice on questions of law from that on questions of fact.

2. Statutory Enactment of the Defense

The defense of reliance upon counsel is a common law defense. Whether it is available in respect of any particular offense would ordinarily depend upon the elements of the offense, and in particular, the contours of the *mens rea* requirement. However, in the case of interrogation of enemy combatants, the defense has been enshrined in statute. The Detainee Treatment Act of 2005 (DTA), enacted amid public outcry at, among other things, revelations that the CIA had been authorized to use waterboarding and other techniques, provides: 30

In any civil action or criminal prosecution against an … agent of the United States Government who is a United States person, arising out of the … 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 … 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.

The statutory provision reflects the common law connection between the defense of reliance upon counsel and ignorance of the law. Reliance upon counsel is not itself the defense; rather, it is an important factor in establishing ignorance that the practices used were unlawful. The objective element of the defense—that a person of ordinary sense and understanding would not know the practices were unlawful—reflects the common law position that a defendant may not rely upon obviously incorrect advice.\textsuperscript{31}

The statutory defense only applies where an agent has used “operational practices … that were officially authorized and determined to be lawful at the time that they were conducted.” In imposing this requirement, it draws upon the common law doctrine of entrapment by estoppel.\textsuperscript{32} The statutory defense therefore applies only to authorized interrogation techniques; in the present context, those techniques authorized by the Second Bybee Memorandum. Interrogators who went beyond the authorized techniques who wish to raise a reliance upon counsel defense must use the common law defense (which is expressly preserved by the statute).

A question arises whether the defense in the DTA is subject to the same requirements as the common law defense; in particular, the common law requirements I have outlined in section I.B.1 above (that advice must be reasonably unequivocal and certain, and relate to a question of law, not fact). I have found no reported cases interpreting this provision of the DTA. I suggest that, as the DTA provision reflects the common law understanding of the defense, it is likely that courts would apply these common law principles in applying the statutory defense.\textsuperscript{33}

D. Reliance Upon the Bybee Memoranda as a Defense

\textsuperscript{31} Note, supra note 23, at 980–81.
\textsuperscript{32} See Part II below.
\textsuperscript{33} See Morissette v. United States, 342 U.S. 246, 250 (1952).
In this section, I consider the ways in which an interrogator might raise reliance upon the Bybee Memoranda as a defense. I have organized this section by reference to the different pieces of advice contained in the Bybee Memoranda.

1. *Specific Intent*

Section 2340 defines torture as an act “specifically intended” to inflict severe physical or mental pain or suffering. The First Bybee Memorandum construes this as a requirement of “specific intent.”\(^\text{34}\) To be guilty of torture under section 2340A, it argues, the intention of the defendant must be to inflict severe pain; mere knowledge that severe pain is the likely result of her actions is not enough.

As a matter of law, on this point it is likely that the First Bybee Memorandum is correct.\(^\text{35}\) More recent cases in the immigration context, concerning a similar definition of “torture,”\(^\text{36}\) have concluded that there is a requirement of specific intent to inflict severe pain.\(^\text{37}\) Although the Levin Memorandum declined to endorse the First Bybee Memorandum’s treatment of specific intent, the Eighth Circuit has expressly declined to follow its reasoning.\(^\text{38}\)

As section 2340A requires a mental state of specific intent, a reliance upon counsel defense is available at common law (as well as under the DTA) to negate that mental state. I analyze in section I.D.3 below, the possibility that an agent might plead that her good faith, reasonable reliance on the Second Bybee Memorandum might show that she lacked specific intent.

\(^{34}\) First Bybee Memorandum, *supra* note 4, at 174.

\(^{35}\) It is difficult to argue against the proposition that Congress clearly intended section 2340A to have this construction. *See* Pierre v. Gonzales, 503 F.3d 109, 118 n.7 (2d Cir. 2007).

\(^{36}\) 18 C.F.R § 208.18(a)(5).


\(^{38}\) Cherichel, 591 F.3d at 1016.
What about the advice as to the specific intent requirement *itself* though? Let us assume that I am wrong and that a court holds that section 2340A does not require specific intent. Such a court would hold an agent guilty of torture if she simply had knowledge that her conduct was likely to inflict severe pain. In these circumstances, could a defendant argue that, because she believed on the basis of the First Bybee Memorandum that specific intent was required, that she was entitled to employ a technique despite her knowledge that it would result in severe pain?

I suggest that such an argument would fail. Knowledge, like intent, is an element of an offense that may be negated by reliance on counsel.39 However, reliance on the Bybee Memoranda cannot negate an interrogator’s knowledge that severe pain is likely to result from her actions; that is a question of fact. Nor can such reliance negate the intent element of a *general* intent offense; that intent is just intent to apply the technique in question.

Moreover, the First Bybee Memorandum is not unequivocal when it comes to the issue of knowledge. Even for specific intent, the Memo suggests that a jury would be likely to convict unless convinced that a defendant had a good faith belief that her conduct would not result in severe pain.40 Thus a defendant who subjectively believed that her conduct was likely to inflict severe pain receives no comfort from the Memo.

There is one final issue to consider under the rubric of specific intent. Some commentators have suggested that “[a]lthough [the First Bybee Memorandum] does not quite say so, it suggests strongly that the presence of a purpose to gather intelligence negates criminal specific intent.”41

Could an interrogator say that, on the basis of the First Bybee Memorandum, she understood that

40 First Bybee Memorandum, *supra* note 4, at 175.
if her intent was to gather information, she would not be considered as having the required specific intent?

Again, I suggest that such an argument would fail. First, as the commentators note, the Memo does not explicitly go so far as to give this advice. Thus the element of clarity and unequivocacy is lacking. Second, such an argument suggests reliance in bad faith.

2. Severe Pain or Suffering

The term “severe” is not defined in section 2340. The First Bybee Memorandum interpreted the statute as prohibiting only “extreme acts,”\(^{42}\) causing “excruciating and agonizing” pain: physical pain equivalent in intensity to that accompanying “organ failure, impairment of bodily function, or even death” and mental pain resulting in significant psychological harm “lasting for months or even years.”\(^{43}\)

To be convicted of torture under section 2340A, a defendant must have intended to inflict “severe pain.” Might a defendant, who admitted an intention to inflict a significant degree of pain, argue that she lacked specific intent on the basis that she relied upon the First Bybee Memorandum and thus thought that unless the intended pain was “excruciating” (or one of the other extreme formulations in the memo), it would not constitute an act of torture?

I do not think that such an argument would be of much practical utility to a defendant. It is clear enough that torture is a relative term; it lies on one end of a spectrum that encompasses lesser, albeit deplorable, conduct.\(^ {44} \) This is underscored by the fact that the Convention Against

\(^{42}\) First Bybee Memorandum, supra note 4, at 172, 176, 191.

\(^{43}\) Id. at 172, 176–77, 188. These three formulations were repudiated by the Levin Memorandum: supra note 14 at 8 n.17, 14 n.24.

Torture also proscribes lesser conduct, being “cruel, inhuman or degrading treatment or punishment which do not amount to torture.”

Thus, discerning whether or not any particular action constitutes an act of torture requires an exercise of judgment. The exercise of this judgment does not seem to be particularly illuminated by use of other definitional phrases like “excruciating and agonizing.” Rather, a defendant who sought to rely upon such mincing of words, I suggest, would likely be considered to have acted in bad faith.

Nonetheless, it should be recognized that there may be cases where it is difficult to determine whether not a course of conduct rises to the level of torture. This increases the desirability from a policy perspective that an interrogator be able to rely upon an authoritative opinion about the application of the Torture Statute to specific interrogation techniques; i.e., the Second Bybee Memorandum. I now turn to that Memo.

3. Application of the Torture Statute to Specific Techniques

The Second Bybee Memorandum concluded that ten specified interrogation techniques were not torture within the meaning of section 2340. These included physical contact (the “attention grasp,” “facial hold,” “facial slap,” “walling”), fatigue techniques (sleep deprivation, “wall standing,” cramped confinement, stress positions), exploitation of the detainee’s fear of insects, and waterboarding.

The Second Bybee Memorandum recites at length the factual details of how the CIA proposed to employ these techniques. For example, it notes that the CIA had instructed that none

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45 Convention Against Torture, supra note 5, at art. 16; see also the War Crimes Statute, 18 U.S.C. § 2441(d)(1)(B).
of the techniques would be used with “substantial repetition.” Several times it notes that medical personnel would be on hand to monitor the harm suffered by the detainee and prevent any severe harm. The Memo makes clear that its advice is dependant upon the truth of the facts supplied to the OLC by the CIA.

There is evidence that CIA applied some of the approved interrogation techniques in a manner that went beyond the facts supplied to the OLC. To the extent that interrogators did not strictly follow counsel’s advice, they will be unable to rely upon the advice to establish an affirmative defense (there is room for some variation from counsel’s advice, however this is limited).

However, let us assume that there are some interrogators who used the approved techniques only in accordance with the description of their operation in the Second Bybee Memorandum. Does reliance upon the Memorandum provide such an interrogator with a defense to a charge under section 2340A?

This may depend in part upon the nature of the Second Bybee Memorandum. As its title suggests, the Second Bybee Memorandum does not itself construe any law. Rather, the Memo takes the Torture Statute as construed by the First Bybee Memorandum, and applies it to the

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46 Second Bybee Memorandum, supra note 8, at 11.
47 Id. at 3, 4, 11, 15, 16.
48 Id. at 1.
49 For example, Abu Zubaydah was waterboarded 83 times during the month of August 2002, and Khalid Sheikh Mohammed was waterboarded 183 times during the month of March 2003: CIA SPECIAL REVIEW, supra note 9, at 90–91. It appears that the CIA did seek further guidance from the OLC regarding the increased frequency of waterboarding: id. at 5. However, there is also evidence that this was not sought until after waterboarding had already been used with substantial repetition: BRUFF, supra note 41, at 236, citing Scott Shane, David Johnston and James Risen, Secret U.S. Endorsement of Severe Interrogations, N.Y. TIMES, Oct. 4, 2007, A1, A22.
50 See Note, supra note 23, at 980.
facts as advised by the CIA. Could it be said, then, that the Second Bybee Memorandum really concerns matters of fact?

This does not seem fair. The Second Bybee Memorandum is a common enough form of advice in legal practice; the client seeks a lawyer’s view of how the law applies to the facts of a given situation. Seeking such advice is particularly appropriate from a policy perspective where, as here, there may not always be a clear line between prohibited and permissible conduct. This policy concern may be thought even more pressing in the circumstances of the war against al Qaeda, in which interrogators are under constant pressure to extract information to protect the nation against the novel methods of a new type of enemy.

Thus if an interrogator were to rely upon the Second Bybee Memorandum in good faith and follow it strictly, she cannot be considered to intend to inflict severe pain or suffering. Or in the words of the DTA, she “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”

However, the nature of the Second Bybee Memorandum places a limit upon such reliance. The advice rendered in the Memo can be no greater than the facts it assumes. Thus the Memo can advise, as it does, that if waterboarding does not inflict physical pain or suffering, then it does not amount to torture; it cannot, however, give legal advice that waterboarding does not inflict physical pain or suffering.

Thus an interrogator who observed that waterboarding, contrary to the facts assumed in the memo, was inflicting physical suffering, could not rely upon the memo to negate specific intent.

51 See supra section I.D.2. I leave to one side the issue that lesser conduct would likely constitute cruel or inhumane treatment, and accordingly would violate the War Crimes Statute. The executive branch considered the War Crimes Statute did not apply to the detention and interrogation of al Qaeda and Taliban operatives: see supra note 21.

52 Second Bybee Memorandum, supra note 8, at 11. The memo separately treats mental pain or suffering.
Abu Zubaydah told the ICRC that during waterboarding he vomited, struggled to breathe, thought he was going to die and lost control of his urine.\(^{53}\) It is difficult to believe that an interrogator could witness this and retain a good faith belief that she was not inflicting physical pain or suffering. At that point, the interrogator can no longer rely upon the memo—she must seek further advice, or ascertain herself that the level of pain inflicted is not “severe.”

It might be objected at this point that I am unfairly assuming that the interrogator has read the Second Bybee Memorandum and considered it carefully. I do not think my argument depends upon such an assumption. Let us assume that an interrogator has not read the memo, but has been told something like: “Waterboard this detainee; we’ve been advised by OLC that it is legal as long as we stay within these parameters.” The prohibition on torture would not mean much if an interrogator, confronted with clear evidence that she was inflicting pain, was not then obliged to carefully determine whether or not the OLC’s advice was truly applicable. This is especially the case if the interrogator has evidence that suggests the infliction of severe pain.

There is evidence that suggests interrogators should have been aware that techniques such as waterboarding amounted to infliction of severe pain. Interrogators would likely have known that the CIA’s use of waterboarding was adapted from the U.S. Military’s Survival, Evasion, Resistance and Escape (SERE) training, designed to prepare military personnel for torture by an enemy.\(^{54}\) There have been reports that some CIA officials declined training in extreme coercive techniques, leaving that to the “gung-ho paramilitary types” in the Agency.\(^{55}\) FBI agents are also

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\(^{54}\) STAFF OF S. COMM ON ARMED SERVICES, 110\(^{\text{TH}}\) CONG., 2D SESS., *supra* note 1, at 17; see W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, 12 LEGAL ETHICS 107, 119–120 (2009).

said to have expressed concerns to the CIA that various coercive techniques amounted to torture.\textsuperscript{56}

Accordingly, whether or not an interrogator who conducted techniques approved by the Second Bybee Memorandum will be able to rely upon it as a defense to a charge under section 2340A is a matter that can only be assessed on a case-by-case basis. In particular, an interrogator who ought to have known from her own observation that the technique being applied was inflicting a greater level of pain than that assumed in the Second Bybee Memorandum cannot rely upon it. This will depend upon the evidence in each case.

4. Constitutionality of the Torture Statute, Necessity and Self-Defense

The First Bybee Memorandum advised that application of section 2340A to interrogations of operatives of al Qaeda and its allies undertaken pursuant to the President’s Commander-in-Chief powers may be unconstitutional.\textsuperscript{57} The Memo further advised that, in certain circumstances (namely, where torture was thought necessary to prevent an impending terrorist attack in the United States), an operative accused of violating section 2340A may have available justifications of necessity or self-defense that negate criminal responsibility.\textsuperscript{58}

Might an interrogator claim reliance upon this advice in mounting a defense that she believed in good faith that her conduct was lawful? The short answer to this question is that the mere existence of the Second Bybee Memorandum, and the continual involvement of the OLC following that advice,\textsuperscript{59} strongly suggests that the CIA did not in fact rely upon these portions of

\textsuperscript{56} JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 156–57 (2009); Clarke, supra note 41, at 118.
\textsuperscript{57} First Bybee Memorandum, supra note 4, at 173, 200–07, 214.
\textsuperscript{58} Id. at 207–14.
\textsuperscript{59} See supra text accompanying note 11.
the First Bybee Memorandum. Rather, the CIA appears to have sought further advice on staying within the limits of what section 2340A permits.

The consequences allowing such a defense to a charge under section 2340A would be very serious. In the case of the advice as to constitutionality, it would immunize any act of torture, no matter how heinous, conducted in the course of the war against al Qaeda and the Taliban. This would allow the United States to completely insulate its operatives from domestic prosecution for conduct which contravenes a universally held, *jus cogens* norm of international law, and would place it in flagrant violation of its obligations under the Convention Against Torture to prevent and criminalize acts of torture.\(^{60}\)

In light of these considerations, I suggest that a court would be slow to allow an interrogator to plead a defense based upon reliance on these portions of the memoranda. There is some authority for limiting the reliance on counsel defense where to do otherwise “would result in the advice of an attorney being paramount to the law.”\(^{61}\) A court might reason that, since a defendant claiming reliance upon these portions of the memo does not deny the essential elements of the offense—she does not deny that she intended to inflict severe pain—the violation is established. Hence, ignorance of the law is no excuse. The defendant’s belief that her conduct was lawful would be relevant, at most, only to questions of penalty.

E. “Superior Orders” Defense

There is an additional method suggested by commentators by which the Bybee Memoranda could provide interrogators charged under section 2340A with a legal defense. An operative

\(^{60}\) Convention Against Torture, *supra* note 5, at art. 2, art. 4.

\(^{61}\) People v. McCalla, 220 P. 436, 441 (Cal. 1923); *see* Hawes and Sherrard, *supra* note 24, at 18–19; Note, *supra* note 23, at 991–92.
could mount a “superior orders” defense.\textsuperscript{62} Under military law, a defense is available to an inferior following an order of a superior, unless such order is “manifestly unlawful.”\textsuperscript{63} The point here is that, irrespective of whether or not an interrogator relied upon the Bybee Memoranda, the mere existence of the Memoranda (as well as other memoranda produced by Department of Defense lawyers) is a basis for showing that the interrogation techniques used, even if unlawful, are not \textit{manifestly} unlawful.\textsuperscript{64} Thus, a superior orders defense is available.

A superior orders defense would seem to apply most logically to use of the techniques authorized by the Second Bybee Memorandum. If OLC lawyers considering these techniques carefully believed that they did not rise to the level of torture, then surely these techniques cannot be considered manifestly unlawful.

I suggest that such a defense would be subject to a similar limit as that outlined in section I.D.3 above. In circumstances where an interrogator should have known from her own observation that she was inflicting pain beyond that assumed by the OLC, the defense would not apply. The Second Bybee Memorandum does not speak to the lawfulness, manifest or otherwise, of actions other than in accordance with the facts it assumes.

\textbf{II. OLC AUTHORIZATION AS AN ESTOPPEL AGAINST PROSECUTION}

Thus far, I have considered whether the Bybee Memoranda would provide a legal defense to a charge of torture under section 2340A. In this part, I consider whether the issuance of the Memoranda prevents prosecution of interrogators by way of estoppel. What is relevant here is

\textsuperscript{62} Luban, \textit{supra} note 41, at 55. \textit{See also} Clarke, \textit{supra} note 41, at 70; Mark Osiel, \textit{The Mental State of Torturers: Argentina’s Dirty War, in} \textit{TORTURE: A COLLECTION} 129 (Sanford Levinson ed., 2004).

\textsuperscript{63} \textit{See MODEL PENAL CODE} \textsection 2.10; \textit{cf} Rome Statute of the International Criminal Court art. 33, \textsection 1, Jul. 17, 1998, 37 I.L.M. 999.

\textsuperscript{64} Luban, \textit{supra} note 41, at 55.
not that the Bybee Memoranda were prepared by lawyers, but that they represented the official
government position on the legality of specific conduct.

A. *The Doctrine of Entrapment by Estoppel*

The idea that individuals should not be subject to prosecution for conduct which they have
been officially advised is legal is known as “entrapment by estoppel.” Entrapment by estoppel
has been derived by lower courts from three leading Supreme Court decisions, holding that the
Due Process Clause of the Fifth and Fourteenth Amendments required an exception to the usual
position that “ignorance of the law is no excuse.”

Entrapment by estoppel arises where a government agent affirmatively misleads a party as to
the state of the law and that party proceeds to act, in actual, reasonable and good faith reliance,
on the misrepresentation. The doctrine is reflected in the Model Penal Code.

Although there are a number of different policy rationales behind the doctrine, at its root is
fundamental fairness. Courts have stressed that the doctrine is to be applied sparingly; it will
only be appropriate where conviction is unfair.

The doctrine of entrapment by estoppel shares many features with the reliance upon counsel
defense. Like reliance upon counsel, entrapment by estoppel is an exception to the usual rule

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67 MODEL PENAL CODE § 2.04(3).

68 Billimack, supra note 66, 577–80.

69 Connelly, supra note 65, at 632; Billimack, supra note 66, at 566; Note, *Applying Estoppel Principles

70 Chacon, 150 P.3d, at 762 (citing authorities).

71 Connelly, supra note 65, at 634, 636.
that “ignorance of the law is no excuse;” requires good faith and reasonableness; and is dependent upon the nature of the advice rendered.

The main difference between the doctrines from a theoretical standpoint is that entrapment by estoppel implicates “the interest of the citizenry as a whole in obedience to the rule of law.” It must be used sparingly, with its purpose—fairness—kept firmly in mind.

For this reason, one commentary suggests that entrapment by estoppel should not be available for “heinous” crimes. For such crimes, it is argued, there is no unfairness in allowing prosecution. In part, this is said to be because such crimes involve a significant deviation from community morals.

I do not find this reasoning convincing. Even for heinous offenses, there is sometimes a fine line between acceptable and impermissible conduct. And while community morals are important, they may not always be an appropriate touchstone, particularly in the context of national security action taken to combat a new type of enemy in a new type of conflict.

That said, the serious of an offense bears a relationship to the cost to society of allowing the offense to go unpunished. This cost is a matter that may properly be taken into account in weighing the fairness of prosecuting the accused.

B. Application of the Doctrine to Prosecution Under Section 2340A

72 Indeed, it has been suggested that entrapment by estoppel is superfluous in relation to crimes of specific intent, as reliance upon a governmental assurance that conduct is lawful will also negate the mental element: Connelly, supra note 65, at 637–38.
74 Note, supra note 69, at 1060–61.
75 Id. at 1061.
With these considerations in mind, would the defense of entrapment by estoppel be available to an interrogator accused of a violation of section 2340A? A number of considerations are important in resolving this question.

First, the interrogator must have been “affirmatively assured” that certain conduct is legal. This requirement implies a degree of certainty in the advice; advice that is sufficiently qualified will not be capable of misleading the subject to the extent that prosecution would be unfair. Moreover, the requirement implies specificity—the doctrine is usually employed where a person has been told that a particular course of conduct is legal. Thus, this defense applies only to interrogators who employed the techniques specifically authorized by the OLC in the Second Bybee Memorandum (and subsequent advice).

Second, the assurance must come from a government official. In the present case, the respective positions of the OLC lawyers and CIA interrogators strongly support an entrapment by estoppel defense. While many entrapment by estoppel cases involve private citizens receiving advice from a government official (often not a lawyer), the present case involves a member of the executive, receiving advice from government lawyers whose opinions bind the executive. Moreover, the OLC are those lawyers within the executive branch entrusted with resolution of the “most difficult and consequential legal questions.” Executive agents are not only permitted, but required to seek the OLC’s advice on difficult questions; it is only fair that they be permitted to rely upon this advice.

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76 United States v. Howell, 37 F.3d 1197, 1204 (7th Cir. 1994).
Third, the interrogator’s reliance upon the advice must have been reasonable and in good faith. Some courts have suggested an appropriate test is whether the defendant can show that “a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.”

I suggest that whether or not an interrogator’s reliance upon the OLC’s advice was, in the circumstances, reasonable and in good faith, will depend upon the same considerations adumbrated in section I.D.3 above. That is, where an interrogator ought to have realized that a particular technique was inflicting pain or suffering on the subject beyond the facts assumed by the OLC, she can no longer claim entrapment by estoppel. It may be that the threshold for losing the protection of entrapment by estoppel is lower than in the case of the reliance upon counsel defense; as soon as circumstances arise which put an interrogator on notice that she ought to make further inquiries, she is no longer protected. A reasonable suspicion that pain is being inflicted might, therefore, be enough.

The final, and overriding consideration is whether or not conviction would be unfair in the circumstances. As I have stated, the cost to society of allowing the offense to go unpunished will be a factor. This may involve considering not only the severity of the offense, but also society’s interest in effective national security, in the context of a new and different enemy and conflict.

In light of these competing considerations, I suggest that a court’s willingness to apply the estoppel by entrapment doctrine is likely to turn upon whether or not the interrogator ought to have realized that a technique was likely to inflict severe harm. If an interrogator did realize or ought to have realized this, prosecution is less likely to be thought unfair.

79 United States v. Lansing, 424 F.2d 225, 227 (9th Cir. 1970); reaffirmed by United States v. Batterjee 361 F.3d 1210, 1217 (9th Cir. 2004); followed by United States v. Abcasis, 45 F.3d 39, 43 (2d Cir. 1995); United States v. Taylor, 448 F.2d 349, 351 (5th Cir. 1971).
III. SHOULD DOJ PROSECUTE AS A MATTER OF POLICY?

Thus far, I have considered legal limits upon prosecution of interrogators under section 2340A. In this part, I assume that there is a proper legal basis for prosecution, and examine the policy factors which may bear upon the exercise of the DOJ’s broad discretion to prosecute.

A. Prosecutorial Discretion in the Criminal Justice System

In the American criminal justice system, the government enjoys broad discretion as to whom to prosecute. As long as a prosecutor does not engage in vindictive prosecution (a Due Process violation) or selective prosecution (an Equal Protection violation), her discretion is not judicially reviewable. The logic of prosecutorial discretion has its basis in sovereignty—since strict enforcement of all laws may do societal harm, the state retains discretion to be sensibly applied where this will lead to a preferable outcome—and separation of powers between the executive, legislature and judiciary.

The factors that may appropriately weigh in to a prosecutor’s decision to charge include, at least, the strength of the case, the general deterrent value of the prosecution, the government’s enforcement priorities and its overall plan for enforcement of law. This admits a broad range of policy and practical considerations.

B. Considerations in Favor of Prosecution

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82 Id. at 404–08.
The following considerations weigh in favor of prosecuting interrogators for violations of section 2340A. First, the seriousness of the charge. There is a clear tension between a prosecutorial decision not to charge and maintenance of the rule of law. Respect for the rule of law is reflected in the Constitutional command to the President to “take Care that the Laws be faithfully executed.” In the case of such a serious charge, such as torture, this tension mitigates in favor of charging, unless there are good policy grounds to the contrary.

Second, respect for international law. The prohibition on torture is a fundamental (jus cogens) norm of international law. The United States is required under the Convention Against Torture to take steps to prevent acts of torture occurring within its jurisdiction, and to criminalize all acts of torture. The Convention Against Torture further provides that “no exceptional circumstances whatsoever” may be invoked as a justification for torture. It contains no exception allowing non-prosecution for policy or prudential grounds. The Bybee Memoranda and the executive’s decision not to prosecute have attracted considerable criticism from the international community, and prosecution of torture interrogators would be one step towards improving America’s standing, especially with the Muslim world.

Third, consistency. Consistent treatment (treat like cases alike) is an aspect of the rule of law. A decision not to prosecute, for example, acts of waterboarding, would run contrary to U.S.

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86 Convention Against Torture, supra note 5, at art. 2, art. 4.
87 Id. at art. 2.2.
prosecutions of U.S. soldiers for waterboarding during the occupation of the Philippines, Japanese soldiers in World War II, U.S. soldiers in Vietnam and a Texas sheriff who employed the technique in 1986.\textsuperscript{90} It does not sit well with the fact that the CIA waterboarding technique was derived from SERE training of military personnel to resist torture.\textsuperscript{91} There is considerable hypocrisy in a failure to prosecute use of techniques which are listed in official documents (in State Department reports\textsuperscript{92} and the Army Field Manual\textsuperscript{93}) as torture.

Fourth, legitimacy. The CIA’s interrogation programme has been viewed as part of an overall illegitimate course of conduct in the war against al Qaeda, including the operation of “black sites,” extraordinary rendition and denial of access to American courts.\textsuperscript{94} Some commentators have placed it in the context of a history of torture and extraordinary rendition by the CIA carried out in secret.\textsuperscript{95} It is thus not surprising that many see the CIA’s requests for OLC advice as a contrivance; an Orwellian device designed to immunize CIA operatives and thereby legalize torture.\textsuperscript{96} A related point is that the Bybee Memoranda, in creating a category of “permissible” torture, created an environment more likely to produce even more severe abuse, such as the

\textsuperscript{91} Wendel, supra note 54, at 119–120.
atrocities at Abu Ghraib. Prosecution of interrogators would repudiate the OLC and CIA’s attempts to legitimize torture and other unlawful tactics.

Finally, should the DOJ fail to prosecute, there is the possibility that other countries might invoke universal jurisdiction to prosecute interrogators themselves—a diplomatic embarrassment for the United States.

C. Considerations Against Prosecution

The policy considerations counselling in favor of prosecution are substantial. Nonetheless, I shall argue that, except in certain circumstances, the DOJ should elect not to prosecute interrogators who relied upon the Bybee Memoranda. A number of important considerations compel this conclusion.

First, and fundamentally, is fairness. As discussed in Part II above, there is palpable unfairness in prosecuting interrogators who relied upon the Bybee Memoranda reasonably and in good faith. It is for this reason that the Attorney General, and various commentators, have concluded that prosecution of interrogators who relied upon the Bybee Memoranda is impossible or unwise.

Fairness is also implicated in a second way. For better or worse, it is politically virtually unthinkable that either higher officials in the Bush Administration, or the OLC and other lawyers

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98 Cohn, supra note 85.
99 DOJ, supra note 17.
who authored the Bybee Memoranda and similar advices, will be prosecuted for conspiracy to commit torture, war crimes, or any similar offense. Thus any prosecution of CIA interrogators may be seen as prosecuting the “little guys” while those higher up go free. Such a situation would offend notions of fundamental fairness. Unless and until there is political will to prosecute those who wrote the legal advice and authorized the interrogations, prosecution of the underlings is unadvisable.

Third, there are prudential considerations. These are related to the issue of fairness, but concerned with the consequences, rather than ethics, of prosecution. As President Obama and others have observed, the dangerous tasks entrusted to CIA operatives demand that they be able to rely upon advice from the OLC in order to effectively do their jobs. It runs contrary to national security interests and the division of labor within the executive branch for CIA operatives to be constantly second-guessing OLC advice. There is, moreover, a political dimension to this consideration—the CIA cannot operate under the possibility that the ground rules will change with a change of Administration.

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101 Although John Yoo, the author of the memoranda that went out under Jay Bybee’s name, is currently being sued by a former detainee, alleging, *inter alia*, that the advice caused him to be tortured: Padilla v. Yoo, 633 F.Supp.2d 1005 (N.D. Cal. 2009). The Obama Administration has filed an *amicus* brief supporting Yoo’s motion to dismiss: http://www.concurringopinions.com/wp-content/uploads/2009/12/DOJ-Amicus.pdf (last accessed Apr. 17, 2010).


Fourth, there are practical considerations. In part due to the legal issues set out in Parts I and II above, conviction of a CIA interrogator in a torture prosecution would be far from certain. Some have speculated that a jury would be very unlikely to convict, given the inherent appearance of unfairness.\(^{105}\) Moreover, interrogators would likely seek to make use of classified information in mounting their defense.\(^{106}\) This might raise state secrets issues (which potentially could force the Government to discontinue prosecution if it were unwilling to give up state secrets claims)\(^{107}\) and would certainly impede the holding of public trials. An acquittal or a mistrial might serve to further vindicate the conduct,\(^{108}\) and be worse than not prosecuting at all in terms of the United States’ standing in the world.\(^{109}\)

In light of these considerations, I suggest that in most cases where interrogators have performed interrogations limited to the techniques authorized by the Second Bybee Memorandum, it would be unwise policy to prosecute them. The exception, for similar reasons to those I have raised in Parts I and II above, is where an interrogator ought to have known, from direct observation of the subject, that she was inflicting severe pain or suffering. In such a case, the unfairness of prosecution is significantly less and there is a greater chance of a jury conviction. While it might still be said that this raises prudential concerns for CIA operatives going forwards, prosecution of only a narrow range of cases where the infliction of severe pain was patently obvious would provide a workable doctrine for other agents. While the unfairness

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\(^{106}\) *Drum, supra* note 102.

\(^{107}\) The government has been quick to invoke the state secrets privilege in civil cases involving torture: *see El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009).

\(^{108}\) *Anonymous Liberal: A Response to Glenn, supra* note 105.

of prosecuting lower level operatives while refraining from prosecuting higher officials would remain, this might be outweighed by the considerations set out in section III.B above.

CONCLUSION

Fundamental legal and policy considerations are implicated in any decision to prosecute or not to prosecute CIA interrogators who acted in reliance upon OLC advice under the Torture Statute. This paper has analyzed the interplay of these considerations as they arise in considering various obstacles to prosecution. Behind all these considerations lies the rule of law. However, discerning what the rule of law demands in these cases is no easy task. Also lurking forever in the background is the fact that the interrogations in question were carried out in the uncertain fog of a new type of conflict.

In considering the potential legal defenses, I have concluded that the Bybee Memoranda only assist interrogators who acted in accordance with the Second Bybee Memorandum and used just those techniques which were specifically authorized. The twisted reasoning of the First Bybee Memorandum does not provide sufficient guidance for either a reliance upon counsel defense, or an entrapment by estoppel defense.

Prosecution of interrogators who genuinely relied upon the Second Bybee Memorandum in good faith is legally almost impossible and bad policy in any case. The legal case for a defense on the basis of reliance upon counsel or entrapment by estoppel is very strong. Fairness, above all, dictates that the DOJ should not prosecute even if it legally could.

However, there is an important limit to the immunization afforded by the Second Bybee Memorandum. Even OLC advice should not protect an interrogator who ought to have known from direct observation that she was inflicting severe pain. If, upon investigation, it becomes
apparent that interrogators ought to have realized this, they can and should be prosecuted. To do otherwise would be to further perpetuate the disrespect for rule of law and international norms reflected in the Bybee Memoranda in the first place.