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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Infamous Crimes and Criminals/The War on Terror

## Memoranda on Standards of Conduct of Interrogation ("Torture Memos")

*In the months after the attacks of September 11, 2001, advisors to President George W. Bush asked the Office of Legal Counsel (OLC) within the Department of Justice to provide legal guidance on a variety of questions relating to the rapidly expanding war on terrorism. Among the questions asked were the legal limits on interrogation methods that the United States might use on suspected terrorists and those captured on the battlefields of Afghanistan. The OLC produced two memos to the then–White House legal counsel Alberto Gonzales. One, by Assistant Attorney General Jay Bybee, examined the interpretation and limits of treaty and statutory prohibitions on torture. Another, by Deputy Assistant Attorney General John Yoo, further examined the treaty obligations of the United States and the jurisdiction of the International Criminal Court over the interrogation of al-Qaeda operatives. Both offered a relatively narrow interpretation of the treaty and statutory provisions limiting methods of "enhanced interrogation", and both memos offered an additional constitutional analysis that limited the extent to which Congress could direct how the president conducted the military campaign.*

*The legal interpretation of the political appointees within the OLC was met with some consternation among the career legal staff within the Department of Justice and the Pentagon, as well as from other political appointees. In the summer of 2004, after public revelations that prisoners in military custody in Iraq were being abused, these so-called "torture memos" were leaked to the press. By then, Bybee had left the OLC for a seat on a federal circuit court, Yoo had returned to academia, and the White House was in the midst of a reelection campaign. Under international and domestic pressure, President Bush quickly emphasized that the administration was against torture. Gonzales distanced himself and the White House from the memos. He announced that the memos had been withdrawn, and he directed the OLC to produce a new opinion on legal standards affecting interrogations. In December 2004, Acting Assistant Attorney General Daniel Levin produced a new opinion, which was made public. The memo's broadened definition of torture was to guide administration policy relating to interrogations. After Levin's departure in 2005, the OLC produced new opinions, which were not publicly released, that once again shrank the definition of torture under existing statutes and treaties. These opinions maintained that a wide range of interrogation techniques were legally acceptable.*[1] *Does the Levin memo disavow the constitutional analysis in the Bybee and Yoo memos?*

*The Bybee memo cites the Supreme Court in* Johnson v. Eisentrager *(1950) as recognizing implied presidential powers that are "necessary and proper" to carrying out the "enumerated powers" in Article II of the U.S. Constitution. The language and structure also mirror the constitutional text in Article I. Consider how the Supreme Court has understood the scope of the necessary and proper clause of Article I after the New Deal. What are the implications of that characterization of presidential powers? Are implied powers more confined in the context of separation of powers than they are in the context of federalism?*

*The constitutional authority of Congress to limit how the president may use the military forces that Congress supplies to him is a recurrent issue in American constitutional politics. During World War I, former president William Howard Taft argued that "Congress could not order battles to be fought on a certain plan, and*

[1] On the interrogation memos, see also Jack Goldsmith, *The Terror Presidency* (New York: W. W. Norton, 2008); Jane Mayer, *The Dark Side* (Boston: Anchor Books, 2008); John Yoo, *War by Other Means* (Washington, DC: Atlantic Monthly Press, 2006); Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers* (New York: Cambridge University Press, 2005).

*could not direct parts of the army to be moved from one part of the country to another."[2] After World War II, Cold War liberals beat back conservative proposals to curtail the president's authority to station troops abroad. During the waning days of the Vietnam War, Congress sought to prevent the use of American air and ground forces in neighboring Cambodia. During the Reagan administration, proposals to prohibit the president from making first use of nuclear weapons were made and defeated. Having appropriated funds to build weapon systems or create an army, can Congress direct how the president can use those instruments of war? Or do those decisions fall within the discretion of the president as commander in chief?*

*When reading the Yoo memo, consider whether the author believed any significant constitutional limitations existed on presidential interrogations during wartime. Did the memo suggest any limitations on presidential powers during war? Should limitations exist and, if so, what are their sources? What is the role of the Bill of Rights and international law in these matters? Consider also the responsibility of persons in the Office of Legal Council (OLC). Should OLC lawyers provide plausible constitutional arguments that might justify presidential policies or are they obligated to provide the president with their best judgment as to constitutional standards?*

*Jay S. Bybee, Memo to Alberto R. Gonzales, Counsel to the President[3]*

You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340–2340A of Title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. . . .

. . .

Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.

. . .

. . . [T]he President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces. Because both "[t]he executive power and the command of the military and naval forces is vested in the President," the Supreme Court has unanimously stated that it is "*the President alone* who is constitutionally invested with the *entire charge of hostile operations*." *Hamilton v. Dillin* (1874) (emphasis added). That authority is at its height in the middle of a war.

In light of the President's complete authority over the conduct of war, without a clear statement otherwise, we will not read a criminal statute as infringing on the President's ultimate authority in these areas. We have long recognized, and the Supreme Court has established a canon of statutory construction that statutes are to be construed in a manner that avoids constitutional difficulties so long as a reasonable alternative construction is available. . . .

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[2] William Howard Taft, "The Boundaries between the Executive, the Legislative and the Judicial Branches of the Government," *Yale Law Journal* 25 (1916): 610.

[3] Excerpted from Office of Legal Counsel, *Re: Standards for Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (August 1, 2002).

In order to respect the President's inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. As our Office has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of operations during a war. . . .

. . .

It could be argued that Congress enacted 18 U.S.C. § 2340A with full knowledge and consideration of the President's Commander-in-Chief power, and that Congress intended to restrict his discretion in the interrogation of enemy combatants. Even were we to accept this argument, however, we conclude that the Department of Justice could not . . . enforce Section 2340A against federal officials acting pursuant to the President's constitutional authority to wage a military campaign.

Indeed, in a different context, we have concluded that both courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President's constitutional powers. This Office, for example, has previously concluded that Congress could not constitutionally extend the congressional contempt statute to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. . . . Although Congress may define federal crimes that the President, through the Take Care Clause, should prosecute, Congress cannot compel the President to prosecute outcomes taken pursuant to the President's own constitutional authority. If Congress could do so, it could control the President's authority through the manipulation of federal criminal law.

. . . The President's constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders' intention to create a federal government "clothed with all the powers requisite to the complete execution of its trust." *The Federalist* No. 23 . . . . Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not "reducible within certain determinate limits,"

> it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy.



. . .

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. . . . This Office has long understood the Commander-in-Chief Clause in particular as an affirmative grant of authority to the President. . . . The implication of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy in action that characterize the Presidency rather than Congress.

As the Supreme Court has recognized, the Commander-in-Chief power and the President's obligation to protect the nation imply the ancillary powers necessary to their successful exercise. "The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, the grant of war power includes all that is necessary and proper for carrying those powers into execution." *Johnson v. Eisentrager* (1950). In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. . . . The President's complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. [See] the *Prize Cases* (1863). . . .

One of the core functions of the Commander-in-Chief is that of capturing, detaining, and interrogating members of the enemy. . . .

Any effort of Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. There can be little

doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

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*John Yoo, Memo to William J. Haynes II, General Counsel of the Department of Defense (2003)*[4]

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.

In Part I, we conclude that the Fifth and Eighth Amendments, as interpreted by the Supreme Court, do not extend to alien enemy combatants held abroad. In Part II, we examine federal criminal law. We explain that several canons of construction apply here. Those canons of construction indicate that federal criminal laws of general applicability do not apply to properly authorized interrogations of enemy combatants, undertaken by military personnel in the course of an armed conflict. Such criminal statutes, if they were misconstrued to apply to the interrogation of enemy combatants, would conflict with the Constitution's grant of the Commander in Chief power solely to the President.

. . .

Two fundamental constitutional issues arise in regard to the conduct of interrogations of al Qaeda and Taliban detainees. First, we discuss the constitutional foundations of the President's power, as Commander in Chief and Chief Executive, to conduct military operations during the current armed conflict. We explain that detaining and interrogating enemy combatants is an important element of the President's authority to successfully prosecute war. Second, we address whether restraints imposed by the Bill of Rights govern the interrogation of alien combatants during armed conflict. Two constitutional provisions that might be thought to extend to interrogations—the Fifth and Eighth Amendments—do not apply here. . . . These provisions . . . do not regulate the interrogation of alien enemy combatants outside the United States during an international armed conflict. This is clear as a matter of the text and purpose of the Amendments, as they have been interpreted by the federal courts.

. . . The September 11, 2001, terrorist attacks marked a state of international armed conflict between the United States and the al Qaeda terrorist organization. Pursuant to his Commander-in-Chief power, as supported by an act of Congress, the President has ordered the Armed Forces to carry out military operations against al Qaeda, which includes the power both to kill and to capture members of the enemy. Interrogation arises as a necessary and legitimate element of the detention of al Qaeda and Taliban members during an armed conflict.

. . .

Given the ongoing threat of al Qaeda attacks, the capture and interrogation of al Qaeda operatives is imperative to our national security and defense. Because of the asymmetric nature of terrorist operations, information is perhaps the most critical weapon for defeating al Qaeda. Al Qaeda is not a national-state, and has no single country or geographic area as its base of operations. It has no fixed, large-scale military or civilian infrastructure. It deploys personnel, material, and finances covertly and attacks without warning using unconventional weapons and methods. As the September 11, 2001, attacks and subsequent events demonstrate, it seeks to launch terror attacks against purely civilian targets within the United States, and seeks to acquire weapons of mass destruction for such attacks. Because of the secret nature of al Qaeda's operations, obtaining advance information about the identity of al Qaeda

[4] Excerpt taken from Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003).

operatives and their plans may prove to be the only way to prevent direct attacks on the United States. Interrogation of captured al Queda operatives could provide that information; indeed, in many cases interrogation may be the only method to obtain it. Given the massive destruction and loss of life caused by the September 11 attacks, it is reasonable to believe that information gained from al Qaeda personnel could prevent attacks of a similar (of not greater) magnitude from occurring in the United States.

. . . [T]he text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to protect the security of the United States. The decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause . . . and by the Commander-in-Chief Clause. . . . The framers understood the Commander-in-Chef Clause to grant the President the fullest range of power recognized at the time of the ratification as belonging to the military commander. In addition, the structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the "executive Power shall be vested in a President of the United States of America." This sweeping grant vests in the President the "executive power" and contrasts with the specific enumeration of the powers—those "herein"—granted to Congress in Article I. Our reading of the constitutional text and structure are confirmed by historical practice, in which Presidents have ordered the use of military force more than 100 times without congressional authorization, and by the functional consideration that national security decisions require a unity in purpose and energy that characterizes the Presidency alone.

As the Supreme Court has recognized, the Commander-in-Chief power and the President's obligation to protect the nation imply the ancillary powers necessary to their successful exercise. . . . In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. . . . The President's complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. In the *Prize Cases* . . . the Court explained that whether the President "in fulfilling his duties as Commander in Chief" had appropriately responded to the rebellion of the southern states was a question "to be decided *by him*" and which the Court could not question, but must leave to "the political department of the Government to which this power was entrusted." . . .

One of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy. . . . It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict, and the laws of war make clear that prisoners may be interrogated for information concerning the enemy, its strength, and its plans. . . . Recognizing this authority, Congress has never attempted to restrict or interfere with the President's authority on this score.



We conclude below that the Fifth Amendment Due Process Clause is inapplicable to the conduct of interrogations of alien enemy combatants held outside the United States for two independent reasons. First, the Fifth Amendment Due Process Clause does not apply to the President's conduct of a war. Second, even if the Fifth Amendment applied to the conduct of war, the Fifth Amendment does not apply extraterritorially to aliens who have no connection to the United States. . . .

First, the Fifth Amendment was not designed to restrict the unique war powers of the President as Commander in Chief. As long ago as 1865, Attorney General Speech explained the unquestioned rule that, as Commander in Chief, the President waging a war may authorize soldiers to engage in combat that could not be authorized as a part of the President's role in enforcing the laws . . . . As Attorney General Speed concluded, the Due Process Clause has no application to the conduct of a military campaign:

> That portion of the Constitution which declares that 'no person shall be deprived of his life, liberty, or property without due process of law,' has such direct reference to, and connection with, trials for crime or criminal prosecutions that comment upon it would seem to be unnecessary. Trials for offences against the laws of war are not embraced or intended to be embraced in those provisions. . . . The argument that flings around offenders against the laws of war these guarantees of the Constitution would convict all

> the soldiers of our army of murder; no prisoners could be taken and held; the army could not move. The absurd consequences that would of necessity flow from such an argument show that it cannot be the true construction—it cannot be what was intended by the framers of the instrument. One of the prime motives for the Union and a federal government was to confer the powers of war. If any provisions of the Constitution are so in conflict with the power to carry on war as to destroy and make it valueless, then the instrument, instead of being a great and wise one, is a miserable failure, a felo de se.
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> . . .

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

The Supreme Court has repeatedly refused to apply the Due Process Clause or even the Just Compensation Clause to executive and congressional actions taken in the direct prosecution of a war effort against enemies of the Nation. It has long been settled that nothing in the Fifth Amendment governs wartime actions to detain or deport alien enemies and to confiscate enemy property. . . . Similarly, as the Supreme Court has explained with respect to enemy property, "[b]y exertion of the war power, and untrammeled by the due process of just compensation clause," Congress may "enact[] laws directing seizure, use, and disposition of property in this country belonging to subjects of the enemy." . . .

. . .

Second, even if the Fifth Amendment applied to enemy combatants in wartime, it is clear that . . . the Fifth Amendment does not operate outside the United States to regulate the executive's conduct toward aliens. . . . As the Supreme Court explained in *Eisentrager v. Johnson* (1950), 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 freedom of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, 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.
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> . . .

A second constitutional provision that might be thought relevant to interrogations is the Eighth Amendment. The Eighth Amendment, however, applies solely to those persons upon whom criminal sanctions have been imposed. . . . The Eighth Amendment thus has no application to those individuals who have not been punished as part of a criminal proceeding, irrespective of the fact that they have been detained by the government. . . . 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. . . .

The detention of enemy combatants can in no sense be deemed "punishment" for purposes of the Eighth Amendment. Unlike imprisonment pursuant to criminal sanction, the detention of enemy combatants involves no sentence judicially imposed or legislatively required and those detained will be released at the end of the conflict. Indeed, it has long been established that "'[c]aptivity [in wartime] is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.'" . . . Detention also serves another vital military objective—i.e., obtaining intelligence from captured combatants to aid in the prosecution of the war. Accordingly, the Eighth Amendment has

no application here."

As the Supreme Court has recognized . . ., the President enjoys complete discretion in the exercise of his Commander-in-Chief authority in conducting operations against hostile forces. Because both "[t]he executive power and the command of the military and naval forces is vested in the President," the Supreme Court has unanimously stated that it is "*the President alone* [] who is constitutionally invested with the *entire charge of hostile operations*." *Hamilton v. Dillin* (1874).

In light of the President's complete authority over the conduct of war, in the absence of a clear statement from Congress otherwise, we will not read a criminal statute as infringing on the President's ultimate authority in these areas. 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. . . .

In the area of foreign affairs and war powers in particular, the avoidance canon has special force. In contrast to the domestic realm, foreign affairs and war clearly place the President in the dominant constitutional position due to his authority as Commander in Chief and Chief Executive and his plenary control over diplomatic relations. There can be little doubt that the conduct of war is a matter that is fundamentally executive in nature, the power over which the Framers vested in a unitary executive. . . . Correspondingly, during war Congress plays a reduced role in the war effort and the courts generally defer to executive decisions concerning the conduct of hostilities.

. . .

In order to respect the President's inherent congressional authority to direct a military campaign against al Qaeda and its allies, general criminal laws must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress cannot interfere with the Presidents exercise of his authority as Commander in Chief to control the conduct of operations during a war. . . . As we have discussed above, the 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 authorization that would allow it to infringe on the President's constitutional control over the operation of the Armed Forces in wartime. 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 the direction of the President in the conduct of war."

. . .

Even if these statutes were misconstrued to apply to persons acting at the direction of the President during the conduct of war, the Department of Justice could not enforce this law or any of the other criminal statutes applicable to the special maritime and territorial jurisdiction against federal officials acting pursuant to the President's constitutional authority to direct a war. Even if an interrogation method arguably were to violate a criminal statute, the Justice Department could not bring a prosecution because the statute would be unconstitutional as applied in this context. . . .

. . . Any effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. Indeed, such operations may be of more importance in a war with an international terrorist organization than one with the conventional armed forces of a nation-state, due to the former's emphasis on covert operations and surprise attacks against civilians. It may be the case that only successful interrogations can provide the information necessary to prevent future attacks upon the United States and its citizens. Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that would prevent

the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

. . .

In this Part, we examine CAT [the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]. . . . At the outset, it is important to emphasize that the President can suspend or terminate any treaty or provision of a treaty. . . . Any presidential decision to order interrogation methods that are inconsistent with CAT would amount to a suspension or termination of those treaty provisions. Moreover as U.S. declarations during CAT's ratification make clear, the Convention is non-self-executing and therefore places no legal obligation under domestic law on the Executive Branch, nor can it create any cause of action in federal court. . . .

. . .

In its instrument of ratification to the Torture Convention, the United States expressly defined the term "cruel, inhuman, or degrading treatment or punishment" for purposes of Article 16 of the Convention. The reservation limited "cruel and unusual or inhumane treatment or punishment" to the conduct prohibited under the Fifth, Fourteenth, and Eighth Amendments. . . .

. . .

Under the Supreme Court's "cruel and unusual punishment" jurisprudence, there are two lines of analysis that might be relevant to the conduct of interrogations: (1) when prison officials use excessive force; and (2) when prisoners challenge their conditions of confinement. . . .

. . . [T]he excessive force analysis turns on whether the official acted in good faith or maliciously and sadistically for the very purpose of causing harm. For good faith to be found, the use of force should, among other things, be necessary. Here depending upon the precise factual circumstances, such techniques may be necessary to ensure the protection of the government's interest here—national security. . . . In the typical excessive force case, the protection of other inmates and officers or the maintenance or order are valid government interests that may necessitate the use of force. If prison administration or the protection of one person can be deemed to be valid governmental interests necessitating the use of force, then the interest of the United States here—obtaining intelligence vital to the protection of thousands of American citizens—can be no less valid. . . .

. . .

The conditions of confinement cases provide a useful analogue to interrogation techniques that alter the conditions of a detainee's cell and surrounding environment. . . . In those cases, a condition of confinement is not "cruel and unusual" unless it (1) is "sufficiently serious" to implicate the constitutional protection . . . and (2) reflects "deliberate indifference to the prisoner's health or safety. . . . The failure to demonstrate either one of these components is fatal to the claim. The first element is objective, and inquires whether the challenged condition is cruel and unusual. The second, so-called "subjective" element requires an examination of the actor's intent and inquires whether the challenged condition is imposed as a punishment. . . .

As to the objective element, the Court has established that "only those deprivations denying 'the minimal civilized measures of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." . . .

. . .

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

. . .

Here, interrogation methods that do not deprive enemy combatants of basic human needs would not meet the objective element of the conditions of confinement test. For example, a deprivation of a basic human need would include denial of adequate shelter, such as subjecting a detainee to the cold without adequate protection. . . . Such things as insulting or verbally ridiculing detainees would not constitute the deprivation of a basic human need. . . . Additionally, the clothing of a detainee could also be taken away

for a period of time without necessarily depriving him of a basic human need that satisfies this objective test. . . . While the objective element would not permit the deprivation of food altogether, alterations in a detainee's diet could be made that would not rise to the level of a denial of life's necessities.

Even if an interrogation method amounted to a deprivation of life's necessities under the objective test, the subjective component would still need to be satisfied, i.e., the interrogators would have to act with deliberate indifference to the detainee's health and safety. We believe that if an interrogator acts with the honest belief that the interrogation methods used on a particular detainee do not present a serious risk to the detainee's health or safety, he will not have acted with deliberate indifference. . . .

Finally, the interrogation methods cannot be unnecessary or wanton. As we explained regarding the excessive force analysis, the government interest here is of the highest magnitude. . . . [W]e believe it is beyond question that there can be no more compelling government interest than that which is presented here and depending upon the precise factual circumstances of an interrogation, e.g., where there was credible information that the enemy combatant had information that could avert a threat, deprivations that may be caused would not be wanton or unnecessary.

Under the Due Process clauses of the Fifth and Fourteenth Amendments, substantive due process protects an individual from "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." . . . Under substantive due process "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." . . . That conduct must "shock[] the conscience." . . .

. . .

Although substantive due process case law is not pellucid, several principles emerge. First, whether conduct is conscience-shocking turns in part on whether it is without any justification, i.e., it is "inspired by malice or sadism." . . . Although enemy combatants may not pose a threat to others in the classic sense seen in substantive due process cases, the detainees here may be able to prevent great physical injury to countless others through their knowledge of future attacks. By contrast, if the interrogation methods were undertaken solely to produce mental suffering, they might shock the conscience. Second, the official must have acted with more than mere negligence. Because, generally speaking, there will be time for deliberation as to the methods of interrogation that will be employed, it is likely that the culpability requirement here is deliberate indifference. . . . Thus, an official must know of a serious risk to the health and safety of a detainee and he must act in conscious disregard for that risk in order to violate due process standards. Third, this standard permits some physical contact. Employing a shove or slap as part of an interrogation would not run afoul of this standard. Fourth, the detainee must sustain some sort of injury as a result of the conduct, e.g., physical injury or severe mental distress.

. . .

Even if an interrogation method might arguably cross the line drawn in one of the criminal statutes described above, and application of the statute was not held to be an unconstitutional infringement of the President's Commander-in-Chief authority, we believe that under the current circumstances certain justificatory defences might be available. Standard criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens. . . .

. . . [N]ecessity has been defined as follows:

> Conduct the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> > (A) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged. . . .

. . .

It appears to us that the necessity defense could be successfully maintained in response to an allegation of a violation of a criminal statute. Al Qaeda's September 11, 2001 attack led to the deaths of thousands and losses in the billions of dollars. According to public and government reports, al Qaeda has

other sleeper cells within the United States that may be planning similar attacks. Indeed, we understand that al Qaeda seeks to develop and deploy chemical, biological and nuclear weapons of mass destruction. Under these circumstances, a particular detainee may possess information that could enable the United States to prevent imminent attacks that could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.

Under this calculus, two factors will help indicate when the necessity defense could appropriately be invoked. First, the more certain that government officials are that a particular individual has information needed to prevent an attack, the more necessary interrogation will be. Second, the more likely it appears to be that a terrorist attack is likely to occur, and the greater the amount of damage expected from such an attack, the more that an interrogation to get information would become necessary. Of course, the strength of the necessity defense depends on the particular circumstances, and the knowledge of the government actors involved, when the interrogation is conducted. While every interrogation that might violate a criminal prohibition does not trigger a necessity defense, we can say that certain circumstances could support such a defense.

. . .

Even if a court were to find that necessity did not justify the violation of a criminal statute, a defendant could still appropriately raise a claim of self-defense. The right to self-defense, even when it involves deadly force, is deeply embedded in our law, both as to individuals and as to the nation as a whole. . . .

. . .

In the current conflict, we believe that a defendant accused of violating the criminal prohibitions described above might, in certain circumstances, have grounds to properly claim the defense of another. The threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens. . . . If an attack appears increasingly certain, but our intelligence services and armed forces cannot prevent it without the information from the interrogation of a specific individual, then the more likely it will appear that the conduct in question will be seen as necessary. The increasing certainty of an attack will also satisfy the imminence requirement. Finally. The fact that previous al Qaeda attacks have had as their aim the deaths of American citizens, and that evidence of other plots have had a similar goal in mind, would justify proportionality of interrogation methods designed to elicit information to prevent such deaths.

. . .

. . . [A] claim by an individual of the defense of another would be further supported by the fact that, in this case, the nation itself is under attack and has the right to self-defense. As *In re Neagle* . . . (1890) suggests, a federal official who has used force in self-defense may also draw upon the national right to self-defense to strengthen his claim of justification. In that case, the State of California arrested and held deputy U.S. Marshall Neagle for shooting and killing the assailant of Supreme Court Justice Field. . . . [T]he Court found that Neagle, as an agent of the United States and of the executive branch, was justified in the killing because, in protecting Justice Field, he was acting pursuant to the executive branch's inherent constitutional authority to protect the United States government. . . . That authority derives, according to the Court, from the President's power under Article II to take care that the laws are faithfully executed. In other words, Neagle as a federal officer not only could raise self-defense or defense of another, but also could defend his actions on the ground that he was implementing the Executive Branch's authority to protect the United States government.

. . . Following the example of *In re Neagle*, a government defendant may also argue that his conduct of an interrogation, if properly authorized, is justified on the basis of protecting the nation from attack. In order to make the fullest use of this defense, on the defendant would want to show that his conduct was specifically ordered by national command authorities that have the authority to decide to use force in national self-defense.

. . .

. . . [T]he Nation's right to self-defense has been triggered by the events of September 11. If a

government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate a criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network. In that case, we believe that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions. This national and international version of the right to self-defense could supplement and bolster the government's defendant's individual right."

*Daniel Levin, Memo to James B. Comey, Deputy Attorney General (2004)*[5]

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340–2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT"); customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.

This Office interpreted the federal criminal prohibition against torture—codified at 18 U.S.C. §§ 2340–2340A. . . . The August 2002 Memorandum [the Bybee memo] also addressed a number of issues beyond the interpretation of those statutory provisions, including the President's Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340–2340A. . . .

Questions have since been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that "severe" pain under the statute was limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." . . . We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety. Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture.

. . .

The Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis. . . .

[5] Excerpt taken from Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A* (December 30, 2004).