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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 people have claimed the Memo was completely void of legal foundation and 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 a thorough legal memorandum supported by a wide variety of valid legal resources. Accordingly, Yoo should not be condemned for authoring a memorandum which contained unpopular conclusions.

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I. INTRODUCTION

In March 2003, John C. Yoo,¹ 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.² 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.³ In response, the Department of Justice's memorandum, now commonly referred to as the Torture Memo, concluded that the Fifth and Eighth Amendments to the United States Constitution did not extend to alien enemy combatants detained outside of the United States.⁴ The Memo also concluded that certain federal criminal statutes did not apply to properly authorized interrogations of enemy combatants.⁵ Finally, the Memo interpreted § 2340A of Title 18 of the United States Code—the statute that makes it a criminal offense for any person outside of the United States to commit or attempt to commit torture.⁶ The Memo concluded that the criminal statutory prohibition against torture did not apply to interrogations conducted within the United States or on

1. John Choon Yoo received his B.A. from Harvard University and his J.D. from Yale Law School. Berkeley Law, Faculty Profiles, <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235> (last visited Oct. 10, 2010). 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 Oct. 10, 2010) (detailing numerous scholarly works authored by John Yoo).

2. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel of the Dep't of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003) [hereinafter Torture Memo], http://www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf. This memorandum was originally stamped "SECRET," but is now marked "UNCLASSIFIED." *Id.* It is signed by John C. Yoo. *Id.*

3. Torture Memo, *supra* note 2, 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 from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Opinions (May 16, 2005), <http://www.usdoj.gov/olc/best-practices-memo.pdf> (setting forth best practices for opinions issued by the Office of Legal Counsel and detailing the Office's "reputation for giving candid, independent, and principled advice" and its responsibility to issue "clear, accurate, thoroughly researched, and soundly reasoned" opinions that are "controlling on questions of law within the Executive Branch").

4. Torture Memo, *supra* note 2, at 1–10.

5. *Id.* at 1, 11–47.

6. *Id.* at 1, 32–47.

permanent military bases outside the territory of the United States.⁷ 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.”⁸ 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.⁹

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.¹⁰ 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 professor¹¹—blasted the Torture Memo for having “no foundation” in any “source of law” and containing “one-sided legal arguments.”¹² 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.”¹³ Reporters and other commentators

7. *Id.* at 1–2, 32–47.

8. *Id.* at 39, 1, 38–47.

9. *See id.* at 1 (indicating that the Torture Memo was declassified on March 31, 2008); Press Release, ACLU, *Secret Bush Administration Memo Released Today in Response to ACLU Lawsuit* (Apr. 1, 2008), <http://www.aclu.org/safefree/torture/34747prs20080401.html> [hereinafter ACLU Press Release] (explaining that the Torture Memo was declassified in response to a Freedom of Information Act lawsuit initiated in June 2004 by the ACLU and other organizations).

10. *See, e.g.*, ACLU Press Release, *supra* note 9 (quoting Jameel Jaffer, Director of the ACLU National Security Project, as criticizing the Torture Memo for its “extremely broad view of the president’s power as Commander-in-Chief”).

11. Harvard Law School Faculty, Jack Landman Goldsmith, <http://www.law.harvard.edu/faculty/directory/index.html?id=559> (last visited Oct. 16, 2010).

12. Stephen Gillers, *The Torture Memo*, NATION, Apr. 9, 2008, <http://www.thenation.com/article/torture-memo> (internal quotation marks omitted) (quoting Jack Goldsmith, Jay Bybee’s successor as head of the Office of Legal Counsel, and characterizing the Memo as “an abysmal piece of work” that uses “the veneer of legal scholarship . . . to create an aura of legitimacy for near-death interrogation tactics and unrestrained executive power”); *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*, ESQUIRE, Apr. 3, 2008, <http://www.esquire.com/the-side/qa/john-yoo-responds> (quoting John Yoo as responding to Goldsmith’s characterization of the memo as “slapdash” and poorly reasoned by noting that the Memo “went through the normal process opinions go through in the Justice Department”).

13. Gillers, *supra* note 12 (internal quotation marks omitted). *See Exclusive: “Torture Memo” Author John Yoo Responds to This Week’s Revelations*, *supra* note 12. Critics have alleged that the Torture Memo was not well-reasoned. *See, e.g., id.* They have suggested that 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

similarly have condemned the Memo, describing it in disparaging terms; for instance, one columnist called the Memo “an abysmal piece of work.”¹⁴ In addition, groups of protestors have picketed the streets to convey their outrage toward John Yoo, the Torture Memo’s signatory.¹⁵ Web bloggers have also directed hateful messages toward John Yoo, claiming that Yoo violated his legal ethical obligations by authoring and signing the Torture Memo.¹⁶

on sound legal principles, citing 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 then 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—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. *See* The Torture Question (edited transcript of an interview conducted on July 19, 2005), <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>. 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.”

Id. 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.

14. Gillers, *supra* note 12 (claiming the “incompetence” of the authors of the Torture Memo); *see* ACLU Press Release, *supra* note 9 (quoting Jameel Jaffer, describing the Memo as employing “the same disgraceful legal analysis that was at the root of the CIA’s illegal interrogation program,” and as saying that if the Memo is believed, “there is no limit at all to the kinds of interrogation methods the President can authorize”).

15. *See, e.g.,* Jacob Schneider, *Protest Targets Law Professor’s Prisoner Memo*, DAILY CALIFORNIAN, 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 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”).

16. *See, e.g.,* Grievance Project (Apr. 15, 2008),

Indeed, the Torture Memo has spawned much debate nationwide.¹⁷ To be sure, considering the emotionally charged and hotly controversial issues addressed in the Memo, the degree of attention it has received is not surprising.¹⁸ However, to the extent that critics have alleged that John Yoo violated his legal ethical obligations by authoring the Memo, these assertions are unsubstantiated.¹⁹ 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

<http://grievanceproject.wordpress.com/2008/04/15/john-yoo/> (originally posted two weeks after the Torture Memo was declassified, this Web page provides detailed instructions on how to file a grievance against Yoo in either Pennsylvania or Washington, D.C., or both); John H. Richardson, *Is John Yoo a Monster?*, ESQUIRE, 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).

17. 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 PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, 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 251 (2009), <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 Sept. 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. Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES, Feb. 19, 2010, at A1, available at <http://www.nytimes.com/2010/02/20/us/politics/20justice.html> (reviewing the Deputy Attorney General's opinion released in February 2010, quoting John Conyers, Jr., House Judiciary Committee leader, as stating that John Yoo and others "dishonored their office and the entire Department of Justice," and also quoting Illinois Senator Richard J. Durbin, stating, "Mr. Yoo may keep [his] law license[], but [he] will not escape the verdict of history"); Memorandum from David Margolis, Associate Deputy Attorney Gen., Office of the Deputy Attorney Gen., to Eric H. Holder, Jr., Attorney Gen.: 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), http://media.washingtonpost.com/wp-srv/nation/pdf/MargolisMemo_021910.pdf?sid=ST2010021904308. Lichtblau and Shane's 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 the Memo, people still disagree, and, indeed, the Attorney General's criminal investigation of this matter is still underway and is not expected to be completed for several months. Lichtblau & Shane, *supra*. The emotional national dispute about how torture is properly defined and whether John Yoo violated his ethical obligations as a lawyer could be long-lived. See *id.*; see also, e.g., *supra* notes 10–16 and accompanying text (illustrating the controversy the Torture Memo has spawned).

18. See *supra* notes 10–17 and accompanying text.

19. See *infra* Part III.

authoring the Memo.²⁰

II. BACKGROUND

Before analyzing whether John Yoo violated his ethical obligations by authoring the Torture Memo, Part II.A of this Article first provides an overview of the September 11, 2001 terrorist attacks on the United States. Part II.B then explains the Department of Defense's request for a legal opinion from the Department of Justice's Office of Legal Counsel. Finally, Part II.C sets forth the Torture Memo's significant findings.

A. *The Terrorist Attacks of September 11th and America's Response*

On September 11, 2001, in an unprecedented terrorist attack on the United States, nineteen Islamist terrorists, believed to be affiliated with Al-Qaeda, hijacked four United States-operated commercial passenger airplanes and intentionally crashed them, killing nearly three thousand people.²¹ 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.²² Specifically, they crashed two planes into the Twin Towers of the World Trade Center in New York City and one plane into the Pentagon, in Arlington County, Virginia.²³ 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.²⁴

In total, nearly three thousand people lost their lives as a result of these attacks.²⁵ Numerous buildings located in the World Trade Center

20. *See infra* Part III.

21. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, 12, 1-46, 552 n.188, *available at* <http://www.9-11commission.gov/report/911Report.pdf> (describing the events of September 11th as "unprecedented"; referring to the nineteen 9/11 terrorist hijackers as Islamist extremists; detailing the horrific plane crashes and resulting damage that occurred on September 11, 2001; reporting that as of July 9, 2004, the 9/11 attacks killed a total of 2973 nonterrorists, and specifying the breakdown of these deaths as follows: the World Trade Center attacks killed 2749 nonterrorists, the Pentagon attack killed 184 nonterrorists, and the crash of United Airlines Flight 93 in Pennsylvania killed 40 nonterrorists).

22. *Id.*

23. *Id.* at 1-10.

24. *Id.* at 10-14.

25. *9/11 by the Numbers*, NYMAG.COM, <http://nymag.com/news/articles/wtc/1year/numbers.htm> (last visited Oct. 16, 2010) (reporting that as of September 5, 2002, the total number killed in the attacks was 2819, and reporting other statistics relating to the attacks of September 11, 2001, including the number of deaths, the cost of clean-up efforts, costs related to insurance payments issued, and the number of people who suffered from post-traumatic stress disorder as a result of the attacks); *First*

complex and in the surrounding financial district, including those housing thousands of small businesses, were “dislocated, disrupted[,] or destroyed,” and much of the Lower Manhattan area near the World Trade Center was condemned and deemed uninhabitable because of the toxic conditions caused by the attacks.²⁶ North American air space and national stock exchanges closed almost immediately after the attacks.²⁷ Several days later, when air travel resumed and the stock exchanges reopened, air travel within the United States significantly decreased, and the stock exchanges reported some of the largest financial declines in history.²⁸ Overall, destruction resulting from the September 11th terrorist attacks, including the costs of rebuilding the damaged areas, exceeded hundreds of billions of dollars.²⁹

The September 11, 2001 terrorist attacks, orchestrated and carried out by members of Al-Qaeda, constituted an armed attack against the

video of Pentagon 9/11 attack released, CNN.COM, May 16, 2006, <http://www.cnn.com/2006/US/05/16/pentagon.video/index.html> (reporting that “[t]he Pentagon attack killed 184 people: Fifty-three passengers and six crew members on board American Airlines Flight 77, and 125 military and civilian personnel inside the building”); *Missing Doctor Added to List of 9/11 Victims*, NEW YORK SUN, July 10, 2008, <http://www.nysun.com/new-york/missing-doctor-added-to-list-of-9-11-victims/81626/> (reporting that as of July 10, 2008, the number of World Trade Center victims is believed to be approximately 2751); NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, 552 n.188, *available at* <http://www.9-11commission.gov/report/911Report.pdf> (reporting that as of July 9, 2004, the crash of the United Airlines Flight 93 in Pennsylvania killed forty nonterrorists).

26. GAIL MAKINEN, THE ECONOMIC EFFECTS OF 9/11: A RETROSPECTIVE ASSESSMENT, CONGRESSIONAL RESEARCH SERVICE REPORT RL31617 (Sept. 27, 2002), at CRS-5, *available at* <http://www.fas.org/irp/crs/RL31617.pdf>; *see* Anita Gates, *Buildings Rise From Rubble While Health Crumbles*, N.Y. TIMES, Sept. 11, 2006, at E6, *available at* <http://www.nytimes.com/2006/09/11/arts/television/11dust.html?ref=nyregionspecial3> (discussing the “toxic soup”— comprised of thousands of contaminants—that filled the air in New York City after the September 11th attacks on the World Trade Center); *see also* Henry C K Liu, *The Towering Challenge of the WTC Project*, ASIA TIMES, Feb. 12, 2003, at A1, *available at* http://www.atimes.com/atimes/Front_Page/EB12Aa01.html.

27. Alan Levin, Marilyn Adams, & Blake Morrison, *Amid Terror, A Drastic Decision: Clear the Skies*, USA TODAY, Aug. 12, 2002, at 1A, *available at* http://www.usatoday.com/news/sept11/2002-08-12-clearskies_x.htm; Alexandra Twin, *Stocks: 5 Years After 9/11*, CNNMONEY.COM (Sept. 11, 2006), http://money.cnn.com/2006/09/08/markets/markets_fiveyearsater/index.htm (“Financial markets never opened on Sept. 11, 2001, and remained closed for the next four trading sessions.”).

28. Bill Barnhart, *Markets Reopen, Plunge*, CHI. TRIB., Sept. 17, 2001, at N1 (noting that stocks dropped sharply the first day stock trading resumed on Wall Street after September 11, 2001, causing the Dow Jones to experience its biggest one-day point loss ever); Dipasis Bhadra & Pamela Texter, *Airline Networks: An Econometric Framework to Analyze Domestic U.S. Air Travel*, 7(1) J. TRANSP. & STAT. 87 (2004), *available at* http://www.bts.gov/publications/journal_of_transportation_and_statistics/volume_07_number_01/html/paper_06/ (last visited Oct. 16, 2010) (discussing post-September 11th effects on the airline industry); *see* MAKINEN, *supra* note 26 at 3–4 (discussing immediate and long-term post-September 11th effects on the airline industry and on the United States financial system).

29. *See generally* MAKINEN, *supra* note 26 (discussing the financial costs resulting from the September 11, 2001 terrorist attacks and noting that New York City’s Gross City Product alone was reduced by \$27.3 billion from October 2001 to December 2002).

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 Al-Qaeda and other affiliated terrorist organizations ceased.³⁰ The United States Government responded to this armed attack by launching what has since been referred to as the War on Terror.³¹ 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.³² Many countries, including Canada, China, France, Germany, India, Indonesia, Jordan, Pakistan, Russia, the United Kingdom, and Zimbabwe, not only launched anti-terrorism legislation but many also froze the bank accounts of individuals who were thought to be connected to Al-Qaeda.³³ 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 Italy, arrested individuals who were suspected terrorists.³⁴

In October 2001, Congress passed the USA PATRIOT Act, which was aimed at identifying and prosecuting individuals engaged in terrorism and other similar crimes.³⁵ In addition, the Bush Administration initiated a secret national security operation which enabled government officials

30. Military Order of November 13, 2001, 66 Fed. Reg. 57, 833 (Nov. 13, 2001), *available at* <http://www.fas.org/irp/offdocs/eo/mo-111301.htm> (indicating that the United States Government determined that the attacks of September 11, 2001 constituted an act of war); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 209-15 (2003) (discussing whether the September 11, 2001 terrorist attacks initiated an international armed conflict, thereby justifying the use of military force by the United States to subdue and defeat the enemy).

31. See Jide Nzelibe & 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, and explaining that a unilateral presidential approach might be appropriate where the United States is involved in a dispute with a terrorist organization).

32. See *U.S. President Bush's speech to United Nations*, CNN.COM, Nov. 10, 2001, <http://archives.cnn.com/2001/US/11/10/ret.bush.un.transcript/index.html> (referring to the "coalition against terror," just one month after the attacks of September 11, and addressing the need for a coordinated attack against terrorists and their financial networks); see also *Who are the Taliban of Afghanistan*, CNN.COM, http://articles.cnn.com/1996-10-05/world/9610_05_taleban_1_taliban-islamic-militia-kabul-islamic-afghanistan?_s=PM:WORLD (last visited Oct. 16, 2010) (describing the Taliban as "imposing a fundamentalist regime guided by their own interpretation of Islamic law").

33. See 68th IFLA Council and General Conference (August 18-24, 2002), <http://www.ifla.org/IV/ifla68/papers/156-079e.pdf> (discussing anti-terrorism legislation enacted in numerous countries worldwide); Kananaskis Summit 2002, G8 counter-terrorism cooperation since September 11th backgrounder, http://www.g8.fr/evian/english/navigation/g8_documents/archives_from_previous_summits/kananaskis_summit_-_2002/g8_counter-terrorism_cooperation_since_september_11th_backgrounder.html (discussing the efforts of over 160 countries and jurisdictions to freeze assets belonging to terrorists).

34. See, e.g., Courtney C. Walsh, *Italian Police Explore Al Qaeda Links in Cyanide Plot*, CHRISTIAN SCI. MONITOR, Mar. 7, 2002, World, at 7, *available at* <http://www.csmonitor.com/2002/0307/p07s02-woeu.html> (discussing the arrests of several people allegedly tied to Islamic militant cells).

35. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 114 Stat. 272, *available at* <http://www.fdic.gov/regulations/resources/lessons/patriotact.pdf>.

“to eavesdrop on telephone and e-mail communications between [people in] the United States and people overseas without [obtaining] a warrant.”³⁶ 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.³⁷

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 200 inmates still remain.³⁸ This detention center has received a great deal of attention from the media over the years and has been the focus of much controversy among the public.³⁹

36. Jim VandeHei & Dan Eggen, *Cheney Cites Justifications For Domestic Eavesdropping*, WASH. POST, Jan. 5, 2006, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/04/AR2006010400973.html> (discussing the Bush Administration’s communications monitoring operation aimed at allowing government officials to secretly monitor conversations involving individuals suspected to be affiliated with Al-Qaeda without first obtaining court orders); see John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 812–22 (2004) (discussing the transformation of threats to American national security since September 11, 2001).

37. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001), *superseded by* Exec. Order No. 13,425, 72 Fed. Reg. 7,737 (Feb. 14, 2007); Steve Vogel, *Afghan Prisoners Going to Gray Area; Military Unsure What Follows Transfer to U.S. Base in Cuba*, THE WASHINGTON POST, Jan. 9, 2002, at A1.

38. See Hiromi Yasui, *Guantánamo Bay Naval Base (Cuba)*, N.Y. TIMES, Jun. 28, 2010, <http://topics.nytimes.com/top/news/national/usstatesterritoriesandpossessions/guantanamobaynavalbasecuba/index.html>; *Guantanamo Bay Timeline*, WASH. POST, <http://projects.washingtonpost.com/guantanamo/timeline/> (noting that, on January 11, 2002, the first twenty prisoners from the Afghan battlefield were transferred to the Guantánamo Bay Naval Base); Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/11/AR2008111102865.html> (noting that as of November 2008, approximately 250 detainees remained at Guantánamo Bay); William Glaberson, *6 at Guantánamo Said to Face Trial in 9/11 Case*, N.Y. TIMES, Feb. 9, 2008, at A1, available at <http://www.nytimes.com/2008/02/09/us/09gitmo.html> (noting that as of February 2008, 275 prisoners remained at the detention center in Guantánamo Bay, including Khalid Shaikh Mohammed, the “principal planner,” and five other suspected participants of the attacks on September 11).

39. See Glaberson, *supra* note 38 (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, at A01 (noting that the Guantánamo Bay detention camp has been referred to as a “gray area”); Jim VandeHei & Josh White, *Guantanamo Bay to Stay Open, Cheney Says*, WASH. POST, June 14, 2005, at A06, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/13/AR2005061301513.html>.

This is because the detention center at Guantánamo Bay is what is known as a “legal, political[,] and geographical limbo.”⁴⁰ Indeed, soon after prisoners were taken to Guantánamo Bay, civil libertarians and some lawyers well-versed in international law principles claimed that the United States was required under the Geneva Conventions to hold tribunals to determine whether these detainees were truly prisoners of war.⁴¹ Other people believed that the Guantánamo Bay prisoners did not qualify for prisoner-of-war status because they were unlawful enemy combatants.⁴²

40. Neil A. Lewis, *Aftereffects: Prisoners; Detainees from the Afghan War Remain in a Legal Limbo in Cuba*, N.Y. TIMES, Apr. 24, 2003, at A21, available at <http://www.nytimes.com/2003/04/24/us/aftereffects-prisoners-detainees-afghan-war-remain-legal-limbo-cuba.html?pagewanted=all>. Lewis reflects on the dilemmas concerning prisoners held at Guantánamo Bay:

[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[,] [t]wo 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. . . . [An Oxford professor and leading authority on the law of war has] said that the United States might not be obliged to treat them as prisoners of war but that officials should recognize that they had some international legal rights. “The U.S. has paid a huge price in international opinion” “In Britain, people see Guantánamo as a symbol of American defiance of international norms.” The discussions [about holding inmates at Guantánamo] have . . . 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.

Id.

41. *Id.*; Alan Bock, *Guantanamo and Geneva: The Missing Questions*, ANTIWAR.COM, Jan. 30, 2002, <http://www.antiwar.com/bock/b013002.html> (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” and arguing that 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 unless there is evidence that these detainees have personally committed war crimes); see RICHARD A. POSNER, 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).

42. See Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen. & John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel for William J. Haynes II, Gen. Counsel, Dep’t of Def., Re: Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001) (asserting the opinion that “a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantanamo Bay”); Lewis, *supra* note 40 (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). See generally John Yoo, *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 Kosovo, Afghanistan, and Iraq).

Indeed, the 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 Defense requested an opinion to establish the legal standards governing military interrogations of alien unlawful combatants detained outside of the United States.⁴³

C. The 2003 "Torture Memo": Significant Findings

On March 13, 2003, the Department of Justice's Office of Legal Counsel issued the Torture Memo, setting forth legal standards applicable to military interrogations of illegal enemy combatants detained outside of the United States.⁴⁴ 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.⁴⁵ In addition, the Office of Legal Counsel of the Department of Justice submitted drafts of the Torture Memo, while it was being written, to top officials at the Department of Defense, thereby providing them with a sense of the Memo's basic principles before the final version of the Memo was completed.⁴⁶

43. Torture Memo, *supra* note 2, 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 from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the Pres. and William J. Haynes II, Gen. Counsel of the Dep't of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf> (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); Fact Sheet, Status of Detainees at Guantanamo, http://www.aclu.org/files/assets/2002_02_07_Factsheet_Status_of_Detainees_at_Guantanamo_0.pdf (last visited Oct. 2, 2010) (describing the treatment to be afforded to detainees held at Guantánamo Bay and the supporting reasoning underlying such treatment).

44. Torture Memo, *supra* note 2.

45. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, 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 from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002) (same); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President and William J. Haynes II, Gen. Counsel of the Dep't of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf> (same); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., 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 from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002) (same).

46. *Exclusive: "Torture Memo" Author John Yoo Responds to This Week's Revelations*, *supra*

Therefore, suffice it to say, the President, the Department of Defense, and other individuals responsible for establishing policies related to the treatment of Guantánamo Bay detainees did not need to wait until the Torture Memo was finished in order to finalize policy decisions regarding treatment of these Guantánamo Bay prisoners.⁴⁷

When the official Torture Memo was issued, it contained several controversial findings.⁴⁸ First, the Memo concluded that the Fifth and Eighth Amendments to the United States Constitution do not extend to alien enemy combatants detained outside of the United States.⁴⁹ Second, the Memo asserted that certain federal criminal statutes do not apply to properly authorized interrogations of enemy combatants.⁵⁰ Third, the Memo interpreted 18 U.S.C. § 2340A—the statute that makes it a criminal offense for any person outside of the United States to commit or attempt to commit torture.⁵¹ 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

note 12. This article, posted on April 3, 2008, summarizes an interview with John Yoo that occurred approximately the day after the Torture Memo was declassified. In this interview, Yoo stated that drafts of these memoranda dealing with treatment of detainees were provided to the Department of Defense officials during the drafting processes, so that officials had “a sense” of the “basic outlines” before the memoranda were finalized. *Id.*

47. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, 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 from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, 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 from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President and William J. Haynes II, Gen. Counsel of the Dep’t of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf> (discussing whether the Geneva Convention treaties apply to Al-Qaeda and Taliban detainees); Memorandum from Jay S. Bybee, Assistant Attorney Gen., to William J. Haynes II, Gen. Counsel, Dep’t of Def., 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 from Jay S. Bybee, Assistant Attorney Gen., to William J. Haynes II, Gen. Counsel, Dep’t of Def., 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); *Exclusive: “Torture Memo” Author John Yoo Responds to This Week’s Revelations*, *supra* note 12 (indicating that John Yoo stated that the Department of Justice 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).

48. See *supra* notes 4–8 and accompanying text (indicating the Torture Memo’s significant findings); *supra* notes 10–17 (explaining that several of the Torture Memo’s findings have proven to be controversial); *infra* notes 49–53 and accompanying text (indicating the Torture Memo’s significant findings).

49. Torture Memo, *supra* note 2, at 1–10.

50. *Id.* at 1, 11–47.

51. *Id.* at 1, 32–47.

military bases outside the territory of the United States.⁵² 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.”⁵³

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.⁵⁴ 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.⁵⁵ Since then, perhaps not surprisingly given the topics it addresses, the Memo has undergone intense scrutiny and has been widely criticized.⁵⁶

III. ANALYSIS

To counter the aforementioned 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 that John Yoo did not violate his legal ethical obligations in authoring the Memo. Accordingly, Part III.A first examines 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. Part III.B next considers the Memo’s assertion that certain federal criminal statutes do not apply to properly authorized interrogations of enemy combatants. Finally, Part III.C explores the Memo’s interpretation of § 2340A of Title 18 of the United States Code—the statute that makes it a crime for any person outside of the United States to commit or attempt to commit torture. More specifically, 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. 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

52. *Id.* at 1–2, 32–47.

53. *Id.* at 39, 1, 36–47.

54. *See supra* note 2 and accompanying text (noting that the Torture Memo was originally marked “classified”).

55. *See* ACLU Press Release, *supra* note 9 and accompanying text.

56. *See supra* notes 10–17 and accompanying text (highlighting criticism aimed at the Torture Memo).

body functions” constitute torture.⁵⁷

*A. The Fifth and Eighth Amendments to 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.⁵⁸ The Memo then concludes that the Fifth and Eighth Amendments to the United States Constitution do not extend to alien enemy combatants detained outside of the United States and puts forth several reasons to support this conclusion.⁵⁹

In considering Fifth Amendment jurisprudence, the Memo first asserts that the Fifth Amendment Due Process Clause does not apply to the President’s conduct during a war; second, it asserts that, even if it did, the Due Process Clause does not apply extraterritorially to aliens who have no connection to the United States.⁶⁰ The Memo first 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.⁶¹ The Memo also cites recent case law that further supports the idea that the Fifth Amendment should not apply to the capture or detention of enemy combatants during war time.⁶² For instance, the Memo adopts the reasoning of the United States Supreme Court’s decision in *United States v. Verdugo-Urquidez*, decided in 1990 (which concluded that the Fourth Amendment of the United States Constitution does not apply to governmental actions against aliens outside the United States), to support the opinion that the Fifth Amendment similarly does not apply to governmental actions against enemy aliens detained outside of United States borders:

The United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of

57. See Torture Memo, *supra* note 2, at 38–39 (defining torture).

58. See *id.* at 2–6.

59. See *id.* at 1, 6–10.

60. *Id.*

61. *Id.* at 6–7 (quoting Military Commissions, 11 Op. Att’y Gen. 297, 314 (1865) (internal quotation marks omitted) (“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*.”)).

62. *Id.* at 7 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)).

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 [T]he 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.⁶³

The Memo also reasons that the United States Supreme Court has refused to apply the Fifth Amendment Due Process Clause to executive actions taken in war efforts against enemies of the Nation, citing *United States v. Salerno*, wherein the Court stated that "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 running afoul of the Due Process Clause.⁶⁴ 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.⁶⁵

63. *Id.* at 7 (second, third, and fourth alterations in original) (footnote omitted) (citation omitted) (quoting *Verdugo-Urquidez*, 494 U.S. at 274). "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." *Id.* at 8.

64. *Id.* at 8 (quoting *United States v. Salerno*, 481 U.S. 739, 748 (1987)) (internal quotation marks omitted). The Torture Memo provides the following explanation:

Similarly, as the Supreme Court has explained with respect to enemy property, "[b]y exertion of the war power, and untrammelled 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. (8 Cranch) 110, 122 (1814). *See also 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 "untrammelled 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. Mech's. 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]").

Id. (alterations in original) (emphasis added).

65. *See id.* at 9. The Torture Memo additionally acknowledges the Supreme Court's general rule asserted in *United States v. Pacific R.R.*, 120 U.S. 227, 239 (1887), that the Fifth Amendment

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.⁶⁶ 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."⁶⁷ 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 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.⁶⁸ There, the Court said "[t]he Court of Appeals has cited no authority what[so]ever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses."⁶⁹ The Torture Memo draws on this case and others to conclude that the Fifth Amendment does not apply extraterritorially to aliens and notes that the

does not protect against all damage to private property during military operations:

For "[t]he terse language of the Fifth 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. (Philippines)*, 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.

Id.

66. *Id.* at 9. 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.").

67. Torture Memo, *supra* note 2, at 9 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

68. *Id.* at 9 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950)). In discussing the *Eisentrager* holding, the Torture Memo states,

As 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 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.

Id. at 9 (citation omitted) (quoting *Eisentrager*, 339 U.S. at 784).

69. *Eisentrager*, 339 U.S. at 783 (1950).

D.C. Circuit has expressly stated as such in a case where U.S. officials were accused of torturing, during peacetime, a non-U.S. citizen outside of the United States.⁷⁰ 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 legal sources, such as opinions of the Attorney General and of the Supreme Court.⁷¹ 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.⁷²

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.⁷³ 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.'"⁷⁴ 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.⁷⁵

Unlike imprisonment pursuant to a criminal sanction, the detention

70. Torture Memo, *supra* note 2, at 9–10 (citing *Harbury v. Deutch*, 233 F.3d 596, 603–04 (D.C. 2000), *rev'd on other grounds*, *Christopher v. Harbury*, 536 U.S. 403 (2002)). The Torture Memo also cites other cases to support its proposition that the Fifth Amendment does not apply extraterritorially to aliens. *Id.* (citing *Rasul v. Bush*, 215 F. Supp. 2d 55, 72 n.16 (D.D.C. 2002) ("The Supreme Court in *Eisentrager*, *Verdugo-Urquidez*, and *Zadvydas*, and the District Court of Columbia Circuit in *Harbury*, have all held that there is no extraterritorial application of the Fifth Amendment to aliens.")).

71. See *supra* notes 61–65 and accompanying text.

72. See *supra* notes 66–70 and accompanying text.

73. Torture Memo, *supra* note 2, at 10.

74. *Id.* at 10 (citation omitted) (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)). For further support, the Torture Memo cites *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979), noting that the *Bell* Court held that the "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 from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., 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.

75. *Id.* at 10 (quoting *In re Territo*, 156 F.2d 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 from captured individuals intelligence that will help in the war efforts).

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.”⁷⁶

Thus, because prisoner detention is not a form of punishment, the Eighth Amendment does not apply.⁷⁷ While the Torture Memo’s discussion of the Eighth Amendment is fairly brief, it cites relevant and binding 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.⁷⁸

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.⁷⁹

*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 includes several reasons to support this conclusion.⁸⁰ First, as the United States Supreme Court stated in *Hamilton v. Dillin* in 1874, because “[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.”⁸¹ Complete authority over the conduct of a war is vested in the President, and a criminal statute does not infringe on this authority

76. *Id.* at 10 (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 788 (2d ed. 1920)).

77. *Id.* at 10.

78. *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 73–77 and accompanying text. *See also* Torture Memo, *supra* note 2, at 10.

79. *See supra* notes 60–65 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); *supra* notes 66–70 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); *supra* notes 73–77 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).

80. *See* Torture Memo, *supra* note 2, at 1, 11–32, 32–47.

81. *Id.* at 11 (quoting *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874)) (emphasis omitted).

unless Congress, in the statute's text, has unambiguously expressed its intent for the statute to do so.⁸² This result is based on the canon of statutory construction that requires statutes to be construed to avoid constitutional conflicts as long as another reasonable construction may be

82. *Id.* at 11–12. The Torture Memo discusses textual silence and what may be inferred by such silence with regard to congressional intent. *Id.* The Torture Memo states:

We presume that Congress does not seek to provoke a constitutional confrontation with an equal, coordinate branch of government unless it has unambiguously indicated its intent to do so. The Supreme Court has recognized, and this Office has adopted, a canon of statutory construction that statutes are to be construed in a manner that avoids constitutional difficulties as long as reasonable alternative construction is available. *See, e.g.,* *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499–501, 504 (1979)) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe [a] statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). *Cf.* *United States Assistance to Countries That Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 149 (July 14, 1994) (“Shoot Down Opinion”) (requiring “careful examination of each individual [criminal] statute” before concluding that generally applicable statute applied to the conduct of U.S. government officials). This canon of construction applies especially where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government. *See, e.g.,* *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (citation omitted) (“Out of respect of the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the [Administrative Procedure Act]. We would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion.”); *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 465–67 (1989) (construing Federal Advisory Committee Act not to apply to advice given by [the] American Bar Association to the President on judicial nominations, to avoid potential constitutional question[s] regarding encroachment on Presidential power to appoint judges).

Id. The Torture Memo continues by specifically addressing the question of whether Congress intended for general criminal statutes to supersede the President’s power to detain and interrogate enemy combatants during wartime—a power that arises out of the President’s Commander in Chief authority:

[T]he President’s power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief. Any construction of criminal laws that regulated the President’s authority as Commander in Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions whether Congress had intruded on the President’s constitutional authority. Moreover, we do not believe that Congress enacted general criminal provisions such as the prohibitions against assault, maiming, interstate stalking, and torture pursuant to any express authority that would allow it to infringe on the President’s constitutional control over the operation of the Armed Forces in wartime.

Id. at 13. The Torture Memo next draws an analogy to other conduct of the President during wartime and concludes:

In our view, Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. In fact, the general applicability of these statutes belies any argument that these statutes apply to persons under direction of the President in the conduct of war.

Id.

applied.⁸³ As such, “federal statutes should not be read to interfere with the executive Branch’s control over foreign affairs unless Congress specifically and clearly seeks to do so.”⁸⁴ To support this proposition, the Torture Memo quotes several Supreme Court cases and legal opinions issued by the Department of Justice’s Office of Legal Counsel.⁸⁵ It is well-established that where Congress has not unambiguously expressed a

83. *Id.* at 11–12 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe [a] statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

84. *Id.* at 12, 11–13.

85. *Id.* at 11–13 (quoting *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 232–33 (1986) (construing federal statutes to avoid curtailment of traditional presidential prerogatives in foreign affairs); *Haig v. Agee*, 453 U.S. 280, 293–94 (1981) (deference to executive branch is “especially” appropriate “in the area . . . of . . . national security”); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (“during war[,] Congress plays a reduced role in the war effort[,] and the courts generally defer to executive decisions concerning the conduct of hostilities.”); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def., Re: Legal Constraints to Boarding and Searching Foreign Vessels on the High Seas (June 13, 2002) (rejecting the application of a different statute to conduct during a war, stating:

[W]e 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.);

Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Daniel J. Bryant, Assistant Attorney Gen., Office of Legislative Affairs, 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 from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Timothy E. Flanigan, Deputy Counsel to the President, Re: The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), <http://www.usdoj.gov/olc/warpowers925.htm> (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 from Richard L. Shiffrin, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Andrew Fois, Assistant Attorney Gen., Office of Legislative Affairs, 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); Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Jamie S. Gorelick, Deputy Attorney Gen., Re: United States Assistance to Countries That Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 149 (July 14, 1994), <http://www.justice.gov/olc/shootdow.htm> (“Unless Congress by a clear and unequivocal statement declares otherwise,” a criminal statute should not be construed to apply to the properly authorized acts of the military during armed conflict.); Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Alan Kreczko, Legal Adviser to the National Security Council, Re: Applicability of 47 U.S.C. § 502 to Certain Broadcast Activities (Oct. 15, 1993) (“In the absence of a clear statement of [the] intent [to apply the statute to military personnel acting under the President as Commander in Chief], we do not believe that a statutory provision of this generality should be interpreted so to restrict the President’s constitutional powers.”). “Courts will not lightly assume that Congress has acted to interfere with the President’s constitutionally superior position as Chief Executive and Commander in Chief in the area of military operations.” *Id.* at 12.

desire for the statute to infringe on the President's complete authority over the conduct of war, such intent should not be inferred.⁸⁶

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.⁸⁷ 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.⁸⁸ The Torture Memo notes that the *Egan* Court concluded that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."⁸⁹ The Memo further provides numerous examples of situations in which allowing a criminal statute to apply to military conduct during war would produce "ridiculous" results.⁹⁰ For instance, if criminal statutes of general applicability applied

86. Torture Memo, *supra* note 2, at 11–13; see *supra* notes 82–85 and accompanying text (noting the well-established principle that unless Congress has unambiguously expressed a desire for a statute to infringe on the President's complete authority over the prosecution of war, such intent should not be inferred, and citing a variety of sources that were included in the Torture Memo to support this proposition).

87. Torture Memo, *supra* note 2, at 1, 14; *Japan Whaling Ass'n*, 478 U.S. at 232–33 (construing federal statutes to avoid curtailment of traditional presidential prerogatives in foreign affairs); *Haig v. Agee*, 453 U.S. 280, 291 (stating that deference to the executive branch is "especially" appropriate "in the area . . . of . . . national security"); *The Prize Cases*, 67 U.S. (2 Black) at 670 ("[D]uring war[,] Congress plays a reduced role in the war effort[,] and the courts generally defer to executive decisions concerning the conduct of hostilities."); Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Jamie S. Gorelick, Deputy Attorney Gen., Re: United States Assistance to Countries That Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 164 (July 14, 1994) ("Unless Congress by a clear and unequivocal statement declares otherwise," a criminal statute should not be construed to apply to the properly authorized acts of the military during armed conflict); Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Alan Kreczko, Legal Adviser to the National Security Council, Re: Applicability of 47 U.S.C. § 502 to Certain Broadcast Activities (Oct. 15, 1993) ("In the absence of a clear statement of [the] intent [to apply the statute to military personnel acting under the President as Commander in Chief], we do not believe that a statutory provision of this generality should be interpreted so to restrict the President's constitutional powers."); Application of the Neutrality Act to Official Government Activities, 8 Op. O.L.C. 58, 81 (1984) (concluding that, in absence of a clear and unambiguous congressional statement, that the Neutrality Act does not apply to United States "Government officials acting within the course and scope of their official duties").

88. Torture Memo, *supra* note 2, at 14 (citing Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Jamie S. Gorelick, Deputy Attorney Gen., Re: United States Assistance to Countries That Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 149 (July 14, 1994), <http://www.justice.gov/olc/shootdow.htm>; Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Alan Kreczko, Legal Adviser to the National Security Council, Re: Applicability of 47 U.S.C. § 502 to Certain Broadcast Activities (Oct. 15, 1993); Application of the Neutrality Act to Official Government Activities, 8 Op. O.L.C. 58, 81 (1984)); see also *Egan*, 484 U.S. at 530.

89. Torture Memo, *supra* note 2, at 12, 14 (citing *Egan*, 484 U.S. at 530).

90. See *id.* 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

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.⁹¹ Surely, such a result must be incorrect. 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.⁹² Where 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.⁹³

Third, a criminal statute of general applicability does not apply to the sovereign.⁹⁴ Instead, as the United States Supreme Court explained in *United States v. Nardone*, the State has historically been exempt from the operation of general statutes of limitation.⁹⁵ Applying a statute of general applicability to properly authorized interrogations of enemy combatants would deprive the sovereign of a recognized prerogative.⁹⁶ One such prerogative is the Commander in Chief's ability to treat unlawful combatants as desired and without reference to regulatory regime.⁹⁷ The United States Supreme Court recognized this prerogative in *Ex Parte Quirin* when it stated, "[b]y universal agreement and practice[,] the law of war draws a distinction between . . . lawful and unlawful combatants."⁹⁸ Indeed, longstanding historical practice supports the

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 *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] bec[o]me concerned 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.

Id. (citation omitted).

91. *Id.* at 14; *see supra* note 90.

92. Torture Memo, *supra* note 2, at 14; *see supra* notes 87–89 (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).

93. Torture Memo, *supra* note 2.

94. *Id.* at 15–16.

95. *Id.* at 15 (citing *United States v. Nardone*, 302 U.S. 379, 383 (1937)).

96. *Id.* at 15 (citing *Nardone*, 302 U.S. at 383).

97. *Id.* at 15 (citing *Nardone*, 302 U.S. at 383).

98. *Id.* at 15 (quoting *Ex Parte Quirin*, 317 U.S. 1, 30–31 (1942) (emphasis omitted)).

Memo's proposition that "unlawful belligerents are '[n]ot . . . within the protection of the laws of war.'" ⁹⁹ Given this authority, construing 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. ¹⁰⁰

In addition, applying a statute of general applicability to 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. 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

99. *Id.* (quoting William Winthrop, *Military Law and Precedents* 784 (2d ed. 1920)); *id.* at 15–16 (citing R.C. Hingorani, *Prisoners of War* 18 (1982) (emphasis omitted) ("[U]nlawful 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"); 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.")).

100. Torture Memo, *supra* note 2, at 15. 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. *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 from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto Gonzales, Counsel to the President and William J. Haynes II, Gen. Counsel, Dep't of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf>).

101. *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 *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. [United States v. Nardone, 302 U.S. 379, 384 (1937)]. See also United States v. Kirby, 74 U.S. (7 Wall.) 482, 486–87 (1868) (holding that a 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 [from Larry L. Simms, Deputy Assistant Attorney Gen., Office of Legal Counsel, to] Maurice C. Inman, Jr., Gen. Counsel, Immigration and Naturalization Service, Re: Visa Fraud Investigation at 2 (Nov. 20, 1984). Indeed, to construe such statutes otherwise[,] would undermine almost all undercover investigative efforts. 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.

Id.

duty.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.¹⁰³ In both cases, the policeman and the fireman are charged with definite public duties in defense of the public. Holding them responsible for “the literal violation of facially applicable statutes” while in pursuit of their public duties would countermand their original charge.¹⁰⁴ For this reason, in such instances, a criminal statute of general applicability does not apply to the sovereign.¹⁰⁵ By extension, in cases involving properly authorized interrogations of enemy combatants, criminal statutes of general applicability do not apply to the sovereign.¹⁰⁶ The sovereign retains the 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.¹⁰⁷

Fourth, a criminal statute of general applicability does not apply where another more specific statute has been enacted.¹⁰⁸ This proposition is well-established in American jurisprudence and employed in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, where the Court stated that “[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment.”¹⁰⁹ As such, because Congress enacted the Uniform Code of Military Justice (the “UCMJ”), 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.¹¹⁰ Specifically, the UCMJ provides that “[n]o prosecution may be commenced against a member of the Armed Forces

102. See *id.* at 16 (citing *Nardone*, 302 U.S. 379; *Kirby*, 74 U.S. at 486–87); Memorandum from Larry L. Simms, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Maurice C. Inman, Jr., Gen. Counsel, Immigration and Naturalization Service, Re: Visa Fraud Investigation at 2 (Nov. 20, 1984).

103. Torture Memo, *supra* note 2, at 16; see *supra* note 102 (quoting the Torture Memo).

104. Torture Memo, *supra* note 2, at 16 (quoting Memorandum from Larry L. Simms, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Maurice C. Inman, Jr., Gen. Counsel, Immigration and Naturalization Serv., Re: Visa Fraud Investigation at 2 (Nov. 20, 1984)).

105. *Id.*

106. *Id.* (analogizing to other situations in which applying statutes of general applicability to government officials carrying out their official duties leads to untenable results).

107. *Id.* at 15–16.

108. *Id.* at 17 (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)) (“Where a specific statute or statutory scheme has been enacted, it and not a more general enactment will govern.”).

109. *Crawford Fitting Co.*, 482 U.S. at 445.

110. Torture Memo, *supra* note 2, at 1, 17.

subject to [the UCMJ]” unless the member is no longer a member of the Armed Forces or the offense involves another defendant who is not subject to the UCMJ.¹¹¹ Additionally, the UCMJ specifies that any member of the Armed Forces that commits a felony will be punished, as provided, for that offense.¹¹² Because these statutory provisions specifically govern the treatment of offending Armed Forces members, they supersede general federal criminal laws when dealing with the conduct of military personnel during wartime.

As the foregoing discussion demonstrates, criticism condemning the Torture Memo’s assertion that certain federal criminal laws do not apply to properly authorized interrogations of enemy combatants is wholly unsubstantiated.¹¹³

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 of the United States to commit or attempt to commit torture.¹¹⁴ First, 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.¹¹⁵ 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.”¹¹⁶ Each assertion is considered in turn.¹¹⁷

111. 18 U.S.C. § 3261(d) (2006).

112. *Id.* § 3261(a).

113. *See supra* notes 80–86 and accompanying text (discussing that unless Congress unambiguously expresses a desire for a statute to infringe on the President’s constitutionally dominant position as Commander in Chief with authority over the prosecution of war, such intent should not be inferred); *supra* notes 87–93 and accompanying text (discussing that a criminal statute of general applicability does not apply to military conduct during the prosecution of a war, and thus does not apply to properly authorized interrogations of enemy combatants); *supra* notes 94–108 and accompanying text (discussing why a criminal statute of general applicability does not apply to the sovereign); *supra* notes 109–13 and accompanying text (explaining that criminal statutes of general applicability do not apply to properly authorized interrogations of enemy combatants during a war because Congress enacted the Uniform Code of Military Justice, which explicitly governs the conduct of the military during a war).

114. Torture Memo, *supra* note 2, at 1, 32–47.

115. *Id.* at 1–2, 32–47.

116. *Id.* at 1, 38–47.

117. *See infra* Parts III.C.1–2.

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 criminal 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.¹¹⁸ 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.”¹¹⁹ The statute further defines “United States” as “all areas under the jurisdiction of the United States including any of the places described in” §§ 5 and 7 of Title 18 of the Code.¹²⁰ The Torture 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.¹²¹ 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.¹²² 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.¹²³

118. Torture Memo, *supra* note 2, at 1–2, 36.

119. 18 U.S.C. § 2340A(a) (2000).

120. *Id.*; 18 U.S.C. § 5 (2000) (“The term ‘United States,’ as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.”); *see* 18 U.S.C. § 7 (2000) (defining the special maritime and territorial jurisdiction of the United States); *see also* Torture Memo, *supra* note 2, at 34 n.42 (concluding that “the persons discussed in this memorandum are not within United States as it is defined in section 5”).

121. *See* 18 U.S.C. § 2340A (2000); Torture Memo, *supra* note 2, at 34–35.

122. Torture Memo, *supra* note 2, at 34–35 (“[I]nterrogations 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). If, however, the interrogations occur “outside the special maritime and territorial jurisdiction and are otherwise outside the United States, the torture statute applies.” *Id.* at 35.

123. *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).

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.”¹²⁴ Although this definition has received significant criticism, to the extent that critics have alleged that this definition is unfounded, these allegations are completely unsubstantiated.¹²⁵ On the contrary, to

124. See Torture Memo, *supra* note 2, at 39, 36–47 (defining “torture”). Some commentators have asserted that the mere fact that another memorandum on which the (2003) Torture Memo relied in defining “severe pain” was later rescinded (i.e., the August 2002 OLC memorandum was rescinded) implies that the (2003) Torture Memo was based on unsound legal principles, suggesting, by innuendo, that the mere fact that another memorandum on which the (2003) Torture Memo relied was rescinded implies that the (2003) Torture Memo was misguided, improper, or carelessly drafted. See, e.g., Washington Monthly, *The Torture Memo* (Apr. 2, 2008), http://www.washingtonmonthly.com/archives/individual/2008_04/013450.php (stating, “As we all know, this memo was eventually rescinded.”). See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, to the Deputy Attorney Gen., Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), <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.”).

See also Richardson *supra* note 16. 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 from Daniel Levin, *supra*; Torture Memo, *supra* note 2. 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 because the statutory terms are not precisely defined in the statute. Memorandum from Daniel Levin, *supra*; Torture Memo, *supra* note 2. In addition, both memoranda consider the ordinary or natural meaning of “severe pain” by looking to how dictionaries define “severe.” Memorandum from Daniel Levin, *supra*; Torture Memo, *supra* note 2. 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). Memorandum from Daniel Levin, *supra*; Torture Memo, *supra* note 2. 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.” Memorandum from Daniel Levin, *supra*; Torture Memo, *supra* note 2.

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 16. 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 responded diligently and should not now be criticized because other people subsequently rendered a different legal opinion clarifying the meaning of torture as the term is used in 18 U.S.C. § 2340A. *Id.* The fact that two different conclusions were rendered does not support the allegation that John Yoo violated his ethical duties as a lawyer. See *id.*

125. See Torture Memo, *supra* note 2, at 39, 36–47; Richardson, *supra* note 16. Richardson acknowledged that John Yoo was asked to answer a tough question—what activities constitute torture and what is meant by severe pain? Richardson, *supra* note 16. Richardson

support its interpretation of the statute's definition of torture, the Memo includes lawyerly analysis based on law and fact and sometimes the telling absence of both.¹²⁶ Indeed, the Memo acknowledges from the start that no prosecutions have been brought under 18 U.S.C. § 2340A, and therefore, no judicial interpretations are available to ascertain the statute's meaning of "torture."¹²⁷ In such a situation, when a statute does not define a key 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.¹²⁸ But, if the statute is silent, the lawyer should then consider how various courts have defined the term within the same statutory context.¹²⁹ When no judicial interpretations are

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 dodged 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 Geneva Conventions. . . ." 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 10–17 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); *see* discussion *infra* Part III.C.2 (explaining that allegations that the Torture Memo's definition of torture is unfounded are unsubstantiated).

126. Torture Memo, *supra* note 2, at 36–37.

127. *Id.* at 36.

128. *See* *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("[W]e construe [the] term in accordance with its ordinary or natural meaning."); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) ("[I]n all cases involving statutory construction, 'our starting point must be the language employed by Congress'")); Memorandum from Daniel Levin, *supra* note 124; Torture Memo, *supra* note 2, at 38 (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)).

129. *See Am. Tobacco Co.*, 456 U.S. at 68 (indicating that after considering the plain meaning of a statutory term, it is appropriate to consider how courts have defined the term);

available, what next? It is well-established that a lawyer should then look to the legislative history of the statute, judicial interpretations of similar statutes, and judicial interpretations of the same term in other statutes.¹³⁰ This is what lawyers do. 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.¹³¹ Indeed, lawyers have long followed this approach.

The Torture Memo very closely follows this well-accepted methodology in interpreting the meaning of “torture” within the context of 18 U.S.C. § 2340A. Specifically, the Memo first sets forth the definition of torture, as included in § 2340:

“torture” [i]s 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.¹³²

Drawing from its previous conclusion that § 2340A’s criminal prohibition against torture applies only to interrogations conducted outside of the United States, the Memo next identifies the elements that the prosecution must demonstrate to establish an offense of torture under the statute:

(1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant’s custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) . . . the act inflicted severe physical or mental pain or suffering.¹³³

Torture Memo, *supra* note 2, 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).

130. See, e.g., *Am. Tobacco Co.*, 456 U.S. at 71 (indicating that a statute’s legislative history is one indicator as to the meaning of a term contained in the statute); *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 2, at 36, 38 (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).

131. See *supra* notes 129–31 and accompanying text (discussion).

132. Torture Memo, *supra* note 2, at 36 (quoting 18 U.S.C. § 2340(1)).

133. *Id.* at 36.

The Memo acknowledges that the text of 18 U.S.C. § 2340A provides a “starting point” for determining the statute’s meaning of torture, but points out that the statute unfortunately fails to define several key statutory phrases employed in the statutory definition of torture.¹³⁴ For instance, a critical component of the statute’s definition of torture states that an act amounts to torture if it causes “severe physical or mental pain or suffering,” but the statute does not define “severe.”¹³⁵ The Memo explains that no prosecutions have been brought under this particular statute; therefore, no case law exists to clarify the precise meaning of the statutory terms defining torture.¹³⁶ The Memo thus proceeds to construe the meaning of key terms employed in the statutory definition of torture by considering how dictionaries have defined the terms, how Congress has defined the terms elsewhere in the U.S. Code, and how the United States Supreme Court has defined the terms within the context of different statutes.¹³⁷ The Memo examines “the language

134. *Id.* at 38 (citing *INS v. Phinpathya*, 464 U.S. 183, 189 (1984)).

135. *Id.*

136. *Id.* at 36.

137. *Id.* at 36–47. 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*. See also Torture Memo, *supra* note 2, at 38–39.

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.” See *id.* (citing *West Va. Univ. Hosp., 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 § 2340, but are nonetheless at least “helpful for understanding” what is meant by “severe . . . pain” in 18 U.S.C. § 2340A. See *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

and design of the statute as a whole” to ascertain the statute’s meaning of torture, and then concludes that “[e]ach component of the definition emphasizes that torture . . . [requires the infliction of] intense pain or suffering.”¹³⁸ The Memo also considers the legislative history of 18 U.S.C. §§ 2340–2340A in ascertaining the meaning of torture, noting that it is “scant” and that “[n]either the definition of torture nor these [statutory] sections as a whole sparked any debate[among the members of Congress].”¹³⁹ The Memo finally reviews the judicial interpretation of a statute closely related to 18 U.S.C. § 2340A—the Torture Victims Protection Act—to ascertain the meaning of the word “torture” as it is used in 18 U.S.C. § 2340A.¹⁴⁰

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. *See 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.*

138. Torture Memo, *supra* note 2, at 44, 44–45.

139. *Id.* at 45.

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).

140. *Id.* at 45–47 (citing 28 U.S.C. § 2350 (2000)). Like 18 U.S.C. § 2340A, Congress intended for the definition of “torture” in the Torture Victims Protection Act (“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 16. 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 TVPA, the Torture Memo states:

[I]t 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 a 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,

Yet, notwithstanding that the Torture Memo adheres to this well-established methodology in interpreting what is meant by “torture” in 18 U.S.C. § 2340A, critics have denigrated how the Memo defines torture.¹⁴¹ It seems they do so because they disapprove of the definition, regardless of the approach followed in reaching this definition.¹⁴² But disparaging the Torture Memo because its conclusions are disagreeable amounts to merely expressing an opinion about the topics discussed in the Memo, which is far from asserting a legally principled argument that the Memo is unfounded.¹⁴³ Many legal topics provoke criticism.¹⁴⁴ This is nothing new. Torture joins the ranks of all sorts of topics like abortion, capital punishment, and assisted suicide—subjects which evoke very strong feelings in people.¹⁴⁵ But, to the extent that critics have claimed that John Yoo violated his legal ethical obligations in authoring the Memo and, specifically, in interpreting 18 U.S.C. § 2340A to define torture

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* notes 141–47 (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).

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 from Daniel Levin, *supra* note 124.

141. See Torture Memo, *supra* note 2, at 36–47; ACLU Press Release, *supra* note 9 (broadly criticizing the Torture Memo for defining torture extremely narrowly); *supra* notes 10–17 and accompanying text.

142. See Torture Memo, *supra* note 2, at 36–47.

143. See Richardson, *supra* note 16. 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. *Id.* But Yoo *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. *Id.* Yoo cited several valid legal sources to support this conclusion. See *id.* Some areas of the law are simply grey areas, and this is one of them. 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.

144. See, 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 *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. *Id.*

145. See, e.g., *id.* (involving the constitutionality of an abortion statute); *Cruzan v. Dir., Mo. 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); *In re Kemmler*, 136 U.S. 436 (1890) (involving a statute that called for capital punishment by way of electrocution).

narrowly, critics have gone too far.¹⁴⁶ They may disagree with the current state of the law, how the current applicable 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 this 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.¹⁴⁷

The Torture Memo properly cites an assortment of valid legal sources to support its conclusions and is replete with scholastic, critical analysis.¹⁴⁸ In summary, John Yoo did not violate his ethical obligations as a lawyer in authoring the Torture Memo.¹⁴⁹

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 called—rendered several highly controversial legal conclusions. First, the Memo concluded that the Fifth and Eighth Amendments to the United States Constitution do not extend to alien enemy combatants detained outside of the United

146. See *supra* Part III (analyzing the Torture Memo and the legal analysis contained therein).

147. Gillers, *supra* note 12 (criticizing the Torture Memo for having "no foundation" in any "source of law" and containing "one-sided legal arguments"); see *Exclusive: "Torture Memo" Author John Yoo Responds to This Week's Revelations*, *supra* note 12. 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 that a "clear line" is better for those actually carrying out these interrogations than the vague standard that resulted after the 2004 OLC Memo superseded the Torture Memo. *Id.* He went on to say that some people think the "words [in the Torture Memo] are shocking because they're too clear 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 16 (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 10–17 and accompanying text.

148. See *Exclusive: "Torture Memo" Author John Yoo Responds to This Week's Revelations*, *supra* note 12 (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).

149. 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 12.

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 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 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 a thorough, well-founded legal memorandum, supported by a wide variety of valid legal sources, including opinions of the United States Supreme Court. He should not be condemned for authoring a memorandum which happened to contain unpopular legal conclusions.