Unfounded Allegations That John Yoo Violated His Ethical Obligations As A Lawyer: A Critical Analysis of the Torture Memo

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UNFOUNDED ALLEGATIONS THAT JOHN YOO VIOLATED HIS ETHICAL OBLIGATIONS AS A LAWYER: A CRITICAL ANALYSIS OF THE TORTURE MEMO

Carrie L. Flores, Esq., SPHR

Abstract

In 2003, John C. Yoo, then Deputy Assistant Attorney General for the United States Department of Justice’s Office of Legal Counsel, signed a memorandum issued to the U.S. Department of Defense. This memorandum provided a legal opinion regarding the standards governing military interrogations of alien unlawful combatants detained outside of the U.S. It is now commonly referred to as the “Torture Memo.”

The Torture Memo contained several highly controversial legal conclusions, including a definition of torture, and although it was classified information when it was originally issued, the Memo was later declassified and made available to the public in 2008. The Memo has been widely criticized ever since. People have blasted it for having no foundation in any source of law and have criticized John Yoo, claiming that he violated his legal ethical obligations by authoring the Memo.

Considering the subject addressed in the Memo, the degree of attention it has received is not surprising. However, to the extent that people have claimed that the Memo was completely void of legal foundation and that John Yoo breached his legal ethical obligations in authoring it, these assertions are unsubstantiated.

This Article analyzes the Torture Memo’s reasoning to show that Yoo did not violate his lawyerly ethical obligations but instead produced an impressive legal memorandum, supported by a wide variety of valid legal resources. Yoo should be commended for his service to the DOJ and to this country, not condemned for authoring a memorandum which contained unpopular conclusions.

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I. INTRODUCTION

In March 2003, John C. Yoo, then Deputy Assistant Attorney General for the United States Department of Justice’s Office of Legal Counsel, signed a classified memorandum issued to the United States Department of Defense.\(^1\) The Department of Defense had requested a legal opinion regarding the legal standards governing military interrogations of alien unlawful combatants detained outside of the United States.\(^2\) In response, the Department of Justice’s memorandum concluded, among other things, that the Fifth and Eighth Amendments of the United States Constitution did not...

\(^1\) Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003) [hereinafter Torture Memo], available at http://www.aclu.org/pdfs/safe/... (noting that this memorandum, commonly referred to as the “Torture Memo,” was originally stamped “SECRET”—indicating that it was originally classified—and was signed by John C. Yoo). See Faculty Profiles, http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235 (last visited Nov. 27, 2008). John Choon Yoo received his B.A. from Harvard University and his J.D. from Yale Law School. Id. Subsequently, he clerked for Judge Laurence H. Silberman of the United States Court of Appeals of the D.C. Circuit, joined the University of California, Berkeley (Boalt Hall) faculty (in 1993), clerked for Justice Clarence Thomas of the United States Supreme Court, and served as Deputy Assistant Attorney General in the Office of Legal Counsel at the United States Department of Justice (from 2001 to 2003), where he worked on issues involving national security and foreign affairs. Id. See also Selected Works of John C Yoo, http://works.bepress.com/johnyoo/ (last visited Mar. 26, 2010) (detailing numerous scholarly works authored by John Yoo).

\(^2\) Torture Memo, supra note 1, at 1 (“You have asked our Office to examine the legal standards governing military interrogations of alien unlawful combatants held outside the United States. You have requested that we examine both domestic and international law that might be applicable to the conduct of those interrogations.”). See Memorandum for Attorneys of the Office, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Best Practices for OLC Opinions (May 16, 2005), available at http://www.usdoj.gov/olc/best-practices-memo.pdf (setting forth best practices for opinions issued by the Office of Legal Counsel). The memorandum provides as follows: By delegation, the Office of Legal Counsel exercises the Attorney General’s authority under the Judiciary Act of 1789 to advise the President and executive agencies on questions of law. OLC is authorized to provide legal advice only to the Executive Branch; we do not advise Congress, the Judiciary, foreign governments, private parties, or any other person or entity outside the Executive Branch. OLC’s primary function is to provide formal advice through written opinions signed by the Assistant Attorney General or (with the approval of the AAG) a Deputy Assistant Attorney General. Our Office is frequently called upon to address issues of central importance to the functioning of the federal Government, and, subject to the President’s authority under the Constitution, OLC opinions are controlling on questions of law within the Executive Branch. Accordingly, it is imperative that our opinions be clear, accurate, thoroughly researched, and soundly reasoned. The value of an OLC opinion depends on the strength of its analysis. Over the years, OLC has earned a reputation for giving candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers. This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in preparing the formal opinions of the Office.

Memorandum for Attorneys of The Office, supra at 1. See also Yoo’s Labour’s Lost: Jack Goldsmith’s Nine-Month Saga in the Office of Legal Counsel the Terror Presidency: Law and Judgment Inside the Bush Administration, 31 Harv. J.L. & Pub. Pol’y 795, 796 & n.9 (2008) (explaining that the Department of Justice Office of Legal Counsel is the governmental office that has historically provided “objective, candid advice on the interpretation of the law”).
extend to alien enemy combatants detained outside of the United States. This memorandum, now commonly referred to as the Torture Memo ("Torture Memo" or "Memo"), also concluded that certain federal criminal statutes did not apply to properly authorized interrogations of enemy combatants. Finally, the Memo interpreted Section 2340A of Title 18 of the United States Code—the statute that makes it a criminal offense for any person outside the United States to commit or attempt to commit torture. The Memo concluded that the statutory prohibition against torture did not apply to interrogations conducted within the United States or on permanent military bases outside the territory of the United States. Perhaps in its most widely debated conclusion, after considering a host of sources, the Memo defined torture as acts inflicting severe pain that result in "death, organ failure, or serious impairment of body functions." On March 31, 2008, in response to a lawsuit filed by the ACLU, the New York Civil Liberties Union, and other organizations, the Department of Justice voluntarily declassified the Torture Memo and made it available to the public.

Immediately after the Torture Memo was released, civil libertarians sharply criticized the conclusions reached in the Memo and the legal reasoning posited in support of these conclusions. For example, Jack L. Goldsmith—former Assistant Attorney General for the Department of Justice’s Office of Legal Counsel, author of The Terror Presidency, and Harvard law professor—blasted the Torture Memo for having "no foundation" in any "source of law" and containing "one-sided legal reasoning.

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3 Torture Memo, supra note 1, at 1-10.
4 Id. at 1, 11-47.
5 Id. at 1, 32-47.
6 Id. at 1-2, 32-47.
7 Id. at 39, 1, 38-47.
8 See id. (indicating that the Torture Memo was declassified on March 31, 2008); Memo Contends That President Can Authorize Torture, Apr. 1, 2008, http://www.aclu.org/safefree/torture/34747prs20080401.html (posted on the World Wide Web on April 1, 2008, the day after the Torture Memo was declassified, this article explains that the Torture Memo was declassified in response to the lawsuit initiated in June 2004 by the ACLU and other organizations).
9 See, e.g., Memo Contends That President Can Authorize Torture, supra note 8 (sharply criticizing the Torture Memo for its "extremely broad view of the president’s power as Commander-in-Chief").
arguments.” Yale Law Dean Harold Hongju Koh called the Memo “a stunning failure of lawyerly craft” and labeled it “a stain upon our law and our national reputation.”

Reporters and other commentators similarly have condemned the Memo, describing it in disparaging terms; for instance, one columnist called the Memo “an abysmal piece of work[.]” In addition, groups of protestors have picketed the streets to convey their outrage toward John Yoo, the Torture Memo’s signatory.

10 Stephen Gillers, The Torture Memo, Apr. 9, 2008, http://www.thenation.com/doc/20080428/gillers/print (posted just nine days after the Torture Memo was declassified, this article sharply criticizes the Memo). See Jack Goldsmith, The Terror Presidency 10 (2007) (“I was astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations.”). See also Exclusive: “Torture Memo” Author John Yoo Responds to This Week’s Revelations, http://www.esquire.com/the-side/qa/john-yoo-responds (last visited Nov. 28, 2008). In an interview by Esquire Magazine of John Yoo approximately one day after the Torture Memo was declassified on March 31, 2008, the following exchange occurred concerning the Torture Memo:

Esquire: . . . Goldsmith said it was slapdash and wasn’t well reasoned.

Yoo: I think that’s unfair, first because Goldsmith never issued an opinion of his own. He’s certainly free to criticize. It goes back to unless you’ve actually made the hard decision yourself, then you don’t really know how you think it through, what you would do. So, he says “slapdash opinion,” but we have no idea what he would have done, because he left. Second thing is, it went through the normal process opinions go through in the Justice Department. It was primarily worked on by career staff people, and then went through a process of editing and review by different offices within the department, no different than any other.

Esquire: Ashcroft saw it?

Yoo: He approved it. And so the idea that’s [sic] its [sic] slapdash, or it was haphazard – I don’t think was true.

11 Gillers, supra note 10.

12 Id. (noting the “incompetence” of the authors of the Torture Memo). See Memo Contends That President Can Authorize Torture, supra note 9. The article provides as follows:

“Senior officials at the Justice Department gave the Pentagon the green light to torture prisoners,” said Amrit Singh, an ACLU staff attorney. “It is outrageous that none of these high-level officials have been brought to task yet of their role in authorizing prisoner abuse.” . . . “The memo shows that the same disgraceful legal analysis that was at the root of the CIA’s illegal interrogation program was also at the root of the Defense Department’s program,” said Jamel Jaffer, Director of the ACLU National Security Project. . . . “If you believe this memo, there is no limit at all to the kinds of interrogation methods the President can authorize.”

13 See, e.g., Jacob Schneider, Protest Targets Law Professor’s Prisoner Memo, June 28, 2004, http://www.dailycal.org/article/15545/protest_targets_law_professor_s_prisoner_memo (describing a protest relating to the treatment of Iraqi prisoners—before the substance of the Torture Memo was even available to the public—in which
Bloggers on World Wide Web pages have also directed hateful messages toward John Yoo, claiming that Yoo violated his legal ethical obligations by authoring and signing the Torture Memo.\(^\text{14}\)

Berkeley law students, opposing the position asserted by John Yoo in a controversial memorandum dated January 2002, chanted, “John Yoo[,] you should feel shame, promoting torture in our name.”).

\(^{14}\) See, e.g., Andrew Cohen, *Don’t Cry for John Yoo*, Jan. 18, 2008, http://blog.washingtonpost.com/benchconference/2008/01/dont_cry_for_john_yoo.html. On January 18, 2008, two months before the Torture Memo was declassified, Andrew Cohen posted an article in which he mocked John Yoo because Yoo said he was “shocked” that he was being sued by former “dirty bomb” suspect Jose Padilla. \textit{Id.} Cohen concluded with a sarcastic comment in response to Yoo’s comment mentioning Abraham Lincoln. \textit{Id.} Cohen first quoted Yoo: “Would we have wanted President Abraham Lincoln to worry about his personal liability for issuing the Emancipation Proclamation freeing the slaves (done on his sole authority as commander-in-chief)?” \textit{Id.} Cohen retorted, “I didn’t know Abraham Lincoln. He wasn’t a friend of mine. But John Yoo clearly is no Abraham Lincoln.” \textit{Id.} In response to Cohen’s remark, one blogger posted the following comment: “You’re being too kind. John Yoo is the perfect moral argument for abortion.” \textit{Id.} See also, e.g., Grievance Project, Apr. 15, 2008, http://grievanceproject.wordpress.com/2008/04/15/john-yoo/ (originally posted April 15, 2008, two weeks after the Torture Memo was declassified, this World Wide Web page provides detailed instructions on how to file a grievance against Yoo in either or both Pennsylvania and Washington, D.C.); John H. Richardson, Is John Yoo a Monster, May 13, 2008, http://www.esquire.com/features/john-yoo-0608?src=rss (noting that John Yoo’s office computer and iPhone screen savers are pictures of his wife, “which helps take the edge off all the hate calls” he receives).
Indeed, the Torture Memo has spawned much debate nationwide.\textsuperscript{15} To be sure, considering the emotionally charged and hotly controversial issues addressed in the Memo, the degree of attention it received is not surprising.\textsuperscript{16} However, to the extent that critics have alleged that John Yoo violated his legal ethical obligations by authoring the Memo, these assertions are unsubstantiated.\textsuperscript{17} Accordingly, the purpose of this Article is to analyze the reasoning in the Torture Memo, thereby demonstrating that John Yoo did not violate his ethical obligations as a lawyer in authoring the Memo.\textsuperscript{18}

II. BACKGROUND

\textsuperscript{15} At the time of publication of this Article, this debate continues. In July of 2009, the Office of Professional Responsibility (OPR) issued a Report, concluding that John Yoo demonstrated professional misconduct in analyzing the use of interrogation tactics in the Torture Memo that he authored in 2003, specifically, stating, “[Yoo] knowingly failed to provide a thorough, objective and candid interpretation of the law[.]” Office of Professional Responsibility Report, Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (July 29, 2009), available at http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf. Notwithstanding this Report by the OPR, in January of 2010, David Margolis, Associate Deputy Attorney General of the Office of the Deputy Attorney General, issued his own report, rejecting the conclusion in the OPR’s July 2009 Report, and further noting that the OPR had given short shrift in its Report to the national climate of urgency in which John Yoo acted after the attacks of September 11, 2001 (a context that is significant to consider, albeit difficult to recapture seven years after the fact), especially considering that the Torture Memo was released shortly after the capture of Abu Zubaydah, suspected operative for Al-Qaeda. Memorandum for Eric H. Holder, Jr., Attorney General, from David Margolis, Associate Deputy Attorney General, Office of the Deputy Attorney General, Subject: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (Jan. 5, 2010) (released to the public in Feb. 2010), available at http://media.washingtonpost.com/wp-srv/nation/pdf/MargolisMemo_021910.pdf?sid=ST2010021904308. See also Eric Lichtblau and Scott Shane, Report Faults 2 Authors of Bush Terror Memos, N.Y. TIMES, Feb. 19, 2010, available at www.nytimes.com/2010/02/20/us/politics/20justice.html?pagewanted=print (noting, even after the Deputy Attorney General issued its opinion in February 2010, that John Conyers, Jr., Michigan Democrat leading the House Judiciary Committee, stated, “the authors of the interrogation memorandums ‘dishonored their office and the entire Department of Justice[,]’” and also noting that Senator Richard J. Durbin, Democrat of Illinois, stated, “Mr. Yoo may keep [his] law license[], but [he] will not escape the verdict of history.’’). This article shows that even though the Deputy Attorney General issued its opinion in February 2010, concluding that John Yoo did not engage in professional misconduct in authoring the Torture Memo and will not be subject to discipline by the bar for his actions related to authoring this memorandum, people continue to express their opinions on the matter, and, indeed, the Attorney General’s criminal investigation of this matter is still underway and is not expected to be completed for several months. Id. The emotional national dispute about how torture is properly defined and whether John Yoo violated his ethical obligations as a lawyer is expected to be long-lived. Id. See also, e.g., supra notes 9-14 and accompanying text (illustrating the controversy the Torture Memo has spawned).

\textsuperscript{16} See id.

\textsuperscript{17} See infra Part III.

\textsuperscript{18} See infra Part III.
Before analyzing whether John Yoo violated his ethical obligations by authoring the Torture Memo, first, Part II.A of this Article provides an overview of the September 11, 2001 terrorist attacks on the United States. ¹⁹ Second, Part II.B explains the United States Department of Defense’s request for a legal opinion from the Department of Justice’s Office of Legal Counsel. ²⁰ Finally, Part II.C sets forth the Torture Memo’s significant findings. ²¹

A. The Terrorist Attacks of September 11th

On September 11, 2001, in an unprecedented terrorist attack on the United States, nineteen Islamist terrorists, believed to be affiliated with Al-Qaeda, hijacked and took control of four United States-operated commercial passenger airplanes and intentionally crashed them, killing nearly three thousand innocent people. ²² These hijackers, now oft-referred to as suicide bombers, used these commercial airplanes as guided missiles, aiming the planes at critical government buildings located in the Nation’s capital and landmark buildings located for the most part in the heart of the Nation’s financial district. ²³ Specifically, they crashed two planes into the Twin Towers of the World Trade

¹⁹ See infra Part II.A.
²⁰ See infra Part II. B.
²¹ See infra Part II. C.
Center in New York City, and then they crashed one plane into the Pentagon, in Arlington County, Virginia. After some passengers and the flight crew attempted to retake control of the fourth plane, which the hijackers had redirected toward Washington, D.C., this fourth plane crashed into a field in Somerset County, Pennsylvania.

In total, nearly three thousand people lost their lives as a result of these attacks. Numerous buildings, including thousands of small businesses, located in the World Trade Center complex and in the surrounding financial district, were instantaneously destroyed, and much of the Lower Manhattan area near the World Trade Center was condemned and deemed inhabitable because of the 

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23 September 11 Attacks, http://www.answers.com/topic/september-11-attacks (last visited Nov. 28, 2008) (referring to the plane crashes that occurred on September 11, 2001 as “suicide bombings”). This report provides as follows:

On Tuesday, [September 11, 2001], nineteen members of the Islamic terrorist group Al Qaeda perpetrated a devastating, deadly assault on the United States, crashing airplanes into the Pentagon and the World Trade Center, killing thousands. The attacks shattered Americans’ sense of security, threw the nation into a state of emergency, and triggered a months-long war in Afghanistan and an extended worldwide “war on terrorism.”

On the morning of [September 11th], four teams of terrorists hijacked jetliners departing from Boston; Newark, New Jersey; and Washington, D.C. Once airborne, the terrorists, some of whom had gone to flight school in the United States, murdered the planes’ pilots and took control of the aircrafts.

Id.


toxic conditions caused by the attacks.\textsuperscript{27} North American air space and national stock exchanges closed almost immediately after the attacks.\textsuperscript{28} Several days later, when air travel resumed and the stock exchanges re-opened, air travel within the United States significantly decreased, and the stock exchanges reported some of the largest financial declines in history.\textsuperscript{29} Overall, destruction resulting from the September 11th terrorist attacks, including the costs of rebuilding the damaged areas, exceeded hundreds of billions of dollars.\textsuperscript{30}

The September 11, 2001 terrorist attacks, orchestrated and carried out by members of Al-Qaeda, constituted an armed attack against the United States, triggering the Nation’s right under both domestic and international law to use force to defend against future attacks until the threat posed by

\begin{itemize}
\item \textsuperscript{27} See 9/11 Attack, \textit{supra} note 24. This report described as follows the chaos and wreckage that resulted following the terrorist attacks on September 11th:
\begin{itemize}
\item The scope of the carnage and devastation, especially in Manhattan, overwhelmed Americans. Besides the towers, several smaller buildings in the World Trade Center complex also collapsed. People trapped on upper floors of the towers jumped or fell to their deaths. Hundreds of firefighters and rescue crews who had hurried to the buildings were crushed when the towers collapsed. All told, 2,819 people died (because of confusion and difficulty in tracking down individuals, early estimates put the toll at more than 6,000). Thousands more suffered severe physical injury or psychological trauma. Others were displaced from their homes and offices for weeks or months. Some businessmen lost large portions of their workforces or sustained financial setbacks. Neighborhood restaurants and shops, which depended on the World Trade Center population for business, struggled to stay solvent.
\end{itemize}
\end{itemize}

\item \textsuperscript{28} See September 11: Chronology of terror, Sept. 12, 2001, \textit{supra} note 26 (noting that on September 11, 2001, the Federal Aviation Administration shut down all United States commercial air traffic, and the American Stock Exchange, the Nasdaq, and the New York Stock Exchange also announced their closures).


\item \textsuperscript{30} See generally \textit{THE ECONOMIC EFFECTS OF 9/11: A RETROSPECTIVE ASSESSMENT}, \textit{supra} note 29 (discussing the financial costs resulting from the September 11, 2001 terrorist attacks).
Al-Qaeda and other affiliated terrorist organizations ceased. The United States Government responded to this armed attack by launching what has since been referred to as the War on Terrorism. Shortly after September 11th, the United States organized a broad coalition of international forces to eradicate the Taliban regime for harboring members of Al-Qaeda. Many


In a meeting on September 12 with his National Security Team, President Bush said, “The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war. This will require our country to unite in steadfast determination and resolve. Freedom and democracy are under attack.”


32 See Jide Nzelibe and John C. Yoo, Rational War and Constitutional Design, 115 Yale L.J. 2512 (2006) (arguing that the constitutional presidential process that is appropriate depends on the type of regime the United States is combating, explaining that a unilateral presidential approach might be appropriate where the United States is involved in a dispute with a terrorist organization); Frequently Asked Questions, supra note 24 (describing the terrorist attacks as an act of war against the United States, and describing the War on Terrorism as the Bush Administration’s response to the terrorist attacks).


Every civilized nation here today is resolved to keep the most basic commitment of civilization. We will defend ourselves and our future against terror and lawless violence. The United Nations was founded in this cause.

. . . .

Every nation has a stake in this cause. As we meet, the terrorists are planning more murder, perhaps in my country or perhaps in yours. They kill because they aspire to dominate. They seek to overthrow governments and destabilize entire regions.

. . . .

They can be expected to use chemical, biological[,] and nuclear weapons the moment they are capable of doing so. No hint of conscience would prevent it. This threat cannot be ignored. This threat cannot be appeased. Civilization itself, the civilization we share, is threatened.

. . . .

The United Nations has risen to this responsibility. On the 12th of September, these buildings opened for emergency meetings of the General Assembly and the Security Council. Before the sun had set, these attacks on the world stood condemned by the world.

. . . .

Terrorist groups like al Qaeda depend upon the aid or indifference of governments. They need the support of a financial infrastructure and safe havens to train and plan and hide.
countries, including Australia, Canada, China, France, Germany, India, Indonesia, Jordan, Pakistan, Russia, United Kingdom, and Zimbabwe, not only launched anti-terrorism legislation but also froze the bank accounts of individuals who were thought to be connected to Al-Qaeda. As part of a wide-scale attempt to break up militant cells scattered around the world, law enforcement and intelligence agencies in a number of countries, including Indonesia, Italy, and the Philippines, arrested individuals who were suspected terrorists.

In October 2001, Congress passed the USA PATRIOT Act, which was aimed at identifying and prosecuting individuals engaged in terrorism and other similar crimes. In addition, the Bush

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The United States, supported by many nations, is bringing justice to the terrorists in Afghanistan. We're making progress against military targets, and that is our objective.

. . . .

We must apply those laws to every financial institution in every nation. We have a responsibility to share intelligence and coordinate the efforts of law enforcement. If you know something, tell us. If we know something, we'll tell you. And when we find the terrorists, we must work together to bring them to justice.

We have a responsibility to deny any sanctuary, safe haven[,] or transit to terrorists. Every known terrorist camp must be shut down, its operators apprehended[,] and evidence of their arrest presented to the United Nations. We have a responsibility to deny weapons to terrorists and to actively prevent private citizens from providing them.

These obligations are urgent, and they are binding on every nation with a place in this chamber. Many governments are taking these obligations seriously, and my country appreciates it. Yet, even beyond Resolution 1373, more is required and more is expected of our coalition against terror.

We're asking for a comprehensive commitment to this fight. We must unite in opposing all terrorists, not just some of them.

In this world, there are good causes and bad causes, and we may disagree on where that line is drawn. Yet, there is no such thing as a good terrorist. No national aspiration, no remembered wrong can ever justify the deliberate murder of the innocent. Any government that rejects this principle, trying to pick and choose its terrorist friends, will know the consequences.

Id. (quotation marks omitted). See also Taliban, http://en.wikipedia.org/wiki/Talibana (last visited Dec. 11, 2008) (defining the Taliban as “a Sunni Islamist, predominately Pashtun movement that ruled most of Afghanistan from 1996 until 2001, when its leaders were removed from power by Northern Alliance and NATO forces”).


The Administration initiated a secret national security operation which enabled government officials “to eavesdrop on telephone and e-mail communications between [people in] the United States and people overseas without [obtaining] a warrant.” In November 2001, President Bush signed an Executive Order, allowing military officials to hold foreign nationals indefinitely, and soon thereafter, the United States established a detention command center in Guantánamo Bay, Cuba, in order to detain illegal enemy combatants for interrogation.

B. The United States Department of Defense’s Request for a Legal Opinion

In January of 2002, the first twenty prisoners from the Afghanistan battlefield were transferred to the detention center at Guantánamo Bay, and in the years following, hundreds of prisoners of war were taken there, and although hundreds of prisoners have also been released, as of January 2010, approximately two hundred inmates still remain. This detention center has received a great deal of


38 Days after the September 11 attacks, http://loh.loswego.k12.or.us/koepping/guantanamo_bay.htm (last visited Dec. 14, 2008) (noting that days after September 11, 2001, Congress authorized the President to use “all necessary and appropriate force” against Al-Qaeda, and in November 2001, President Bush signed the Executive Order, allowing the Bush Administration to hold foreign nationals indefinitely); Guantánamo Bay detention camp, http://www.nationmaster.com/encyclopedia/Guantanamo-Bay-detention-camp (last visited Nov. 28, 2008) (discussing the operation of three detention camps located at Guantánamo Bay Naval Base); Context of “December 2001-January 2002: US Military Vessels Used to House Suspected Terrorists”, http://www.historycommons.org/context.jsp?item=tor ture_rendition_and_other_abuses_against_captives_in_iraq_afghanistan_and_elsewhere_2201#tor ture_rendition_and_other_abuses_against_captives_in_iraq_afghanistan_and_elsewhere_2201 (last visited Nov. 28, 2008) (noting that on December 27, 2001, then-Defense Secretary Donald Rumsfeld announced that Taliban and Al-Qaeda suspects would be moved to the Guantánamo Bay Naval Station and that, on January 11, 2002, the first twenty prisoners were transferred from the Afghan battlefield to the Guantánamo Bay Naval Base).

attention from the media over the years and has been the focus of much controversy among the public. This is because the detention center at Guantánamo Bay is what is known as a “legal, political[,] and geographical limbo.” Indeed, soon after prisoners were taken to Guantánamo Bay, civil libertarians and some lawyers well-versed in international law principles claimed that the United 

See Context of “December 2001-January 2002: US Military Vessels Used to House Suspected Terrorists’, supra note 38 (noting that, on January 11, 2002, the first twenty prisoners from the Afghan battlefield were transferred to the Guantánamo Bay Naval Base); Peter Finn, Guantánamo Closure Called Obama Priority, WASH. POST, Nov. 12, 2008, A01, available at http://www.washingtonpost.com/wp-dyn/content/story/2008/11/12/ST2008111200035.html (“There are about 250 detainees at the U.S. facility at Guantánamo Bay, Cuba. President-elect Barack Obama has said he wants to close the detention center.”); William Glaberson, 6 at Guantánamo Said to Face Trial in 9/11 Case, N.Y. TIMES, Feb. 9, 2008, http://www.nytimes.com/2008/02/09/us/09gitmo.html?_r=2&hp&oref=slogin (noting that as of February 2008, 275 prisoners remain at the detention center in Guantánamo Bay). This article describes the prisoners held at the Guantánamo Bay detention center as of February 2008:

[In particular.] six detainees [(suspected conspirators in the plot that led to the deaths of nearly 3,000 Americans on Sept. 11, 2001)] [are currently being] held at the [Guantánamo Bay] detention camp, including Khalid Shaikh Mohammed, the former senior aide to Osama bin Laden, who has said he was the principal planner of the [September 11th] plot. . . . Officials have long said that a half-dozen men held at Guantánamo played essential roles in the plot directed by Mr. Mohammed, from would-be hijackers to financiers.

. . . .

Officials have said detainees now held at Guantánamo are responsible for attacks that killed thousands of people, including the United States Embassy bombings in East Africa in 1998, the attack on the destroyer Cole in 2000, and the Bali nightclub bombing in 2002.

. . . .

The American-educated Mr. Mohammed was described by the Sept. 11 commission as the “self-cast star, the superterrorist,” with plans for destruction on a vast scale. At a Pentagon hearing last year, he claimed responsibility for more than 30 terrorist attacks and plots.

He was explicit about his role in the 2001 attacks. “I was responsible for the 9/11 operation, from A to Z,” he said.

The other detainee whose treatment could become a focus of any trial is Mohammed al-Qahtani, who has been held at Guantánamo since 2002. Pentagon officials have said he may have been the so-called “20th hijacker.” A month before the attacks, he flew from Dubai to Orlando, Fla., but was denied entry into the United States by an immigration official.

. . . .

Zacarias Moussaoui, who at one point was identified by prosecutors as a potential “20th hijacker” pleaded guilty to conspiracy in 2005, and is serving a life term.

William Glaberson, supra.

See Glaberson, supra note 39 (noting that the detention facility at Guantánamo Bay has been the center of much controversy); Steve Vogel, Afghan Prisoners Going to Gray Area Military Unsure What Follows Transfer to U.S. Base in Cuba, WASH. POST, Jan. 9, 2002, A01 (noting that the Guantánamo Bay detention camp has been referred to as a “gray area” for a long time).

Neil A. Lewis, AFTEREFFECTS: PRISONERS; Detainees From the Afghan War Remain in a Legal Limbo in Cuba, Apr. 24, 2003, http://query.nytimes.com/gst/fullpage.html?res=9F01E2D71F3AF937A1575700A9659C8B63. The article begins with the following comment: “Fifteen months after the first hooded and shackled detainees arrived at a primitive tent facility known as Camp X-Ray [located at Guantánamo Bay], some 664 prisoners seized after the Afghan war remain here in a legal, political[,] and geographical limbo.” Id. (emphasis added). “The United States first leased Guantánamo from Cuba in 1903 as a coaling station[,] and under the agreement, it may stay on the property as long as it maintains a presence.” Id.
States was required under the Geneva Conventions to hold tribunals to determine whether these detainees were truly prisoners of war.\textsuperscript{42} Other people believed that the Guantánamo Bay prisoners did not qualify for prisoner-of-war status because they were unlawful enemy combatants.\textsuperscript{43} Indeed, the United States Department of Defense turned to the Department of Justice’s Office of Legal Counsel for a legal opinion on this very issue; specifically, the Department of Justice requested an opinion to establish the legal standards governing military interrogations of alien unlawful combatants detained outside of the United States.\textsuperscript{44}

\textsuperscript{42} Alan Bock, \emph{Eye on the Empire, Guantánamo and Geneva: The Missing Questions}, Jan. 30, 2002, http://www.antiwar.com/bock/b013002.html (last visited Dec. 14, 2008) (arguing that the United States is obligated by the Geneva Conventions to afford the prisoners at Guantánamo Bay prisoner of war status, and making the following comment regarding the Geneva Convention: “it very specifically says that if there’s doubt about the status of somebody detained[,] that person is to be offered all the protections of the convention until the status is determined by a formal and competent procedure[]”; if the detainees at Guantánamo Bay were determined to truly be prisoners of war, these inmates should have been released when the combat in Afghanistan stopped); Lewis, \textit{supra} note 41. In early 2003, Lewis reflected on the dilemmas concerning prisoners held at Guantánamo Bay:

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[T]he majority of the detainees still face an uncertain future on an island chosen explicitly for its unusual features. Not only is the base lodged on sovereign territory of Cuba, a nominally hostile country, and ringed by a 17-mile-long fence with armed watchtowers on both sides. Two federal courts have also said that despite the fact that it is totally under United States control, the base is outside the reach of United States law because it is technically part of Cuba. . . . The [primary] criticisms from the human rights groups that look after such issues have been . . . [aimed at the fact] that the United States has detained the men indefinitely without any legal rights. . . . The discussions have rather been principally about the nature of the indefinite detention and the slow pace in releasing detainees against whom there is no evidence of wrongdoing. . . . Military officials . . . say they must keep the Guantánamo detainees locked up securely while intelligence personnel mine them for whatever they might know about terrorist activities[, but w]hat intelligence value they have, especially after most of them have been isolated here for more than a year, is [also] a matter of some debate.
\end{quote}

Lewis, \textit{supra} note 41. \textit{See} Richard A. POSNER, \textit{NOT A SUICIDE PACT} 53-75 (Geoffrey Stone ed.) (2006) (discussing the rights individuals have when detained and placed into custody by the federal government).

\textsuperscript{43} \textit{See} Context of “December 2001-January 2002: US Military Vessels Used to House Suspected Terrorists’, \textit{supra} note 38 (noting that on December 28, 2001, the day after then-Defense Secretary Donald Rumsfeld announced that Taliban and al-Qaeda suspects would be moved to the Guantánamo Bay Naval Station, both Deputy Assistant Attorney Generals Patrick Philbin and John Yoo sent a memorandum—endorsed by the Department of Defense and White House legal counsel Alberto Gonzales—to Pentagon General Counsel William J. Haynes, offering the legal opinion that United States courts do not have jurisdiction to review the detention of foreign prisoners at Guantánamo Bay, and therefore, detentions of persons there cannot be challenged in a United States court of law). \textit{See also} John C. Yoo, \textit{Using Force}, 71 U. Chi. L. Rev. 729 (2004) (exploring the international law that governs the use of force in the wake of conflicts in Kosoyo, Afghanistan, and Iraq); Lewis, \textit{supra} note 41 (noting that some people, including the United States Government officials, have argued that Guantánamo Bay prisoners do not qualify for prisoner-of-war status because they are unlawful enemy combatants).

\textsuperscript{44} Torture Memo, \textit{supra} note 1, at 1 (“You have asked our Office to examine the legal standards governing military interrogations of alien unlawful combatants held outside the United States. You have requested that we examine both domestic and international law that might be applicable to the conduct of those interrogations.”).
C. The 2003 “Torture Memo”: Significant Findings

On March 13, 2003, the Department of Justice’s Office of Legal Counsel issued an official, albeit classified, legal memorandum, which came to be known as the Torture Memo, that set forth legal standards applicable to military interrogations of illegal enemy combatants detained outside of the United States.\(^45\) Prisoners from the Afghanistan battlefield had been detained at Guantánamo Bay since early 2002, and the Department of Justice had issued several legal opinions since then on a variety of issues involving the detention of prisoners.\(^46\) In addition, the Office of Legal Counsel of the Department of Justice submitted drafts of the Torture Memo, while it was being written, to officials at the Department of Defense, thereby providing them a sense of the Memo’s basic

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\(^{45}\) See also Memorandum for William J. Haynes, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002) (finding that Al-Qaeda is a non-government terrorist organization whose members are not legally entitled to the protections of the Third Geneva Convention of 1949); Statement by White House Press Secretary Ari Fleischer (Feb. 7, 2002), available at http://www.us-mission.ch/press2002/0802fleischerdetainees.htm (announcing that the President had concluded that the Geneva Conventions do not legally apply to Al-Qaeda terrorists because Al-Qaeda is not a nation state and has not signed the Convention’s treaties and because Al-Qaeda members do not qualify as legal combatants because they hide among peaceful populations and launch surprise attacks on civilians—violating the fundamental principle that war is waged only against combatants; the President also announced that neither Al-Qaeda nor Taliban detainees are entitled to prisoner of war status); Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 at 3 (Feb. 7, 2002) (concluding that the President had reasonable grounds to find that the Taliban failed to meet the requirements for prisoner of war status because they did not effectively distinguish themselves from the civilian population of Afghanistan and did not conduct their operations in accordance with the laws and customs of war); Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 2002, http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html (describing the treatment to be afforded to detainees held at Guantánamo Bay and the supporting reasoning underlying such treatment).

\(^{46}\) See Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Standards of Conduct for Interrogation Under 18 U.S.C. 2340-2340A (Aug. 1, 2002) (memorandum released after the detention facility at Guantánamo Bay was opened and prisoners began to be transferred there); Memorandum for William J. Haynes, Counsel to the President, 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) (same); Memorandum for William J. Haynes, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002) (same); Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002) (same); Memorandum for William J. Haynes, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002) (same); Context of “December 2001-January 2002: US Military Vessels Used to House Suspected Terrorists”, supra note 38 (noting that the first prisoners were transferred to the Guantánamo Bay Naval Base on January 11, 2002).
principles before the final version of the Memo was completed.\textsuperscript{47} Therefore, suffice to say, the President, the Department of Defense, and other individuals responsible for establishing policies related to the treatment of Guantánamo detainees did not need to wait until the Torture Memo was finished in order to finalize policy decisions regarding treatment of these Guantánamo prisoners.\textsuperscript{48}

When the official Torture Memo was issued, it contained several controversial findings.\textsuperscript{49} First, the Memo concluded that the Fifth and Eighth Amendments of the United States Constitution do not extend to alien enemy combatants detained outside of the United States.\textsuperscript{50} Second, the Memo asserted that certain federal criminal statutes do not apply to properly authorized interrogations of enemy combatants.\textsuperscript{51} Third, the Memo interpreted 18 U.S.C. § 2340A—the statute that makes it a

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\textsuperscript{47} Exclusive: “Torture Memo” Author John Yoo Responds to This Week’s Revelations, \textit{supra} note 10. This article, posted on the World Wide Web or around April 3, 2008, summarizes an interview with John Yoo that occurred approximately the day after the Torture Memo was declassified (the Memo was declassified on March 31, 2008). \textit{Id.} In this interview, Yoo stated that drafts of these memoranda dealing with treatment of detainees were provided to the Department of Defense during the drafting processes, so that officials had “a sense” of the “basic outlines” before the memoranda were finalized. \textit{Id.} Yoo also stated that the memo he wrote, now referred to as the Torture Memo, did not apply to Iraq; it applied only to interrogations of Al-Qaeda detained at Guantánamo Bay. \textit{Id.}
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\textsuperscript{48} \textit{See} Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, \textit{Re: Standards of Conduct for Interrogation Under 18 U.S.C. 2340-2340A} (Aug. 1, 2002) (providing guidance regarding 18 U.S.C. § 2340-2340A); Memorandum for William J. Haynes, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, \textit{Re: The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations} (Mar. 13, 2002) (discussing the President’s role as commander-in-chief as it relates to transferring captured terrorists); Memorandum for William J. Haynes, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, \textit{Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan} (Feb. 26, 2002) (describing legal standards governing interrogations of prisoners captured in Afghanistan); Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, \textit{Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949} (Feb. 7, 2002) (clarifying the status of members of the Taliban pursuant to the Third Geneva Convention of 1949); Memorandum for William J. Haynes, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, \textit{Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees} (Jan. 22, 2002) (discussing whether the Geneva Convention treaties apply to Al-Qaeda and Taliban detainees); Exclusive: “Torture Memo” Author John Yoo Responds to This Week’s Revelations, \textit{supra} note 10 (indicating that John Yoo stated that the Department of Defense had “a sense” of the “basic outlines” of the Torture Memo and thus continued to move forward with regard to Guantánamo detainees before the Torture Memo was finalized).
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\textsuperscript{49} \textit{See supra} notes 3-7 and accompanying text (indicating the Torture Memo’s significant findings); \textit{supra} notes 9-14 (explaining that several of the Torture Memo’s findings have proven to be controversial); \textit{infra} notes 50-54 and accompanying text (indicating the Torture Memo’s significant findings).
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\textsuperscript{50} Torture Memo, \textit{supra} note 1, at 1-10.
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\textsuperscript{51} \textit{Id.} at 1, 11-47.
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criminal offense for any person outside the United States to commit or attempt to commit torture. More specifically, in interpreting 18 U.S.C. § 2340A, the Memo concluded that this statute does not apply to interrogations conducted within the United States or on permanent military bases outside the territory of the United States. Additionally, further interpreting 18 U.S.C. § 2340A, the Memo defined torture as acts inflicting severe pain that result in “death, organ failure, or serious impairment of body functions.”

When the Department of Justice’s Office of Legal Counsel issued this Memo to the Department of Defense on March 13, 2003, the Memo was marked classified and kept secret, thereby avoiding public criticism. However, in response to a lawsuit filed in June of 2004 by the ACLU, the New York Civil Liberties Union, and other organizations attempting to enforce the Freedom of Information Act, on March 31, 2008, the Department of Justice voluntarily declassified the Torture Memo and made it available to the public. Since then, perhaps not surprisingly, given the topics it addresses, the Memo has undergone intense scrutiny and has been widely criticized.

III. ANALYSIS

To counter the much-exaggerated criticism that has been directed at the Torture Memo, this Article analyzes the Torture Memo’s controversial assertions to show that the underlying legal reasoning posited in the Memo is sound and, therefore, John Yoo, the Memo’s signatory, did not violate his legal ethical obligations in authoring the Memo. Accordingly, first, Part III.A examines

52 Id. at 1, 32-47.
53 Id. at 1-2, 32-47.
54 Id. at 39, 1, 36-47.
55 See supra note 1 and accompanying text (explaining that the Torture Memo was originally marked classified).
56 See supra note 8 and accompanying text.
57 See supra notes 9-14 and accompanying text (highlighting criticism aimed at the Torture Memo).
58 See infra Part III.
the Torture Memo’s assertion that the Fifth and Eighth Amendments to the United States Constitution do not extend to alien enemy combatants detained outside of the United States.\textsuperscript{59}

Second, Part III.B considers the Memo’s assertion that certain federal criminal statutes do not apply to properly authorized interrogations of enemy combatants.\textsuperscript{60} Finally, Part III.C explores the Memo’s interpretation of Section 2340A of Title 18 of the United States Code—the statute that makes it a crime for any person outside the United States to commit or attempt to commit torture.\textsuperscript{61}

More specifically, initially, Part III.C.1 considers the Memo’s conclusion that the statutory prohibition against torture does not apply to interrogations conducted within the United States or on permanent military bases outside the territory of the United States.\textsuperscript{62} In addition, Part III.C.2 evaluates the definition of torture posited in the Memo: acts inflicting severe pain that result in “death, organ failure, or serious impairment of body functions[]” constitute torture.\textsuperscript{63}

A. \textit{The Fifth and Eighth Amendments of the United States Constitution Do Not Extend to Alien Enemy Combatants Detained Outside of the United States}

The Torture Memo initially places the Department of Defense’s legal question in its appropriate context by discussing the terrorist attacks of September 11th as an act of war against the United States, the ongoing threats of Al-Qaeda attacks, and the President’s power as commander-in-chief during war times.\textsuperscript{64} The Memo then concludes that the Fifth and Eighth Amendments of the United States Constitution do not extend to alien enemy combatants detained outside of the United States and, fittingly, puts forth several reasons to support this conclusion.\textsuperscript{65}

\textsuperscript{59} See infra Part III.A.

\textsuperscript{60} See infra Part III.B.

\textsuperscript{61} See infra Part III.C.

\textsuperscript{62} See infra Part III.C.1.

\textsuperscript{63} See Torture Memo, supra note 1, at 39 (defining torture); infra Part III.C.2.

\textsuperscript{64} See infra Torture Memo, supra note 1, at 2-6.
In considering Fifth Amendment jurisprudence, the Memo first finds that the Fifth Amendment Due Process Clause does not apply to the President’s conduct during a war; second, it finds, that even if it did, the Due Process Clause does not apply extraterritorially to aliens who have no connection to the United States. First, the Memo cites an 1865 opinion of the Attorney General, which states that when a constitutional provision conflicts with the power to carry on war causing such a significant clash as to make the provision valueless, it should not apply. More specifically, the Memo cites recent case law that further supports that the Fifth Amendment should not apply to the capture or detention of enemy combatants during war time. For instance, the Memo reasons that just as the United States Supreme Court concluded in 1990, in United States v. Verdugo-Urquidez, that the Fourth Amendment of the United States Constitution should not apply when it would significantly disrupt the ability of political branches to respond to foreign situations, the Fifth Amendment should likewise not apply in situations involving enemy aliens detained outside of the United States borders. The Memo also reasons that the United States Supreme Court has refused to apply the

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65 See id. at 1, 6-10.
66 Id. at 1, 6-10.
67 Id. at 6-7 (indicating that, in an 1865 opinion, Attorney General Speed stated, “If any provisions of the Constitution are so in conflict with the power to carry on war as to destroy and make it valueless, then the instrument, instead of being a great and wise one, is a miserable failure, a felo de se.”). The Torture Memo placed this Attorney General’s conclusion in its appropriate context by including the same Attorney Generals’ comments about the Due Process Clause:

The portion of the Constitution which declares that ‘no person shall be deprived of his life, liberty, or property without due process of law,’ has such direct reference to, and connection with, trials for crime or criminal prosecutions that comment upon it would seem to be unnecessary. Trials for offences against the laws of war are not embraced in those provisions. . . . The argument that flings around offenders against the laws of war these guarantees of the Constitution would convict all the soldiers of our army of murder; no prisoners could be taken and held; the army could not move. The absurd consequences that would of necessity flow from such an argument show that it cannot be the true construction—it cannot be what was intended by the framers of the instrument. One of the prime motives for the Union and a federal government was to confer the powers of war. If any provisions of the Constitution are so in conflict with the power to carry on war as to destroy and make it valueless, then the instrument, instead of being a great and wise one, is a miserable failure, a felo de se.

Id. (citing Military Commissions, 11 Op. Att’y Gen. 297, 301-02) (1865)).
68 Id. at 7 (citing United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)).
69 Id. at 7 (citing United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)). The Torture Memo states as follows:
Fifth Amendment Due Process Clause to executive actions taken in war efforts against enemies of the Nation, citing United States v. Salerno as an example. Thus, it is well-established that the Fifth Amendment does not apply to the President’s conduct during war, and thus it does not apply to properly authorized interrogations of enemy combatants during war.

The Supreme Court’s reasoning in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), addressing the extra-territorial application of the Fourth Amendment cannot be construed as to apply to the President’s conduct of a war:

The United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security. . . . Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters. . . . The Court of Appeals’ global view of [the Fourth Amendment’s] applicability would plunge [the political branches] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad.

If each time the President captured and detained enemy aliens outside the United States, those aliens could bring suit challenging the deprivation of their liberty, such a result would interfere with and undermine the President’s capacity to protect the Nation and to respond to the exigencies of war.

The Supreme Court has repeatedly refused to apply the Due Process Clause or even the Just Compensation Clause to executive and congressional actions taken in direct prosecution of a war effort against enemies of the Nation. It has long been settled that nothing in the Fifth Amendment governs wartime actions to detain or deport alien enemies and to confiscate enemy property. As the Court has broadly stated in United States v. Salerno, 481 U.S. 739, 748 (1987), “in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the government believes to be dangerous” without violating the Due Process Clause. See also Ludecke v. Watkins, 335 U.S. 160, 171 (1948). Similarly, as the Supreme Court has explained with respect to enemy property, “[b]y exertion of the war power, and untrammeled by the due process or just compensation clause,” Congress may “enact[] laws directing seizure, use, and disposition of property in this country belonging to subjects of the enemy.” Cummings v. Deutsche Bank Und Discontogesellschaft, 300 U.S. 115, 120 (1937). These authorities of the federal government during armed conflict were recognized early in the Nation’s history. Chief Justice Marshall concluded for the Court in 1814 that “war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found.” Brown v. United States, 12 U.S. (Cranch) 110, 122 (1814). See also Johnson v. Eisentrager, 339 U.S. at 775 (“The resident enemy alien is constitutionally subject to summary arrest, internment[,] and deportation whenever a ‘declared war’ exists.”); Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952). As the Court explained in United States v. Chemical Found., Inc., 272 U.S. 1, 11 (1926), Congress is “untrammeled and free to authorize the seizure, use[,] or appropriation of [enemy] properties without any compensation. . . . There is no constitutional prohibition against confiscation of enemy properties.” See also White v. Mechs. Sec. Corp., 269 U.S. 283, 301 (1925) (Holmes, J.) (when U.S. seizes property from an enemy it may “do with it what it like[s]”).

The Supreme Court has also stated a general rule that, notwithstanding the compensation requirement for government takings of property under the Fifth Amendment, “the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field.” United States v. Pacific R.R., 120 U.S. 227, 239 (1887). For “[t]he terse language of the Fifth

See id. at 9. The Torture Memo additionally states as follows:

The Supreme Court has also stated a general rule that, notwithstanding the compensation requirement for government takings of property under the Fifth Amendment, “the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field.” United States v. Pacific R.R., 120 U.S. 227, 239 (1887). For “[t]he terse language of the Fifth

Id. (citation omitted) (footnote omitted).
The Memo then explains that even if the Fifth Amendment applied to the President’s conduct during a war, it does not apply extraterritorially to aliens who have no connection to the United States. After all, as the Memo notes, the Supreme Court recently declared in *Zadvydas v. Davis*, in 2001, that “[i]t is well-established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” It is not an unfounded leap then to conclude that the Fifth Amendment does not apply extraterritorially to aliens who have no connection to the United States, especially considering that the Memo also cites for support the Supreme Court’s discussion in *Johnson v. Eisentrager*, in which the Court specifically addressed the applicability of the Fifth Amendment to aliens who are outside of the United States and have no connection to the United States. The Memo appropriately notes that the *Eisentrager* Court

Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign.” *United States v. Caltex, Inc. (Philipppines)*, 344 U.S. 149, 155-56 (1952). *See also Herrera v. United States*, 222 U.S. 558 (1912); *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909); *Ford v. Surget*, 97 U.S. 594 (1878). These cases and the untenable consequences for the President’s conduct of a war that would result from the application of the Due Process Clause demonstrate its inapplicability during wartime—whether to the conduct of interrogations or the detention of enemy aliens.

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72 Id. at 10. The Torture Memo states that even if the Fifth Amendment applied to enemy combatants in wartime, it is clear that . . . the Fifth Amendment does not operate outside the United States to regulate the Executive’s conduct toward aliens. The Supreme Court has squarely held that the Fifth Amendment provides no rights to non-citizens who have no established connection to the country and who are held outside sovereign United States territory. *See Verdugo-Urquidez*, 494 U.S. at 269 (“[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”).

73 Id. at 10 (quoting Verdugo-Urquidez, 494 U.S. at 269).

74 Id. at 9 (citing Johnson v. Eisentrager, 339 U.S. 763, 783 (1950)). The *Eisentrager* Court, which the Torture Memo cites approvingly, noted the following: The Court of Appeals has cited no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses, except to quote extensively from a dissenting opinion in *In re Yamashita*, 327 U.S. 1, 26, 66 S.Ct. 340, 353, 90 L.Ed. 499. The holding of the Court in that case is, of course, to the contrary. *Eisentrager*, 339 U.S. at 783 (1950). In discussing the *Eisentrager* holding, the Torture Memo states that [a]s the Supreme Court explained in *Eisentrager*, construing the Fifth Amendment to apply to aliens who are outside the United States and have no connection to the United States: would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and ‘werewolves’ could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear
held that the Fifth Amendment does not apply extraterritorially to aliens. \(^{75}\) Accordingly, in determining that the Fifth Amendment does not apply to the President’s conduct during war, the Torture Memo appropriately bases its reasoning on valid sources, such as opinions of the Attorney General and of the Supreme Court. \(^{76}\) Moreover, even if the Fifth Amendment applied to the President’s conduct during a war, it does not apply to the detention of enemy combatants outside of the United States. \(^{77}\)

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arms as in the Second [Amendment], security against ‘unreasonable’ searches and seizures as in the Fourth [Amendment], as well as rights to jury trial as in the Fifth and Sixth Amendments. Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view.

Torture Memo, supra note 1, at 9 (quoting \textit{Eisentrager}, 339 U.S at 784) (citation omitted).

\(^{75}\) Torture Memo, \textit{supra} note 1, at 9. The Torture Memo also cites other cases to support its proposition that the Fifth Amendment does not apply extraterritorially to aliens. \textit{Id.} (citing \textit{Harbury v. Deutch}, 233 F.3d 596, 603-04 (D.C. 2000), rev’d on other grounds, \textit{Christopher v. Harbury}, 536 U.S. 403 (2002); \textit{Rasul v. Bush}, 215 F Supp. 2d 55, 72 n.16 (D.D.C. 2002) (“The Supreme Court in \textit{Eisentrager}, \textit{Verdugo-Urquidez}, and \textit{Zadvydas}, and the District Court of Columbia Circuit in \textit{Harbury}, have all held that there is no extraterritorial application of the Fifth Amendment to aliens.”). The Torture Memo provides the following explanation:

Indeed, in \textit{Harbury v. Deutch}, the D.C. Circuit expressly considered a claim that various U.S. officials had participated in the torture of a non-U.S. citizen outside the sovereign territory of the United States during peacetime. The D.C. Circuit rejected the contention that the Due Process Clause applied extraterritorially to a person in such circumstances. The court found \textit{Verdugo-Urquidez} to be controlling on the question, and determined that the Supreme Court’s rejection of the extraterritorial application of the Fifth Amendment precluded any claim by an alien held outside the United States even when the conduct at issue had not occurred in wartime. \textit{See [Harbury,]} 233 F.3d at 604 (finding that “the Supreme Court’s extended and approving citation of \textit{Eisentrager} [in \textit{Verdugo-Urquidez}] suggests that its conclusions regarding the extraterritorial application of the Fifth Amendment are not . . . limited” to wartime). We therefore believe that it is clear that the Fifth Amendment does not apply to alien enemy combatants held overseas.

\textit{Id.} (citation omitted).


The Torture Memo also considers whether the Eighth Amendment applies to the detention of enemy combatants outside of the United States and determines that it does not. The Memo states, “As the Supreme Court has explained, the Cruel and Unusual Punishments Clause ‘was designed to protect those convicted of crimes.’ As a result, ‘Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.’” Indeed, the purposes of detaining an enemy combatant are to prevent the combatant from serving the enemy and to obtain intelligence from him, not to punish him. Because prisoner detention is not a form of punishment, the Eighth Amendment does not apply. While the Torture Memo’s discussion of the Eighth Amendment is fairly brief, it cites relevant and binding

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78 Torture Memo, supra note 1, at 10.

79 Id. at 10 (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)) (citation omitted). The Torture Memo cites Bell v. Wolfish, 441 U.S. 520, 536 n.16 (1979), noting that the Bell Court held that “condition of confinement claims brought by [a] pretrial detainee must be considered under the Fifth Amendment, not the Eighth Amendment.” Id. The Memo further reasons: The Eighth Amendment therefore cannot extend to the detention of wartime detainees, who have been captured pursuant to the President’s power as Commander in Chief. See [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)] . . . (concluding that “the President has since the Founding era exercised exclusive and virtually unfettered control over the disposition of enemy soldiers and agents captured in time of war”). See also Hamdi v. Rumsfeld, 316 F.3d 450, 463 (4th Cir. 2003) (the President’s powers as Commander in Chief “include the authority to detain those captured in armed struggle”). Id. (emphasis omitted).

80 Torture Memo, supra note 1, at 10 (quoting In re Territo, 156 F2d 142, 145 (9th Cir. 1946)) (stating that “[t]he object of capture is to prevent the captured individual from serving the enemy[,]” and noting that another objective of capture is to obtain intelligence from captured individuals that will help in the war efforts).

81 Id. at 10. In noting that the purpose of detaining enemy combatants is not punishment, the Torture Memo includes the following discussion: The detention of enemy combatants can in no sense be deemed “punishment” for the purposes of the Eighth Amendment. Unlike imprisonment pursuant to a criminal sanction, the detention of enemy combatants involves no sentence judicially imposed or legislatively required and those detained will be released at the end of the conflict. Indeed, it has long been established that “‘[c]aptivity [in wartime] is neither a punishment nor an act of vengeance,’ but ‘merely a temporary detention which is devoid of all penal character.’” William Winthrop, Military Law and Precedents 788 (2d ed. 1920) (quoting British War Office, Manual of Military Law (1882)). . . See also Johnson v. Eisentrager, 339 U.S. 763, 784 (150); Marco Sassoli & Antoine A. Bouvier, How Does Law Protect in War? Cases Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law 125 (1999) (the purpose of detaining enemy combatants “is not to punish them, but . . . to hinder their direct participation in hostilities”). . . Accordingly, the Eighth Amendment has no application here.

Id.
United States Supreme Court case law to adequately support its determination that the Eighth Amendment does not apply to the detention of enemy combatants outside of the United States.82

Based on the foregoing reasons, to the extent that critics have condemned the Torture Memo’s assertion that the Fifth and Eighth Amendments do not apply to alien enemy combatants detained outside of the United States, their allegations are unsubstantiated.83

B. **Certain Federal Criminal Statutes Do Not Apply to Properly Authorized Interrogations of Enemy Combatants**

Next, the Torture Memo asserts that certain federal criminal statutes do not apply to properly authorized interrogations of enemy combatants and, appropriately, includes several reasons to support this conclusion.84 First, as the United States Supreme Court stated in *Hamilton v. Dillin*, in 1874, because both “[t]he executive power and the command of the military and naval forces is vested in the President,” it is “the President alone . . . who is constitutionally invested with the entire charge of hostile operations.”85 Because complete authority over the conduct of a war is vested in the President, a criminal statute does not infringe on this authority unless Congress, in the statute’s text, unambiguously expressed its intent for the statute to do so.86 To support this proposition, the

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82 See id. at 10 (concluding that the Eighth Amendment does not apply to the detention of enemy combatants outside of the United States); supra notes 79-81 and accompanying text (indicating that the Torture Memo cites Bell v. Wolfish, 441 U.S. 520, 536 n.16 (1979) and Ingraham v. Wright, 430 U.S. 651, 664 (1977) in support of its conclusion). See also Torture Memo, supra note 1, at 10 (indicating that the Torture Memo also cites In re Territo, 156 F2d 142, 145 (9th Cir. 1946), in support of its conclusion).

83 See supra notes 67-71 and accompanying text (discussing the Torture Memo’s conclusion that the Fifth Amendment Due Process Clause does not apply to the President’s conduct during a war); 72-77 and accompanying text (explaining the Torture Memo’s determination that even if the Due Process Clause did apply to the President’s conduct during a war, the Due Process Clause does not apply extraterritorially to aliens who have no connection to the United States); 78-82 and accompanying text (demonstrating that the Torture Memo appropriately reasons that the Eighth Amendment does not apply to the detention of enemy combatants outside of the United States).

84 See Torture Memo, supra note 1, at 1, 11-32, 32-47.

85 Id. at 11 (quoting *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874)) (emphasis omitted).
Torture Memo quotes several Supreme Court cases and legal opinions issued by the Department of
Justice’s Office of Legal Counsel. Undeniably, it is well-established that where Congress has not

...
unambiguously expressed a desire for the statute to infringe on the President’s complete authority over the conduct of war, such intent should not be inferred.\textsuperscript{88} 

Second, a criminal statute of general applicability does not apply to military conduct during the prosecution of war, and thus does not apply to properly authorized interrogations of enemy combatants.\textsuperscript{89} To support this assertion, the Torture Memo cites opinions of both the United States Supreme Court and the Department of Justice’s Office of Legal Counsel.\textsuperscript{90} In addition, the Memo

\begin{quote}
\textit{Id.} (citing Memorandum for Jamie S. Gorelick, Deputy Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, United States Assistance to Countries That Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 149 (July 14, 1994)) (requiring “careful examination of each individual [criminal] statute” before concluding that a generally applicable statute applied to the conduct of U.S. government officials). \textit{See} Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Legal Constraints to Boarding and Searching Foreign Vessels on the High Seas (June 13, 2002). This Memorandum rejects the application of a different statute to conduct during a war, stating, we have previously concluded that the President’s authority is very broad, and that in the absence of a clear statement in the text or context of a statutory prohibition to suggest . . . Congress’s intent to circumscribe this authority, . . . a statute should [not] be interpreted to impose such a restriction on the President’s constitutional powers. 
\textit{Id.} \textit{See also} 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 (Apr. 8, 2002) (indicating that Congress may not interfere when the President acts pursuant to his Commander in Chief power in prosecuting a war); Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), available at http://www.usdoj.gov/olc/warpowers925.htm (indicating that Congress may not interfere when the President acts pursuant to his Commander in Chief power in prosecuting a war, and stating, “[t]he power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces”); Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Defense Authorization Act (Sept. 15, 1995) (indicating that Congress may not interfere when the President acts pursuant to his Commander in Chief power in prosecuting a war).
\end{quote}
provides numerous examples of situations in which allowing a criminal statute to apply to military conduct during war would produce “ridiculous” results.\footnote{1} For instance, if criminal statutes of general applicability applied to conduct of military officials during war, a soldier who shoots an enemy combatant on the battlefield would be liable under general criminal laws prohibiting assault and murder.\footnote{2} Surely, such a result must be incorrect.\footnote{3} Therefore, in accordance with jurisprudence dealing with congressional intent, Congress must unambiguously indicate in the text of a statute that it intends for the statute to apply to the conduct of the United States military during a war.\footnote{4} Where

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\footnote{1}{\textit{See Torture Memo, supra note 1, at 14.} To illustrate why statutes of general applicability are not construed so as to apply to the conduct of the military during war, the Torture Memo articulately provides the following explanation of the “absurdities” that would result if statutes of general applicability were construed to apply to the conduct of the military during war:

This canon of construction [i.e., that statutes of general applicability are not construed so as to apply to the conduct of the military during war] is rooted in the absurdities that the application of such laws to the conduct of the military during a war would create. If those laws were construed to apply to the properly-authorized conduct of military personnel, the most essential tasks necessary to the conduct of war would become subject to prosecution. A soldier who shot an enemy combatant on the battlefield could become liable under the criminal laws for assault or murder; a pilot who bombed a military target in a city could be prosecuted for murder or destruction of property; a sailor who detained a suspected terrorist on the high seas might be subject to prosecution for kidnapping. As we noted in the \textit{Shoot Down Opinion}, the application of such laws to the military during wartime “could [also] mean in some circumstances that military personnel would not be able to engage in reasonable self-defense without subjecting themselves to the risk of criminal prosecution.” The mere potential for prosecution could impair the military’s completion of its duties during a war[,] as military officials [could] beconcerned about their liability under the criminal laws. Such results are so ridiculous as to be untenable and must be rejected to allow the President and the Armed Forces to successfully conduct a war.

\textit{Id.} (citation omitted).}

\footnote{2}{\textit{Id.} at 14. \textit{See supra} note 91 (discussing that the Torture Memo gives the example of a soldier shooting an enemy combatant on the battlefield as one absurdity that could result if statutes of general applicability applied to the conduct of the military during war).}

\footnote{3}{\textit{Torture Memo, supra note 1, at 14. \textit{See supra} note 91 (noting that the Torture Memo concludes that because absurdities would result if statutes of general applicability applied to the conduct of the military during war, such statutes should not be applied to the conduct of the military during war).}
Congress has failed to indicate such intent, a statute does not apply to properly authorized interrogations of enemy combatants performed by the military during a war.\textsuperscript{95} Third, a criminal statute of general applicability does not apply to the sovereign.\textsuperscript{96} Instead, the State has historically been exempt from the operation of general statutes of limitation.\textsuperscript{97} For starters, applying a statute of general applicability to properly authorized interrogations of enemy combatants would deprive the sovereign of a recognized prerogative.\textsuperscript{98} This cannot be what the United States Supreme Court intended sixty years ago when it expressed the following guiding principle: “[b]y universal agreement and practice[,] the law of war draws a distinction between . . . lawful and unlawful combatants.”\textsuperscript{99} Indeed, to construe a criminal law of general applicability to require the United States to treat enemy combatants according to particular standards would contradict the well-established prerogative of the sovereign.\textsuperscript{100} In addition, applying a statute of general applicability to

\begin{itemize}
\item \textsuperscript{94} Torture Memo, supra note 1, at 14. See supra notes 86-88 (discussing that for a statute of general applicability to apply to the conduct of the United States military during a war, Congress must unambiguously indicate in the text of the applicable statute that it intends for the statute to apply to the military during wartime).
\item \textsuperscript{95} Torture Memo, supra note 1, at 14. See supra notes 89-94 (discussing that a criminal statute of general applicability does not apply to military conduct during the prosecution of a war, unless Congress states that it does, because to conclude otherwise would produce unintended results).
\item \textsuperscript{96} Torture Memo, supra note 1, at 15-16.
\item \textit{Id.} at 15-16.
\item \textit{Id.} at 15 (citing United States v. Nardone, 302 U.S. 379, 383 (1937)).
\item \textit{Id.} at 15 (quoting Ex Parte Quirin, 317 U.S. 1, 30-31 (1942) (emphasis omitted)).
\item \textsuperscript{98} Ingrid Detter, The Law of War 148 (2d ed. 2000) ("Unlawful belligerents and . . . enj

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\item \textsuperscript{100} Id. at 15 (quoting Ex Parte Quirin, 317 U.S. 1, 30-31 (1942) (emphasis omitted)).
\item \textsuperscript{100} Id. at 15 (citing R.C. Hingorani, Prisoners of War 18 (1982) (“[Unlawful belligerents are] more often than not treated as war or national criminals liable to be treated at will by the captor. There are almost no regulatory safeguards with respect to them[,] and the captor owes no obligation towards them.”); Ingrid Detter, The Law of War 148 (2d ed. 2000) (“Unlawful combatants . . . enjoy no protection under international law); William Winthrop, Military Law and Precedents 784 (2d ed. 1920) (unlawful belligerents are “[n]ot . . . within the protection of the laws of war”); A. Berriedale Keith, 2 Wheaton’s Elements of International Law 716 (6th ed. 1929) (“irregular bands of marauders are . . . not entitled to the protection of the migrated usages of war as practised [sic] by civilized nations”); L. Oppenheim, 2 International Law, § 254, at 454 (6th ed. 1944) (“Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces, and the enemy has, according to a customary rule of International Law, the right to treat such individuals as war criminals.”)). The Torture Memo acknowledges that the Third Geneva Convention of 1949 includes specific criteria for the treatment of prisoners of war, but furthermore notes that unlawful combatants are not entitled to prisoner of war status. \textit{Id.} at 1, 15 (citing Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364; Memorandum for Alberto Gonzales, 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, \textit{Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees} (Jan. 22, 2002)).
a government official performing properly authorized interrogations of enemy combatants would create absurd results, such as effectively preventing the official from carrying out his official duties.\textsuperscript{101} A long line of United States Supreme Court cases has determined that prohibitory laws do not apply to a government official performing a necessary public duty.\textsuperscript{102} To be sure, to decide otherwise would result in, for example, holding a police officer liable for vehicular speeding when pursuing a criminal, or holding a firefighter liable for speeding when driving a fire engine in excess of the speed limit in response to a fire alarm.\textsuperscript{103} These results would be “absurd[,]” and for this reason, in these instances, a criminal statute of general applicability does not apply to the sovereign.\textsuperscript{104} Similarly, in cases involving properly authorized interrogations of enemy combatants, criminal statutes of general applicability do not apply to the sovereign.\textsuperscript{105} The sovereign retains the

\textsuperscript{101} \textit{Id.} at 16. The Torture Memo explains that applying statutes of general applicability to the properly authorized interrogations of unlawful combatants is inappropriate because the application of general laws to a government official would create absurd results, such as effectively preventing the official from carrying out his duties. In \textit{Nardone}, the Supreme Court pointed to “the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm” as examples of such absurd results. \textit{Nardone}, 302 U.S. at 384. \textit{See also United States v. Kirby}, 74 U.S. (7 Wall.) 482, 486-87 (1868) (holding that statute punishing obstruction of mail did not apply to an officer’s temporary detention of mail caused by his arrest of the carrier for murder). In those situations and others, such as undercover investigations of narcotics trafficking, the government officer’s conduct would constitute a literal violation of the law. And while “[g]overnment law enforcement efforts frequently require the literal violation of facially applicable statutes[,] . . . courts have construed prohibitory laws as inapplicable when a public official is engaged in the performance of a necessary public duty.” Memorandum for Maurice C. Inman, Jr., General Counsel, Immigration and Naturalization Service, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, \textit{Re: Visa Fraud Investigation} at 2 (Nov. 20, 1984). Indeed, to construe such statutes otherwise[,] would undermine almost all undercover investigative efforts. \textit{See also id. . . . [t]he application of these general laws to the conduct of the military during the course of a war would create untenable results.}

\textit{Id.}

\textsuperscript{102} \textit{See id.} at 16 (citing United States v. Nardone, 302 U.S. 379 (1937); \textit{United States v. Kirby}, 74 U.S. (7 Wall.) 482, 486-87 (1868); Memorandum for Maurice C. Inman, Jr., General Counsel, Immigration and Naturalization Service, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, \textit{Re: Visa Fraud Investigation} at 2 (Nov. 20, 1984)).

\textsuperscript{103} \textit{Id.} at 16. \textit{See supra} note 101 (quoting the Torture Memo).

\textsuperscript{104} Torture Memo, \textit{supra} note 1, at 16 (emphasis added) (noting that “the application of general laws to a government official [in certain situations] would create \textit{absurd} results, such as effectively preventing the official from carrying out his duties[""])
prerogative to determine the type of treatment used in these interrogations, and military government officials are not hindered in carrying out their official public duties.\footnote{106}

Fourth, a criminal statute of general applicability does not apply where a specific statute has been enacted.\footnote{107} As the Torture Memo points out, this proposition is well-established in American jurisprudence.\footnote{108} Correspondingly, because Congress enacted the Uniform Code of Military Justice, which explicitly governs the conduct of the military during a war, general federal criminal laws do not apply (generally) to the conduct of the military during a war and therefore do not apply (specifically) to properly authorized interrogations of enemy combatants during a war.\footnote{109}

As the foregoing discussion demonstrates, to the extent that critics have condemned the Torture Memo for asserting that certain federal criminal laws do not apply to properly authorized interrogations of enemy combatants, this criticism is wholly unsubstantiated.\footnote{110}
C. Examining 18 U.S.C. § 2340A

Finally, the Torture Memo interprets 18 U.S.C. § 2340A—the statute that makes it a criminal offense for any person outside the United States to commit or attempt to commit torture.\(^{111}\) First, in interpreting 18 U.S.C. § 2340A, the Memo concludes that this statute does not apply to interrogations conducted within the United States or on permanent military bases outside the territory of the United States.\(^{112}\) Second, and perhaps most controversially, the Memo defines torture as acts inflicting severe pain that result in “death, organ failure, or serious impairment of body functions.”\(^{113}\) Each assertion is considered in turn.\(^{114}\)

1. 18 U.S.C. § 2340A’s Prohibition Against Torture Does Not Apply to Interrogations Conducted Within the United States or on Permanent Military Bases Outside the Territory of the United States

   First, the Torture Memo asserts that 18 U.S.C. § 2340A—the statutory prohibition against torture—does not apply to interrogations conducted within the United States or on permanent military bases outside the territory of the United States and considers the text of the statute itself to support this conclusion.\(^{115}\) Section 2340A of Title 18 of the United States Code makes it a criminal offense for a person “outside the United States [to] commit[] or attempt[] to commit torture[.]”\(^{116}\) The statute further defines “United States” as “all areas under the jurisdiction of the United States including any of the places described in” Sections 5 and 7 of Title 18 of the Code.\(^{117}\) The Torture

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\(^{111}\) Torture Memo, supra note 1, at 1, 32-47.

\(^{112}\) Id. at 1-2, 32-47.

\(^{113}\) Id. at 39, 1, 38-47.

\(^{114}\) See infra Parts III.C.1-2.

\(^{115}\) Torture Memo, supra note 1, at 1-2, 36.

Memo thus correctly concludes that enemy combatants detained at Guantánamo Bay Naval Base are not “within the United States[,]” pursuant to this statute’s definition. The Memo further clarifies an important distinction drawn in the statute: although interrogations performed at Guantánamo Bay are not subject to the prohibitions of 18 U.S.C. § 2340A, interrogations conducted outside the special maritime and territorial jurisdiction and that are otherwise outside the United States, such as at a non-United States base in Afghanistan, are subject to these prohibitions. Even though this particular assertion from the Torture Memo has not received wide-scale criticism, it is explained here as a way of introducing the Memo’s interpretation of what is meant by “torture” pursuant to this statute—an interpretation that has been widely criticized as being unfounded.

2. Torture Includes Acts Inflicting Severe Pain That Result in “Death, Organ Failure, or Serious Impairment of Body Functions”

Perhaps the most controversial and often-criticized assertion posited in the Torture Memo, the Memo defines torture as acts inflicting severe pain that result in “death, organ failure, or serious impairment of body functions.” Although this definition has received significant criticism, to the


119 Torture Memo, supra note 1, at 35 (“[F]or example, interrogations conducted at a non-U.S. base in Afghanistan would be subject to section 2340A.”). Specifically, the Torture Memo explains that when interrogations occur “within the special maritime and territorial jurisdiction, such as at a U.S. military base in a foreign state, the interrogations are not subject to sections 2340-2340A.” Id. at 34-35 (emphasis added). The Torture Memo then clarifies that if, on the other hand, the interrogations occur “outside the special maritime and territorial jurisdiction and are otherwise outside the United States, the torture statute applies.” Id. at 35.

120 See id. at 35-36 (concluding that enemy combatants detained at Guantánamo Bay Naval Base are not within the United States, pursuant to the statutory definition of 18 U.S.C. § 2340A); infra Part III.C.2 (discussing the Torture Memo’s interpretation of what is meant by torture pursuant to this statute—an interpretation that has been widely criticized).

121 See Torture Memo, supra note 1, at 39, 36-47 (defining “torture”). See also, e.g., The Torture Memo, Apr. 2, 2008, http://www.washingtonmonthly.com/archives/individual/2008_04/013450.php. This article criticizes the Torture Memo, and among other things, states, “As we all know, this memo was eventually rescinded.” Id. The Article suggests, through innuendo, that the mere fact that another memorandum on which the Torture Memo relied (the August 2002 OLC memorandum) was later rescinded implies that the Torture Memo was based on unsound legal principles. Id. See
extent that critics have alleged that this definition is unfounded, these allegations are completely unsubstantiated. On the contrary, to support its interpretation of the statute’s definition of torture, the Memo includes impressive lawyerly analysis. Indeed, the Memo acknowledges from the start

Memorandum for the Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C §§ 2340-2340A (Dec 30, 2004), available at http://www.usdoj.gov/olc/18usc23402340a2 (“This opinion interprets the federal criminal prohibition against torture codified at 18 U.S.C. §§ 2340-2340A. It supersedes in its entirety the August 1, 2002 opinion of this Office entitled Standards of Conduct under 18 U.S.C. §§ 2340-2340A.”). The Torture Memo, issued in March of 2003, relied on the August 2002 OLC memorandum in defining “severe pain.” See Torture Memo, supra note 1. However, the mere fact that the August 2002 OLC memorandum was later rescinded does not demonstrate that it or the 2003 Torture Memo was unsound. See Memorandum for the Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C §§ 2340-2340A (Dec 30, 2004) (setting forth a definition of torture that is more broad than the definition put forth in the Torture Memo). See also Richardson supra note 14. To be sure, the fact that the August 2002 OLC memorandum was rescinded does little to support the contention that John Yoo violated his legal ethical obligations in authoring the 2003 Torture Memo. Id. Instead, in defining torture, the 2004 OLC memorandum, although it superseded the 2002 OLC memorandum, followed an approach similar to the approach followed in the 2003 Torture Memo. See Memorandum for the Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C §§ 2340-2340A (Dec 30, 2004). Both the 2004 OLC memorandum and the 2003 Torture Memo acknowledge the difficulty of the task of defining precisely what is meant by “torture” as it is used in 18 U.S.C. § 2340A. Id. In addition, both memoranda considered the ordinary or natural meaning of “severe pain” by looking to how dictionaries define “severe.” Id. Finally, both memoranda also consider judicial interpretations of “torture” as the term is used in the Torture Victims Protection Act, 28 U.S.C. § 1350 (2000). Id. The 2004 OLC memorandum merely retracts two statements included in the 2003 Torture Memo, concluding instead as follows: “severe” pain is not limited to “excruciating and agonizing” pain, nor is it limited to pain associated with “organ failure, impairment of body functions, or death.” Id. at n.17. In authoring and signing the 2003 Torture Memo, John Yoo had a difficult assignment—to define as best as possible the limits of acceptable pain as it relates to detaining unlawful enemy combatants outside of the United States. Richardson supra note 14. Yoo evaluated the issue and relied on relevant information and valid legal resources available to him at the time (including the August 2002 OLC memorandum) in rendering a legal opinion regarding the definition of torture. Id. He stepped up to a tall task and responded diligently and should not now be criticized because other people later decided to render a new legal opinion clarifying the meaning of torture as the term is used in 18 U.S.C § 2340A. Id.

See Torture Memo, supra note 1, at 39, 36-47 (interpreting the phrase “torture” in 18 U.S.C. § 2340A); Richardson, supra note 14. Richardson acknowledged that John Yoo was asked to answer tough question—what activities constitute torture and what is meant by severe pain? Richardson, supra note 14. Richardson framed the issue in its proper perspective: maybe John Yoo did not violate his ethical obligations as a lawyer; the questions he was asked are just tough questions that, after all, still have not been answered. Id. Richardson continued:

So what is severe pain? We asked John Yoo, and he drew the line for us, and now he is tainted in our eyes, rendered unclean by his contact with the unspeakable. . . . But, if you read the thousands of essays and books and blogs that rage against him, you will find very few that give a satisfactory answer to the question Yoo was asked. How would you define severe pain? If thousands of lives are at stake and time is of the essence? Would you allow sleep manipulation? Heat and cold? Isolation? Hunger? I asked Jose Padilla’s lawyer three times. Where would you draw the line, Mr. Freiman? He dogged it twice. The third time he said outright, “I’m not going to draw that line for you. But I’ll tell you where I would have looked—I would have first looked at the Constitution to see what was permissible, then I would have looked at the Vienna Convention. . . .” So, we still don’t have an answer to the question.

Id. Indeed, in defining “severe pain” in the Torture Memo, John Yoo appropriately looked to dictionaries, the Constitution, and the Geneva Conventions among other sources. See id. See also supra notes 9-15 and accompanying text (discussing the controversy that the Torture Memo has spawned since it was declassified and made available to the public in April 2008); supra 121 and accompanying text (noting that the Torture Memo defines torture as acts inflicting severe pain that result in “death, organ failure, or serious impairment of body functions[1]”); infra Part III.C.2 (explaining that allegations that the Torture Memo’s definition of torture is unfounded are unsubstantiated).
that no prosecutions have been brought under Section 2340A, and therefore, no judicial interpretations are available to ascertain the statute's meaning of “torture.” In such a situation, when a statute does not define the term at issue and courts have not yet interpreted the term within its statutory context, what then is a lawyer trained to do? The answer is almost so basic as to not even address it in this scholarly Article. Still, because critics have apparently failed to recognize the obvious role of a lawyer who finds himself in these circumstances, this Article would be remiss if it did not discuss this point.

A lawyer—whether serving as a judge, in-house counsel, or in another capacity—faced with the task of interpreting a term in a statute must first consider the text of the statute. But if the statutory text fails to define the term, the lawyer should then consider how various courts have defined the term. When no judicial interpretations are available, what next? It is well-established that a

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123 See Torture Memo, supra note 1, at 36-47 (illustrating the impressive lawyerly analysis of the Torture Memo); infra Part III.C.2 (supporting the assertion that the Torture Memo consists of impressive lawyerly analysis).

124 Torture Memo, supra note 1, at 36.

125 See infra notes 127-33 and accompanying text (discussing how the meaning of a term in a statute should be ascertained when the statute does not define the term and courts have not yet interpreted the term within its statutory context).

126 See supra notes 9-15 and accompanying text (noting that the Torture Memo has been heavily criticized since it was declassified and made available to the public in April 2008); infra notes 127-33 and accompanying text (discussing how a lawyer should analyze a term included in a statute when the statute fails to define the term and courts have not yet interpreted the meaning of the term within the context of the statute).

127 See FDIC v. Meyer, 510 U.S. 471, 476 (1994) (“[W]e construe [the] term in accordance with its ordinary or natural meaning.”); Smith v. United States, 508 U.S. 223, 228 (1993) (indicating that where a term is not defined in a statute, the term should be afforded its “ordinary or natural meaning”); American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982), quoting Reiter v. Sonotone Corp., 442 U.S. 330, 337, (1979), and Richards v. United States, 369 U.S. 1, 9, (1962) (“This Court has noted on numerous occasions that “‘in all cases involving statutory construction, “our starting point must be the language employed by Congress[.]”’ . . . .); Memorandum for the Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C §§ 2340-2340A (Dec 30, 2004), available at http://www.usdoj.gov/olc/18usc23402340a2; Torture Memo, supra note 1, at 36, 39 (citing INS v. Phinpathya, 464 U.S. 183, 189 (1984)) (noting that when considering the meaning of a term in a statute, the text of the statute should be examined and should be the “starting point” in such analysis, and in determining what meaning to attribute to “torture” as it is used in 18 U.S.C. §§ 2340A, it is appropriate to consider the ordinary and necessary meaning of the word “torture” and also the context surrounding the enactment of 18 U.S.C. §§ 2340A).

128 See American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (indicating that after considering the plain meaning of a statutory term, it is appropriate to consider how courts have defined the term); Torture Memo, supra note 1, at 36 (noting that when considering the meaning of a term in a statute, where the statute does not define the term, it is appropriate to examine how courts have defined the term within the context of the statute).
lawyer should then look to the legislative history of the statute and judicial interpretations of similar statutes and judicial interpretations of the same term in other statutes. This is what lawyers do.

See, e.g., American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) (indicating that a statute’s legislative history is one indicator as to the meaning of a term contained in the statute; thus, the legislative history should be considered if the statute or case law fail to adequately define the term); West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100, 101 n.7 (1991) (indicating that where the statute itself and corresponding case law fail to define a term within the statute, a court should consider the meaning that has been attributed to the term because “[a court’s] role is to say what the law, as hitherto enacted, is; not to forecast what the law, as amended, will be.”). See Torture Memo, supra note 1, at 36 (noting that when considering the meaning of a term in a statute, where the statute does not define the term and courts have not interpreted the meaning of the term within the context of the statute, it is appropriate to look to the statute’s legislative history and judicial interpretations of similar statutes and judicial interpretations of the same term in other statutes). “In the absence of . . . a definition[ of a particular term in a statute], we construe [the] statutory term in accordance with its ordinary or natural meaning.” Id. at 38 (citing FDIC v. Meyer, 510 U.S. 471, 476 (1994)). “[W]e construe [a statutory term] to contain the permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.” Id. (citing West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991)).

For example, in interpreting what is meant by “severe . . . pain” in 18 U.S.C. §2340A, the Torture Memo considered the definition of “severe” contained in three different dictionaries—Webster’s New International Dictionary, American Heritage Dictionary of the English Language, and IX The Oxford English Dictionary. Id. After acknowledging that no prosecutions had been brought pursuant to 18 U.S.C. 2340A and therefore no courts had considered the meaning of “severe . . . pain” as used therein, the Torture Memo next considered Congress’s use of the phrase “severe pain” elsewhere in the U.S. Code—in statutes dealing with health benefits. Id. Congress’s use of the phrase “severe pain” elsewhere in the U.S. Code can shed more light on its meaning. See, e.g., West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991) . . . . Significantly, the phrase “Severe pain” appears in statutes defining an emergency medical condition for the purpose of providing health benefits. See, e.g., 8 U.S.C. §1369 (2000); 42 U.S.C. § 1395w-22 (2000); id. § 1395x (2000); id. § 1395dd (2000); id. § 1396b (2000); id. § 1396u-2 (2000). These statutes define an emergency condition as one “manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in—placing the health of the individual . . . (i) in serious jeopardy, (ii) serious impairment of bodily functions, or (iii) serious dysfunction of any bodily organ or part.” Id. § 1395w-22(d)(3)(B) (emphasis added). Although these statutes address a substantially different subject from section 2340, they are nonetheless helpful for understanding what constitutes severe physical 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 a level of death, organ failure, or the permanent impairment of a significant body function. These statutes suggest that to constitute torture[,] “severe pain” must rise to a similarly high level—the level that would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of body functions.

Id. This discussion highlights several aspects of legal analysis contained in the Torture Memo. Id. First, it shows that the Memo’s authors had a basis for turning to other statutory provisions of the United States Code for guidance in ascertaining the meaning of “severe . . . pain.” Id. (citing West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991)). Second, it shows that the Memo’s authors acknowledged that the statutory provisions relied on to ascertain the meaning of “severe pain” are from a different subject from section 2340, but are nonetheless at least “helpful for understanding” what is meant by “severe . . . pain” in 18 U.S.C. § 2340A. Id. Finally, the above passage from the Torture Memo shows that the authors of the Memo fully acknowledged that no clear cut answer existed as to what type of conduct constitutes torture pursuant to 18 U.S.C. § 2340A; indeed, they used phrases like “[t]hese statutes suggest” to preface their legal conclusions. Id. (emphasis added). Sometimes all a lawyer can do, in the absence of a clear statutory definition of a term and in the absence of judicial interpretations of the term within the context of the relevant statute, is look to other sources to make an educated determination as to what the term means, i.e., to determine, based on the most relevant sources available, what a term means or how a court would likely define the term. See id.
As a matter of fact, a mere cursory review of United States Supreme Court opinions in which the Court has been asked to interpret a term in a statute illustrates this well-established modus operandi. Indeed, lawyers have long-followed this approach.

Yet, notwithstanding that the Torture Memo adheres to this well-accepted methodology in interpreting what is meant by “torture” in 18 U.S.C § 2340A, critics have denigrated how the Memo defines torture. It seems they do so because they disapprove of the definition, regardless of the approach followed in reaching this definition. But disparaging the Torture Memo because its

See supra 127-29 and accompanying text (discussion). Even the 2004 OLC memorandum that superseded the August 2002 OLC memorandum defining severe pain as the term is used in 18 U.S.C. § 2340A considered judicial interpretations of “torture” in the context of the Torture Victims Protection Act, 28 U.S.C. § 1350 (2000). See Memorandum for the Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C §§ 2340-2340A (Dec 30, 2004), available at http://www.usdoj.gov/olc/18usc23402340a2. To the extent that people have argued that the 2003 Torture Memo was unfounded because it was based on the August 2002 OLC memorandum that was later rescinded, these allegations have no bases. See id. Both of these memoranda acknowledged that the statutory terms are not precisely defined and therefore defining what is meant by torture pursuant to 18 U.S.C. § 2340A is not an easy task. Id. The fact that two different conclusions were rendered does not support allegations that John Yoo violated his ethical duties as a lawyer. See id.

See supra 127-29 and accompanying text (discussion).

See supra 127-29 and accompanying text (discussion).

See Torture Memo, supra note 1, at 36-47 (acknowledging that no case law existed to interpret 18 U.S.C. § 2340A because no prosecutions had been brought pursuant to it and examining the text of the statute itself, its legislative history, and the judicial interpretation of a closely related statute in order to interpret the meaning of the word “torture” as it is used in 18 U.S.C. § 2340A); Memo Contends That President Can Authorize Torture, supra note 8 (sharply criticizing the Torture Memo for defining torture extremely narrowly); supra notes 9-15 and accompanying text (noting that the Torture Memo has been heavily criticized since it was declassified and made available to the public in April 2008).

See Torture Memo, supra note 1, at 36-47. It appears that people have criticized the Torture Memo’s definition of “torture” because they disapprove of the definition, not because they have a valid complaint about the approach used in reaching this definition. See id. This appears to be the case because in defining “torture[,]” the authors of the Torture Memo followed a logical approach. Id. After acknowledging that no case law existed to interpret 18 U.S.C. § 2340A (because no prosecutions had been brought pursuant to this statute), the Torture Memo examined the text of the statute itself, its legislative history, and the judicial interpretation of a closely related statute—the Torture Victims Protection Act—to ascertain the meaning of the word “torture” as it is used in 18 U.S.C. § 2340A. Id.

Specifically, the Torture Memo considered the text of 18 U.S.C. § 2340A and evaluated the elements that must be satisfied in order for treatment to amount to torture. Id. As the Memo indicated, 18 U.S.C. § 2340A states that torture is 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.” Id. at 36. The Memo identified and discussed at length the elements of torture, including that “severe pain and suffering” are “inflicted with specific intent[.]” and that acts of torture cause either “severe physical or mental pain or suffering.” Id. In determining the types of conduct that amount to “torture” pursuant to 18 U.S.C. § 2340A, the Torture Memo considered how Black's Law Dictionary defines “specific intent” and how other dictionaries have defined “severe.” Id. The Torture Memo also considered several United States Supreme Court cases with regard to construing the meaning of statutory terms and defining “specific intent” and “severe pain.” Id. at 36-39. In conclusion, the Torture Memo,
considering the totality of sources which it had cited in determining the plain meaning of “torture[,]” (and the text of 18 U.S.C. § 2340A), stated as follows:

Section 2340’s definition of torture must be read as a sum of these component parts. See Argentine Rep. v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-35 (1989) (reading two provisions together to determine the statute’s meaning); Bethesda Hosp. Ass’n v. Bowen, 485 U.S. 399, 405 (1988) (looking to “the language and design of the statute as a whole” to ascertain a statute’s meaning). Each component of the definition emphasizes that torture is not the mere infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury, so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term’s common meaning. Torture is generally understood to involve “intense pain” or “excruciating pain,” or put another way, “extreme anguish of body or mind.” Black’s Law Dictionary 1498 (7th Ed. 1999); Random House Webster’s Unabridged Dictionary 1999 (1999); Webster’s New International Dictionary 2674 (2d ed. 1935). In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts.

Id. at 44-45. The Torture Memo then considered legislative history of 18 U.S.C. § 2340A, stating the following:
The legislative history of sections 2340-2340A is scant. Neither the definition of torture nor these sections as a whole sparked any debate. Congress criminalized this conduct to fulfill U.S. obligations under CAT, which requires signatories to “ensure that all acts of torture are offenses under its criminal law.” CAT art. 4. Sections 2340-2340A appeared only in the Senate version of the Foreign Affairs Authorization Act, and the conference bill adopted them without amendment. See H.R. Conf. Rep. No. 103-482, at 229 (1994). The only light that the legislative history sheds reinforces what is obvious from the texts of section 2340 and CAT: Congress intended Section 2340’s definition of torture to track the definition set forth in CAT, as elucidated by the United States’ reservations, understandings, and declarations submitted as part of its ratification. See S. REP. NO. 103-107, at 58 (1993) (“The definition of torture emanates directly from article 1 of the Convention.”); id. at 58-59 (“The definition for ‘severe mental pain and suffering’ incorporates the understanding made by the Senate concerning this term.”).

Id. at 45 (emphasis added). The Torture Memo then considered the judicial interpretation of a statute closely related to 18 U.S.C. § 2340A—the Torture Victims Protection Act (TVPA)—to ascertain the meaning of the word “torture” as it is used in 18 U.S.C. § 2340A. Id. Like 18 U.S.C. § 2340A, Congress intended for the definition of “torture” in the TVPA to follow closely the definition in CAT, id. at 45-46 (citing Xuncax v. Gramajo, 886 F. Supp. 162, 176 n.12 (D. Mass. 1995)), and TVPA’s definition of “torture” differed from section 2340’s definition of “torture” in only two respects. Id. For these reasons, looking to the TVPA for guidance in interpreting the meaning of “torture” in 18 U.S.C. § 2340A was reasonable. See id. 46-47. After reviewing judicial determinations brought under the TVPA, the Torture Memo concluded, “In suits brought under the TVPA, courts have not engaged in any lengthy analysis of which acts constitute torture. . . . Nonetheless, courts appear to look at the entire course of conduct rather than any one act, making it somewhat akin to a totality-of-the-circumstances analysis.” Id. at 47. See also Richardson, supra note 14. The two statutes using the term “severe” to describe pain deal with two different subjects: health care and interrogation. Id. “But it’s still the closest you can get to any definition of that phrase at all.” Id. Thus, considering how the term is defined in the TVPA is appropriate. Id. Based on cases brought in the context of the VTPA, the Torture Memo stated, it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture. Certain acts do, however, consistently reappear in these cases or are of such barbaric nature, that it is likely a court would find that allegations of such treatment would constitute torture: (1) severe beatings using instruments such as iron barks, truncheons, and clubs; (2) threats of imminent death, such as mock executions; (3) threats of removing extremities; (4) burning, especially burning with cigarettes; (5) electric shocks to genitalia or threats to do so; (6) rape or sexual assault, or injury to an individual’s sexual organs, or threatening to do any of these sorts of acts; and (7) forcing the prisoner to watch the torture of others.

Torture Memo, supra note 1, at 47 (emphasis added). Torture is by no means limited to these examples, but the Memo provides these examples as a way of illustrating which acts a court would likely find rise to “torture” pursuant to 18 U.S.C. § 2340A. Id. See also infra note 140 (noting that people may not like the end result reached in the Torture Memo with regard to how “torture” is defined, but that should not reflect negatively on the lawyer-author of the Memo).
conclusions are disagreeable amounts to merely expressing an opinion about the topics discussed in
the Memo, not asserting an argument grounded in legal principles to substantiate that the Memo is
unfounded.\textsuperscript{135} Many legal topics provoke criticism.\textsuperscript{136} This is nothing new.\textsuperscript{137} Torture joins the
ranks of all sorts of topics like abortion, capital punishment, and assisted suicide—subjects which
 evoke very strong feelings in people.\textsuperscript{138} But, to the extent that critics have claimed that John Yoo
violated his legal ethical obligations in authoring the Memo and, specifically, in interpreting the
Torture Statute to define torture narrowly, critics have gone too far.\textsuperscript{139} They may disagree with the
current state of the law, how the Torture Statute defines torture, whether the United States should
have authorized the use of advanced interrogation techniques with regard to interrogating enemy
combatants at Guantánamo Bay, and a host of topics related to the Government’s proclaimed War on
Terrorism, but that does not justify allegations that the Torture Memo has “no foundation[,]” nor
does it justify personal attacks directed at John Yoo, the Memo’s signatory.\textsuperscript{140}

\begin{footnotesize}
\textsuperscript{135} See Richardson, \textit{supra} note 14. Richardson explained that Jose Padilla’s lawyer, Mr. Freiman, criticized Yoo’s
work on the Torture Memo, stating that Yoo should have looked to the Eighth Amendment in answering the question at
issue in the Memo. \textit{Id.} But Yoo \textit{did} look to the Eighth Amendment and determined that it did not apply because the
Eighth Amendment prohibits cruel and unusual punishment, and punishment comes only after a criminal conviction. \textit{See id.}
Yoo cited several valid legal sources to support this conclusion. \textit{See id.} Some areas of the law are simply grey areas,
and this is one of them. \textit{See id.} Yoo reached a different conclusion than some people now say they would have, but that
does not mean he breached his ethical duties as a lawyer. \textit{See id.; notes 78-82 and accompanying text (reviewing the
Torture Memo’s discussion concerning why the Eighth Amendment does not apply to the detention of enemy combatants
outside of the United States).}

\textsuperscript{136} See, \textit{e.g.}, Planned Parenthood v. Casey, 505 U.S. 833, 845-53 (1992) (concerning a woman’s right to choose an
abortion before fetal viability). Discussing the importance of two principles significant in the American legal system, stare
decisis and judicial restraint, the \textit{Casey} opinion notes that judicial opinions are supposed to be based on what the current law is,
not on what individual judges think the law should be. \textit{Id.}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} See, \textit{e.g.}, Planned Parenthood v. Casey, 505 U.S. 833, 845-53 (1992) (involving the constitutionality of an abortion
statute); Cruzan v. Dir., Missouri Dep’t of Mental Health, 497 U.S. 261 (1990) (involving the constitutionality of an assisted
suicide statute); Gregg v. Georgia, 428 U.S. 153 (1976) (involving the constitutionality of a capital punishment statute, and
holding, in part, that a penalty of death for commission of the crime of murder is not unconstitutional in all circumstances); Ritter
v. Mutual Life Ins. Co. of New York, 169 U.S. 139 (1898) (noting that statutes that regulate abortion inherently raise public policy concerns); \textit{In re Kemmler}, 136 U.S. 436 (1890) (involving a statute that called for capital punishment by way of electrocution).

\textsuperscript{139} See \textit{supra} Part III (analyzing the Torture Memo and the legal analysis contained therein).
\end{footnotesize}
The Torture Memo properly cites to an assortment of valid sources to support its conclusions and is replete with scholastic, critical analysis. In summary, John Yoo did not violate his ethical obligations as a lawyer in authoring the Torture Memo.

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140 See Exclusive: “Torture Memo” Author John Yoo Responds to This Week’s Revelations, supra note 10. When John Yoo was asked if he felt badly for the people who might be injured as a result of the legal opinion he gave, he explained:

I didn’t want the opinion to be vague so that the people who actually have to carry these things out don’t have a clear line, because I think that would be very damaging and unfair to the people who are actually asked to do these things. The way I read what the department did two years later [in issuing the 2004 OLC memorandum that superseded the August 2002 OLC memorandum defining “severe pain” in the context of 18 U.S.C. § 2340A], was they just made the line blurry again. And – you can have a dispute – you can say I don’t think the line you’ve drawn is in the right place. That’s fine. But I think it’s not fair to say, which I think they did, . . . it’s not right to say “I don’t want to be very clear.” Because that’s just people protecting their own backs. . . . Now you can say those words are shocking because they’re too clear. But that’s why . . . [it is appropriate to] see if there’s any language that defines this phrase that we can draw from somewhere else. Because I don’t want to make some vague beating around the bush standard. . . . You have to draw the line. What the government is doing is unpleasant. It’s the use of violence. I don’t disagree with that. But . . . part of the job . . . of being a lawyer sometimes is you have to draw those lines. . . . I could have written it in a much more palatable way, but it would have been vague.

Id.; Richardson, supra note 14 (noting that some people believe that torture should be illegal because it “violates the very premise of the legal system itself,” and explaining that John Yoo has noted that in writing the Torture Memo he looked at what the law was; he was tasked with answering the legal question, not determining what policy the government should adopt); supra notes 9-15 and accompanying text (noting that the Torture Memo has been heavily criticized since it was declassified and made available to the public in April 2008); supra Part III (analyzing the Torture Memo and the legal analysis contained therein and concluding that the Torture Memo contains sound legal reasoning, and thus, its signatory, John Yoo did not violate his legal ethical obligations in authoring and signing the Memo).

141 See Exclusive: “Torture Memo” Author John Yoo Responds to This Week’s Revelations, supra note 10 (noting that the Torture Memo was subjected to the typical process to which legal opinions by the Department of Justice are subjected—it was reviewed and edited by a number of career officials at the Department of Justice before it was finalized and released; the Memo was not a “slapdash” work product as Jack Goldsmith has suggested); supra Part III (describing the assertions in the Torture Memo that have been widely criticized and indicating the variety of sources cited in the Memo upon which its assertions are based).

142 See supra Part III (analyzing the aspects of the Torture Memo that have been criticized and showing why the analysis contained in the Torture Memo is sound legal analysis). See also Exclusive: “Torture Memo” Author John Yoo Responds to This Week’s Revelations, supra note 10. Critics have alleged that the Torture Memo was not well-reasoned. See, e.g., id. They have suggested that perhaps John Yoo was rushed by the White House to quickly throw something together and that is what he did. See, e.g., id. Some have suggested that there was not only time pressure working against Yoo, but that the political pressure to release a memorandum that would provide maximum flexibility to the President was enormous, and that Yoo, in releasing the memorandum that he did, was looking out for his own professional career. See, e.g., id. In an interview shortly after the Torture Memo was declassified and made available to the public, Yoo denounced these allegations. See id. He explained that the Torture Memo was based on sound legal principles and cited to relevant statutory text as well as opinions of the Attorney General and the United States Supreme Court. See id. Yoo furthermore explained that the memorandum took several months to draft; it was not a legal opinion that was turned around overnight, or even in a few short weeks. See id. It was thoroughly researched, and it went through the normal process that legal opinions go through at the Department of Justice: “[i]t was primarily worked on by career staff people, and went through a process of editing and review by different offices within the department[,]” See id. Finally, regarding political pressure to deliver a desirable memorandum—one with which the White House would be pleased—Yoo stated,

There wasn’t a lot of back and forth—people would say this is wrong, you need to delete this. . . . there was no pressure from any other agency from within the department that the opinion was going too far—
IV. CONCLUSION

In March 2003, the United States Department of Justice’s Office of Legal Counsel issued a legal memorandum to the Department of Defense in response to the Department of Defense’s request for a legal opinion regarding the legal standards governing military interrogations of alien unlawful combatants detained outside of the United States. This memorandum—the Torture Memo, as it has been affectionately called—rendered several highly controversial legal conclusions. First, the Memo concluded that the Fifth and Eighth Amendments of the United States Constitution do not extend to alien enemy combatants detained outside of the United States. Second, the Memo concluded that certain federal criminal statutes do not apply to properly authorized interrogations of enemy combatants. Third, the Memo concluded that 18 U.S.C. § 2340A—the statute that prohibits torture—does not apply to interrogations conducted within the United States or on permanent military bases outside the territory of the United States. Finally, the Memo concluded that for an act to amount to torture under 18 U.S.C. § 2340A, it must inflict severe pain that results in “death, organ failure, or serious impairment of body functions.”

At the time it was originally issued to the Department of Defense, the Torture Memo was classified information. When it was later made available to the public in April 2008, it was widely

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or that it wasn’t going far enough. It was very much hands off. . . . people wanted the [O]ffice[of Legal Counsel] . . . to take the full responsibility.

Id. Yoo elaborated on this point in response to allegations that the Torture Memo was written to achieve political motives, I just don’t think it’s true. I think [those things are] said by someone who wasn’t there . . . because a lot of the memos are responses of questions that were asked before any policies were set. I think people in the government realize[d] that this was a different war and an unprecedented conflict, and wanted to know what the rules would be. And you would want the government to do that, or you would want the government before it set policy to ask questions about what the legal standards were, rather than saying, “Here’s what we’re going to do, and now write something that covers us for the future.”

The Torture Question (edited transcript of an interview conducted on July 19, 2005), http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html. In indicating that the Torture Memo was not written to appease top officials at the White House, Yoo continued:

I think that it was entirely a good thing that the government asked this question[ the main question asked in the Torture Memo], because as I said, we fight . . . this new kind of enemy in which intelligence and information is the primary means of protecting the country. And you get that information through questioning captured members of the enemy. And what the government wanted to know was what were the rules that applied to that. I would rather have the government had done it this way and asked first rather than have decided to interrogate people how they felt like and then afterward said, “Oh, make sure this is legal.”

Id.
criticized. This is not terribly surprising, given the issues discussed in the Memo. However, to the extent that people have asserted that the Torture Memo was completely void of legal foundation and that John Yoo, the Memo’s signatory, should be liable for breaching his lawyerly ethical obligations, these people have exaggerated the facts. As this Article demonstrates, John Yoo did not violate his ethical obligations as a lawyer in authoring the Torture Memo. Rather, he authored an impressive legal memorandum, supported by a wide variety of valid sources, including opinions of the United States Supreme Court. He should be commended for his service to the Department of Justice and to this country, not condemned for authoring a memorandum which happened to contain unpopular legal conclusions.